# The Legal Transplant of Anglo-American Whistleblowing Law to Chile

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PhD (Law)

The University of Edinburgh

2025


THE UNIVERSITY *of* EDINBURGH

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## Abstract

This Thesis examines the challenges and limits of the legal transplant of Anglo-American whistleblowing protections, particularly anti-retaliation, into the Chilean legal system. It argues that whistleblowing, as a legal category, is an original innovation of Anglo-American law that lacks a true functional equivalent in civil law jurisdictions, such Chile. Drawing on comparative analysis, the research demonstrates that whistleblowing protection in the United States is embedded in its employment discrimination framework and supported by procedural mechanisms, such as discovery and public interest conflicts in the workplace, that are absent in Chile.

Through a combination of doctrinal analysis and comparative methodology, the Thesis first defines the concept of whistleblowing and traces its historical and linguistic origins in English law. It then assesses the Chilean legal framework's capacity to receive and replicate Anglo-American whistleblowing rules, identifying significant mismatches in both substance and procedure. The study shows that Chile's constitutional and statutory system of employment discrimination, which lacks a clear distinction between public interest disclosures and workplace grievances, is unsuited to hosting a functional equivalent of whistleblower protection.

The findings suggest that transplanting whistleblowing protection into Chilean law requires more than adopting statutory language–it demands deeper institutional and cultural adjustments to achieve the intended function. From a comparative law methodology, this Thesis contributes to scholarship by illustrating the limitations of functionalist assumptions and the importance of historical and systemic context in the adoption of whistleblower protection in Chile.

## Lay Summary

This Thesis examines whether the recently adopted US inspired whistleblowing laws can function effectively within Chile's civil law system. These laws are intended to protect employees who report wrongdoing–such as corruption, fraud, or serious misconduct–from dismissal or retaliation. However, the model from which they derive was developed within the Anglo-American legal tradition, whose conceptual foundations and procedural mechanisms differ markedly from those of Chilean law.

The research demonstrates that Chilean law has historically lacked a legal concept equivalent to whistleblowing. While it protects workers who refuse to comply with unlawful orders, it does not extend protection to those who disclose wrongdoing in the public interest. By contrast, the United States and the United Kingdom have established comprehensive anti-retaliation frameworks that treat whistleblowing as a matter of public concern, supported by specific procedural tools to prove retaliation.

Through a comparative analysis, the Thesis concludes that transplanting Anglo-American whistleblowing frameworks into Chile, without significant adaptation, fails to achieve their intended function. Effective protection would require structural and institutional reforms to align Chilean law with the underlying purposes of whistleblower legislation. The findings illustrate more broadly that legal concepts deeply rooted in one legal culture cannot be successfully transplanted into another without careful contextual and functional adjustment.

## Declaration

I certify that the thesis presented here for examination for a PhD degree of the University of Edinburgh is solely my own work, other than where I have clearly indicated that it is the work of others. The thesis has not been edited by a third party beyond what is permitted by the University's PGR Code of Practice.

I declare that the thesis does not include work forming part of a thesis presented successfully for another degree. The copyright of this thesis rests with the author. No quotation from it is permitted without full acknowledgement.

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## Acknowledgements

I wish to acknowledge my former professors at the University of Chile School of Law, María Eugenia Montt Retamales, for their lasting influence and support in my academic career.

This doctoral research was supported by the Becas Chile – ANID *Doctorado en el Extranjero* scholarship (2020 call).

# Introduction

## A. Significance and Context of the Legal Transplant of Whistleblowing to Chile

Imagine you are an employee who makes a public interest disclosure, but whistleblowing is not recognised in your legal system. In Chile and other countries without a legal tradition of whistleblowing, individuals who report wrongdoing face the risk of severe retaliation from their employers, while their legal systems treat them as if they are 'disgruntled employees'. This scenario raises a fundamental question: Can the anti-retaliation protection framework for whistleblowers be effectively transplanted into a legal system, such as Chile's, where whistleblowing has not been a recognised as a concept? Researchers and policymakers often assume that such a transplant is feasible, but this assumption warrants closer examination.[1]

By examining the Chilean experience, this Thesis explores whether anti-retaliation protection is replicable in a civil law country. It is accepted among comparativists that transfer of legal concepts is more suitable between jurisdictions on the same legal family than across them.[2] Surprisingly, scholars and policymakers have overlooked the influence of legal traditions on the question of the potential for the transplantation of whistleblowing protection laws.[3] The available evidence shows that whistleblowing is a legal concept rooted in the Anglo-American tradition, firmly enshrined in the adversarial prosecution system. Indeed, private collaboration with law enforcement became a way to bring cases within a system that did not adopt the centralised inquisitorial procedure.[4] Evidence shows that early forms of whistleblowing, known as *qui tam* actions, originated in medieval England as a method for bringing cases before the courts in a highly decentralised law enforcement system which relied on the collaboration of the victims and the general public. This adversarial system and

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[1] Tom Devine and Tarek F Massarani, *The Corporate Whistleblower's Survival Guide* (Berret-Koehler 2011) 256–69. Regarding international policymakers, see Thomas Devine, Robert Vaughn and Keith Henderson, *Model Law Protecting Freedom of Expression Against Corruption* (OAS 2013) <www.oas.org/juridico/english/model_law_whistle.htm> accessed 30 September 2025. Ramon Ragués i Vallès and Matías Belmonte Parra, 'El incentivo de las denuncias como instrumento de prevención y persecución penal: presente y futuro del *whistleblowing* en Chile' (2021) 16(31) *Política Criminal* 1.

[2] See Mathias Siems, *Comparative Law* (Cambridge University Press 2022); Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 AJCL 5.

[3] Björn Fasterling, 'Whistleblower Protection: A Comparative Law Perspective' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 335.

[4] Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, vol 3 (Stevenson 1956) 425.

the associated whistleblowing laws were passed in the United States (US) and remained in the United Kingdom (UK) until Parliament abolished it in 1951.[5]

*Qui tam* actions and rewards continue to form a substantial part of the American[6] legal system. The US has played an influential role in the development of modern whistleblowing laws. Since the 1970s, the American legal system has begun providing anti-retaliation protections for employees who report misconduct. This framework stems from statutory law, common law and the US Constitution (specifically, the First Amendment); it includes institutional bodies, specific procedures and evidence rules designed to safeguard employees who expose wrongdoing within their organisations.[7] This framework falls within employment law and shares the same structure as a direct discrimination case. Its effectiveness in identifying wrongdoing and protecting employees has led other jurisdictions to adopt it. Notably, the UK borrowed the American direct discrimination model to protect whistleblowers via the Public Interest Disclosure Act 1998 (PIDA), placing whistleblowing protection within the scope of its employment law.[8]

Whistleblowing has continued spreading beyond Anglo-American jurisdictions. Sometimes, in subtle ways, American companies have spread their domestic whistleblowing practices to their European subsidiaries.[9] At other times, policymakers promote international instruments, based on American whistleblowing developments, which recognise the protection of whistleblowers as a means of fighting against corruption. The adoption of protection for whistleblowers in international conventions – namely, the United Nations International Convention Against Corruption[10] or the Inter-American Convention Against

[5] Common Informers Act 1951 (14 & 15 Geo 6 c 39).

[6] In this Thesis, the term 'American' (and related forms, e.g., 'America', 'the American legal system') is used exclusively to refer to the United States of America. This follows common usage in comparative law scholarship, where 'American law' typically denotes the U.S. legal system, and is not intended to include other countries in North, Central, or South America.

[7] Lisa J Banks and Jason C Schwartz, *Whistleblower Law. A Practitioner's Guide* (Law Journal Press 2022) 1–39.

[8] Michael Cover and Gordon Humphreys, 'Whistleblowing in English Law' in Gerald Vinten (ed), *Whistleblowing Subversion or Corporate Citizenship?* (Paul Chapman 1994) 100; Jeremy McMullen, 'Ten Years of Employment Protection for Whistleblowers in the UK: A View from the Employment Appeal Tribunal' in David B Lewis (ed), *A Global Approach to Public Interest Disclosure* (Edward Elgar 2010) 9.

[9] See Chapter 3.

[10] United Nations Convention against Corruption, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) art 33. See also United Nations Convention against Corruption, Conference of the States Parties, Resolution 10/8: Protection of Reporting Persons (CAC/COSP/2023/Rev.1, 15 December 2023).

Corruption[11] – illustrates this point. Researchers and policymakers have drafted different sets of international best practices based on Anglo-American whistleblowing.[12]

Whilst whistleblowing laws have been adopted in diverse jurisdictions, most borrow the US whistleblower protection for their transplants. There are several crucial implications of this. First, whistleblowing cases in their native jurisdiction are litigated under the same direct discrimination framework as employment discrimination cases (i.e. Title VII of the Civil Rights Act of 1964). Second, the *prima facie* case for whistleblowing claims derives from Title VII retaliation claims. Indeed, in certain areas, precedents from employment discrimination cases are authoritative in deciding cases under whistleblowing statutes. Third, discrimination and whistleblowing cases have an administrative phase, where employees can seek relief before trial. It is no coincidence that American legal authors have framed whistleblowing in the context of equal opportunity and employment discrimination litigation.[13]

Whistleblowing claims rely heavily upon American domestic legal proceedings. Chapter 5 addresses how whistleblowing cases require extensive pretrial discovery to succeed on the merits. These trials are governed by the Federal Rules of Civil Procedure, and, even in the administrative forum, lawyers rely heavily on discovery to succeed in their claims. Similarly, whistleblowing cases rely upon the American rules of evidence (including the Federal Rules of Evidence), where the standards referred to as 'preponderance of the evidence' and 'clear

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[11] Inter-American Convention against Corruption, opened for signature 29 March 1996, OAS Treaty Series No 58 (entered into force 6 March 1997) art III.

[12] OECD, *Committing to Effective Whistleblower Protection* (OECD Publishing, Paris 2016) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/03/committing-to-effective-whistleblower-protection_g1g65d0a/9789264252639-en.pdf> accessed 30 September 2025. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted 26 November 2009) <https://legalinstruments.oecd.org/en/instruments/oecd-legal-0378> accessed 30 September 2025.
United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons* (UN 2015) <www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>. accessed 30 September 2025; Devine, Vaughn and Henderson (n 1); Tom Devine and Shelley Walden, *International Best Practices for Whistleblower Policies* (Government Accountability Project 12 April 2013) <https://whistleblower.org/wp-content/uploads/2018/12/Best_Practices_Document_for_website_revised_April_12_2013.pdf> accessed 30 September 2025; Transparency International, *International Principles for Whistleblower Legislation* (2013) <https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf> accessed 30 September 2025.

[13] See Merrick Rossein, *Employment Discrimination Law and Litigation* (Thomson Reuters 2021) and John F Buckley, *Defence of Equal Employment Claims* (Thomson Reuters 2022).

and convincing evidence' are crucial in retaliation cases. Equally important are the rules shifting the burden of proof, placing the risk on the employer of failing to prove the material facts of their defence.

Thus, the US legal structure plays a crucial role in the effectiveness of whistleblowing law. This Thesis hypothesises that the laws borrowed by other jurisdictions may lose their efficacy without this framework. For instance, in the US, whistleblowers in the private or public sector can pursue their cases through an administrative agency. In contrast, in Chile, administrative adjudication is considered unconstitutional; only a court of law can resolve legal disputes. Furthermore, in the US, retaliation claims can use precedents related to direct discrimination, as both issues fall within a similar legal framework. Conversely, in Chile, employment discrimination cases are governed by a general equality clause. As a result, the distinctions between direct and indirect discrimination are often unclear. Additionally, Chilean evidentiary rules do not have the concept of two burdens of proof commonly found in American whistleblowing statutes, where the employee must meet a preponderance of the evidence standard whilst the employer faces a more stringent clear and convincing evidence standard.

### B. Research Questions and Overarching Framework

This Thesis advances the claim that modern whistleblowing laws constitute an original innovation moulded in Anglo-American law without a direct functional equivalent in civil law systems, such as Chile. Its transplantation thus raises questions not only of doctrinal adaptation but also of compatibility with local law and of its operation at the trial level.

The inquiry is structured around the following main research question:

*To what extent can Anglo-American whistleblowing protections—particularly anti-retaliation—be transplanted into the Chilean legal system in a way that replicates their intended function*?

This overarching question is unpacked through a set of secondary research questions; each aligned with the focus of an individual chapter:

1) To what extent is whistleblowing an original innovation of Anglo-American law, and how should it be defined for the purposes of comparative legal analysis? (Chapter 1).
2) To what extent is the Chilean legal system suitable for receiving the Anglo-American model of whistleblower anti-retaliation protection? (Chapter 2).
3) How does the relationship between employment discrimination and whistleblower protection in the US reveal the need for a local employment discrimination system akin to the American one? (Chapter 3).
4) To what extent does Chilean employment law's emphasis on private conflicts and its lack of a developed public interest litigation in the workplace limit the emergence of whistleblowing? (Chapter 4).
5) How suitable are Chile's procedural and institutional mechanisms in supporting whistleblower protection when compared with the US? (Chapter 5).
6) Why does the Chilean system of employment termination fail as an equivalent to anti-retaliatory protection? (Chapter 6).

### C. Methodology: Legal Transplants, Legal Culture and Functionalism

To address those questions, this Thesis uses a comparative approach. In simple words, comparative law relies on the palpable fact that law tends to be national, and lawyers are usually trained in their domestic legal system.[14] Otto Kahn-Freud observed that comparative law is a not a 'branch' of national law but a method to understand the law.[15]

In practice, this method consists of a set of logical steps accepted by comparatists. Mathias Siems summarises the typical comparative research with the following steps: raising a comparative law research question, deciding the countries to be examined, description of laws, comparative analysis, policy evaluation and eventual recommendations.[16] These steps

[14] Siems (n 2).
[15] Otto Kahn-Freud, 'Comparative Law as an Academic Subject' (1966) L Q Rev 82, 40–61.
[16] Siems (n 2) 15. See also, Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2017).

become highly complex because several theories compete to explain the relationship between different countries and their legal systems.

For example, Alan Watson introduced the notion of *legal transplant*,[17] as a metaphor of importing alien law to grow in a new body.[18] In his book *Legal Transplants*, Watson states that the main force in legal development is borrowing law from a donor country to a recipient country.[19] In a later work, *Society and Legal Change*, he argues that those legal borrowings often happen irrespective of the suitability of the transplanted rules in the receptive system:

> To this point I have been arguing in this Chapter that very frequently legal rules do not develop directly from the particular circumstances of the state in question which relate to the rules but are borrowed from elsewhere, and that often factors other than the high quality of the legal rules themselves or their precise fitness for the borrowing state decide the choice.[20]

For Watson, the impetus for these transplants, as well as the differences and similarities of the legal systems involved, should be explored mainly in legal history and through the work of legal elites.[21] [22]

Inspired by these approaches, Chapter 1 of this Thesis explores the ancillary question of why whistleblowing law has not developed in countries such as Chile. The evidence suggests that whistleblowing, in its primary inception, was a form of private collaboration with law

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[17] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Virginia University Press 1974).

[18] The use of figurative language has been criticised by some authors who argue for an explicit theory about legal change, however legal transplant continues as the accepted nomenclature for the subject. See Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009) 10 Theoretical Inquiries in Law 723.

[19] See Michele Graziadei, 'Comparative Law, Transplants, and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019) 471.

[20] Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001) 106. See Alan Watson, *Comparative Law: Reality and Society* (Vandeplas Publishing 2010) 13–39.

[21] 'The nature of any such relationship, the reasons for the similarities and the differences, is discoverable only by study of the history of the systems or the rules; hence in the first place, Comparative Law is Legal History concerned with the relationship between systems.' Watson, *Legal Transplants* (n 17) 6. See also Ancieto Masferrer, Kjell Å Modéer and Olivier Moréteau, 'The Emergence of Comparative Legal History' in Olivier Moréteau, Ancieto Masferrer and Kjell Å Modéer (eds), *Comparative Legal History* (Edward Elgar 2019) 9.

[22] Highlighting the importance historical approach in comparative law, Rodolfo Sacco has asserted: 'The comparative method is thus the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic method is founded upon analytical reasoning. The comparative method examines the way in which, in various legal systems, jurists work with specific rules and general categories. The dogmatic method offers abstract definitions'. Sacco (n 36) 25.

enforcement that developed under the unique English adversarial system, which lacked public prosecution. In contrast, countries like Chile have been shaped by the inquisitorial (centralised) system and, therefore, lack room for this private collaboration.

It is remarkable that the incarnation of whistleblowing law, which has been extensively researched by legal scholars and been promoted for legal transplantation into several legal systems around the world as a form of international best practice, is one that effectively has been stripped from its ecosystem. For example, the employment discrimination framework, where whistleblowing protection is enshrined in the Anglo-American law, has not been considered the branch of the legal system where whistleblowing protection should be hardwired in the receiving country. Chapter 6 addresses how whistleblowing has been placed within the rules of employment termination. Meanwhile, Chapter 3 explores evidence that some continental authors have placed whistleblowing laws within the context of constitutional protection of free speech, a proposition that effectively mixes up whistleblowing and employment grievances. In contrast, the distinction between employment complaints and public interest disclosure is deeply rooted in Anglo-American jurisdictions. Although the new European Union (EU) Directive[23] on whistleblowing may clarify this misunderstanding, it serves as a warning for countries like Chile, where whistleblowing remains a novel concept.

Likewise, comparative studies on whistleblowing law have overlooked the American public policy exception applicable in US law governing the termination of an employee's contract, i.e., dismissal. This exception covers employees dismissed for engaging in activities encouraged by public policy, such as blowing the whistle, and protects them against the at-will termination rule, which enables employers to dismiss without cause or the payment of compensation. This common law cause of action is the subject of extensive litigation in the US, especially in cases where no statutory law is available. Surprisingly, the comparativists on whistleblowing have not paid attention enough to this exception, even though it precedes the first statutes on whistleblowing.[24] In Chapter 4, we discuss how the public policy exception

[23] Directive 2019/1937 of the European Parliament and of the Council on the Protection of Persons who Report Breaches of Union Law [2019] OJ L 305, 26.11.2019, pp. 17–56.
[24] Fasterling (n 3) 335; Patrick Morvan, 'A Comparison of the Freedom of Speech of Workers in French and American Law' (2009) 84(3) Ind L J 1015.

plays a dual role: it ensures fairness in employment dismissals and serves as a mechanism for law enforcement within employment law. Employees who report matters in the public interest, may receive anti-retaliation protection in relation to their dismissal, even when the employer is not the wrongdoer but rather the victim of the wrongdoing. These findings illuminate forms of public interest litigation in the workplace that lack equivalents in civil law countries such as Chile.

Because whistleblowing laws from donor jurisdictions have been removed from their contextual framework, some misunderstandings are inevitable during their legal transplants. Watson contends that frequent misinterpretations of the donor legislation occur in these instances:

> Inserting an alien rule into another complex system may cause it to operate in a fresh way. Not infrequently moreover, often because of translation from a foreign language, a rule that is borrowed is misunderstood yet still is accepted.[25]

He further explains the importance of the context of the borrowed legal institution to understand the extent to which the transplantation process has altered it:

> A transplant of a concept or rule that has a general application may take on an unfortunate significance in a particular context where yet, because of its generality, it cannot easily be changed. The whole concept of the rule or concept has to be studied to understand the extent of the transformation.[26]

Therefore, the context of the legal donation seems crucial to evaluating the possibility of replicating the desired outcomes in a legal transplant. Countries adopting whistleblowing laws aim to increase transparency and accountability and protect society against corruption and abuses of power.[27] Context is crucial to achieve these goals.

There are three main methodological consequences of considering context in a whistleblowing legal transplant. First, understanding the transplant requires a close study of

[25] Watson, *Legal Transplants* (n 17) 116.
[26] ibid.
[27] David Lewis, AJ Brown and Richard Moberly, 'Whistleblowing: The State of the Research' in AJ Brown and others (eds), *International Handbook on Whistleblower Research* (Edward Elgar 2014), 1.

the source of the law, statutes, common law and cases. Doctrinal work is essential. Thus, Chapter 3 addresses US statutory law, Chapter 4 explores the US common law of whistleblowing, and Chapter 6 examines whistleblowing in the framework of 'termination/dismissal' law in the US and Chile.

Second, context may only be provided through selected elements that illustrate the functioning of a particular legal institution. Researching whistleblowing as a legal transplant is not a purely theoretical endeavour; it requires concrete legal examples that illuminate the different pieces of the puzzle. Some elements may ease the transplant, other make it tougher. Professor Otto Kahn-Freud emphasised that may be circumstances that lead to the *rejection of a transplant*.[28] In other words, we should study what conditions make the transplant unsuitable. The goal is to highlight that when certain fundamental features of the legal systems involved in the transplant are missing in the other legal system, the legal institution degenerates in its new environment.

The third methodological issue is how much context is needed to evaluate the legal transplant. This question involves assessing the features of different legal families. Many variables can play a role in the success of a whistleblowing legal transplant, such as the substance of the whistleblowing protection provisions, the reward structure, elements of the cause of action, the rules of procedure, the rules of evidence and the remedies. Historical context also matters. Whistleblowing originated in old English law as a consequence of a privatised law enforcement. More scholars in the field have forgotten this connection, so it is necessary to explain the genealogy of this legal category to understand its challenges.

How much context should be provided? The obvious answer is that the comparative analysis on whistleblowing must consider the historical and cultural differences in law enforcement in common law countries and civil law countries like Chile. Pierre Legrand has stated that the *translability* of unique legal institutions makes transplanting almost impossible. In his paper

[28] 'But there are degrees of transferability. In most cases one must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected.' Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) Mod L Rev 26. For further analysis and discussion, see Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 L Q Rev 79; Eric Stein, 'Uses, Misuses-and Non-uses of Comparative Law' (1977–1978) 72 Nw U L Rev 198.

*The Impossibility of Legal Transplants*,[29] Legrand stresses the limitations of transferring a legal rule to a different environment. Law is a cultural construct, he asserts; therefore, the meaning of a rule cannot be separated from its cultural context.[30]

William Ewald has labelled these theories on the correspondence between law and society as 'mirror theory of law'.[31] Ewald argues that Watson approach does not contradicts the position of law as result of culture, instead Watson's approach is just more nuanced. History shows that the change of law is the result of the law itself through legal transplant instead of original innovation. Law does not change 'by creation *ex nihilo* and will tend to reflect the legal tradition rather than anything extrinsic to law'.[32] Given these elucidations, Watson and his critics seem to agree that the borrowed law will suffer some mutations in the process of transplantation to its new environment. Then, the importance of historical context seems crucial for understanding and evaluating legal borrowing.

According to Legrand, an authentic representation of a foreign legal category should prioritise its historical and cultural specificity. The comparatist should go as in-depth as possible to understand the culture that law mirrors. Nonetheless, quoting Jorge Luis Borges, Legrand warns comparatists not to be overly zealous in their search for accuracy.[33] In *Exactitude in Science*,[34] Borges describes an imaginary empire where the cartographers created a map so perfect in its representation that it matched the terrain on a 1:1 scale. Soon, the inhabitants of the empire abandoned these maps as useless. Legrand reminds comparatists of the moral of the story:

> Not unlike the cartographers' ultimate map of the empire, a comparative practice that purported to mirror the laws being compared and sought to avoid any schematisation whatsoever would be devoid of value. The interest of comparative research lies

[29] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J Eur & Comp L 111.
[30] Roger Coterrell has labelled Watson's approach as a 'sociology-free' for its lack of consideration of social groups and members of the community beyond the legal elites. Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 71.
[31] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 American Journal of Comparative Law 489.
[32] ibid 504.
[33] Pierre Legrand, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 253. See also Pierre Legrand, *Negative Comparative Law* (Cambridge University Press 2022) 412.
[34] Jorge Luis Borges, 'On Exactitude in Science' in Andrew Hurley (tr), *Collected Fictions* (Penguin 1998) 325.

> precisely in the fact that it embodies hermeneutic interventions upon laws or schematisations of laws.[35]

A middle ground between the universal mobility defended by Watson and the impossibility of legal transplants of Legrand is the theory of legal formants proposed by Rodolfo Sacco.[36] Inspired by phonetics, Sacco argues that in the living law, the rule does not necessarily come from legislation or case-law, as it is correspondence among them:

> Thus, even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulation of scholars, and the decisions of judges–elements that he keeps separate in his own thinking. . . we will call them, borrowing from phonetics the 'legal formants'.[37]

What, then, are the implications of these approaches for this Thesis? On the one hand, legal comparison should be layered and consider the specific features of the legal systems involved; on the other, it should not get lost in the constellation of cultural elements that shape the meaning of the rules.[38] Since the theme of this Thesis is the legal transplant of whistleblowing anti-retaliation protection, it must be decided what elements of the protection system are comparable. As a result, some administrative and legal minutiae have been purposely set aside to focus on the elements of litigation that affect the protection of whistleblowers. Because of this approach, the parts of the cause of action for anti-retaliation protection receive more attention than remedies and the bodies involved in adjudication. Similarly, rewards and channels of a formal whistleblowing complaint, as non-determinative elements in the success of a retaliation claim, receive less attention.[39]

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[35] Pierre Legrand, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 253.

[36] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 American Journal of Comparative Law 24.

[37] ibid 22.

[38] This approach has been suggested by traditional authors, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (OUP 1998) 32 et seq.

[39] In their cultural approach to whistleblowing, some scholars have highlighted the ethical attitudes in society to contextualise whistleblowing. See Stelios Andreadakis, 'Enhancing Whistleblower Protection: It's All about Culture' (2019) 30 European Business Law Review 859.

Accordingly, this Thesis centres on the elements of an antiretaliation cause of action. For example, in Chapter 3, we address the elements of the main causes of action for whistleblowing in statutory law and how they interact with the employment discrimination system in the US. In Chapter 4, we provide a detailed consideration of the public interest element of the disclosure in order to qualify as a whistleblower in the US common law. Procedures, evidentiary rules and bodies involved are also covered in the discussion. Chapters 5 and 6 address how certain civil procedures and evidence norms are decisive for the (non-) transferability of the whistleblowing law in Chile. We also address the equivalents or non-equivalents of the foreign rules in those chapters. Ultimately, this Thesis pays special attention to contextual elements to evaluate the extent to which whistleblowing law can work in the Chilean legal system.

In addition to these approaches, this Thesis also adopts the functional method of comparative law. Whilst Watson's legal transplant approach is a doctrinal analysis of the law in the process of reception and Legrand's approach highlights the need to be respectful of the *foreignness* of whistleblowing in the Chilean legal system, the functional method guides us in evaluating whether the Chilean version of whistleblowing complies with its intended purpose. Zweigert and Kötz have described the functional method as follows:

> The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of law to compare, the scope of the undertaking, the creation of a system of comparative law, and so on.[40]

The natural question under this approach is what function whistleblowing protection performs. Scholars agree that whistleblowing laws aim to support anticorruption efforts, strengthen law enforcement and detect abuses against the public interest within private and public organisations.[41] Accordingly, a legal transplant would be successful when the borrowed law performs its function. However, a standard of comparison is needed to assess the fitness of the borrowed law to fulfil these functions. As Zweigert and Kötz have observed, 'the only

[40] Zweigert and Kötz (n 38) 34.
[41] Lewis, Brown and Moberly (n 27).

things that are comparable are those which fulfil the same function'.[42] This is the problem of the *tertium comparationis*. As discussed earlier, the problem of public interest disclosures is an innovation of the old English law and later developed into modern whistleblowing law in the US. In Chapter 6, we explore how this modern version, embedded in the US direct discrimination framework, inspired the UK's PIDA.

Accordingly, the primary comparator for evaluating Chilean law is the US, with the UK serving as a secondary point of reference. As Rodolfo Sacco has observed, legal development may proceed either through original innovation or by imitation. Whistleblowing, much like the trust in property law, constitutes an original Anglo-American innovation, while in other jurisdictions it has typically been received as an imported institution. It is therefore methodologically sound to focus on the US as the principal comparator and on the UK as a supplementary one, rather than dispersing attention across multiple jurisdictions.[43]

Modern whistleblowing law, however, is best understood as a reformulation of earlier English principles, which justifies using the broader category of 'Anglo-American' law as the relevant comparator. This is not a body of binding rules confined to a single jurisdiction, but a conceptual construct that facilitates the analysis of whistleblowing as a legal transplant. As it will be demonstrated in Chapters 3 and 4, this construct also reflects the benchmark set by leading international instruments that articulate best practices in whistleblower protection.

In functional jargon, this Thesis compares how Chilean law solves the problem of public interest disclosures using the standard of Anglo-American law. The contributions of the comparatist Ralf Michaels support this approach. In *The Functional Method of Comparative Law*, Michaels argues that a certain level of abstraction is required in comparative analysis.[44] It is not possible to compare all the minutiae of legal institutions, especially when different legal families are involved. A certain degree of generalisation is required. To evaluate the reception of whistleblowing law in Chile, its origins in Anglo-American law will be adopted as the benchmark for comparison and enquiry.

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[42] Zweigert and Kötz (n 38) 34.
[43] Sacco (n 36) 397.
[44] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), 339

This focus in Anglo-American law is based on our cultural and historical approach. For that reason, it has not been considered the laws of other regions, such as Europe. Regarding Europe, the evidence shows that whistleblowing is also a category that has been the subject of the transplant process. Nevertheless, in Chapter 4, we reference countries, such as France and Germany, to show how Anglo-American whistleblowing has been contested. We also outline some misconceptions, especially among French authors who have identified circumstances where no public interest disclosure has been involved as inclusive of whistleblowing.

Throughout this Thesis, we assess the problem of possible functional equivalents to the Anglo-American whistleblowing law. Chapter 4 explores *ius resistendi* as a possible equivalent to passive whistleblowing. Chapter 5 analyses whether the Chilean employment discrimination system can support the transplantation of Anglo-American whistleblowing. We address whether the Chilean rules of civil procedure can host whistleblowing litigation akin to the Anglo-American law. Most of the modern whistleblowing litigation rules come from the US. Therefore, we have used the American rules for this part of the comparative analysis. Finally, in Chapter 6, we consider whether the just cause dismissal system can serve as a functional equivalent to whistleblowing protection.

In summary, this Thesis has adopted an eclectic methodological approach. As Vlad Perju points out, '[u]nderstanding legal transplants requires case-by-case approach', the binary choice between Watson's rule-centred view and the cultural mirror proposed by Legrand is not mandatory for the researcher.[45] Regarding whistleblowing, various reasons recommend a layered approach instead. First, Watson's legal transplant model which defends the doctrinal analysis of black letter law and history. This approach assumes that rules can move from one jurisdiction to another, regardless of the cultural context or their suitability in the host legal system. The available evidence in the field is undisputed that whistleblowing rules adopted in Chile and other civil law countries belong to the Anglo-American tradition,

[45] Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 1304, 1312. See also, Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 Am J Comp L 583.

especially the US. For Watson, it is the classic problem of 'law out of context'.[46] He argues that cultural differences and the suitability of the rules are not barriers to transplanting rules; the rules may move regardless.

Second, this Thesis follows Legrand's approach, which defends that rules are the result of society. Legrand is sceptical about the possibility of legal transplants. However, rules from different cultures move, and the question is how much context the researcher must provide to understand the suitability of this borrowing. We address this challenge in Chapter 1, where we analyse how the context of whistleblowing in Anglo-American law is a barrier to its reception. In civil law jurisdictions, law enforcement tends to be more centralised – a state monopoly. Our research suggests that in legal systems where the relationship between citizens and law enforcement is not akin to Anglo-American systems, whistleblowing tends to be conflated with other legal categories.

Finally, the functional method supplements the approaches of Watson and Legrand by allowing us to evaluate whether the Chilean rules of whistleblowing reproduce the intended function. This approach permits us to tackle whistleblowing protection through black-letter law and evaluate how much the influence of context may result in the divergence of the Chilean version of whistleblowing from the Anglo-American purpose.

Throughout this Thesis, our findings suggest that the transplantion of whistleblowing protection in Chile cannot replicate the intended results (it would require major reforms). In Chile, whistleblowing has been equated with protection for workplace complaints, and protection for employees who actually blow the whistle is provided through unspecific causes of action. For example, in Chapter 2, we describe how whistleblowers are protected through the fundamental right to physical and psychological integrity. These findings shed light on the need for legal reforms to improve whistleblower protection in the Chilean legal system.

[46] 'Law is out of context much of the time, perhaps even most of the time. The fact is unremarkable and usually unremarked. A society makes law; the society changes, politically or economically, but the law remains the same or little changed. Or the centre of gravity of the society's geography changes dramatically and/or so does its religion. Or one independent state accepts much of the law and legal structure of another despite different circumstances. . . .' Alan Watson, *Law Out of Context* (The University of Georgia Press 2000) xii et seq. See also Watson, *Comparative Law* (n 20) 13-15.

### D. The Problem of Mutation of the Transplant

Otto Kahn-Freund described the challenges of comparison where different legal families are involved. He illustrated an example of a continental lawyer undertaking the comparison of his own contract law to the law of England:

> Much of what on the Continent is done by state legislation is in this country [England] done through standard contracts, a *praeter legem* method of law making. Thus, to know what the actual obligations of carriers and passengers or carriers and consignment owners are, the Continental lawyer must read a considerable number of contracts forms the special function of which is akin to that of the relevant Chapter of a Code in his own country.[47]

As with the continental lawyer in Kahn-Freund's example, this Thesis tackles the challenge of comparing legal institutions from different legal families. Whistleblowing has imperfect functional equivalents in Chilean law. The Chilean case illustrates how, for a legal institution to be properly adopted, strong reform is needed to perform the same function as in the donor jurisdiction.

In the case of legal transplants, modern authors have labelled these frictions between foreign and local rules as 'legal irritants'. In his influential paper, 'Legal Irritants: Goof Faith in British Law or How Unifying Law End up in New Divergences',[48] Gunther Teubner analyses the consequences of the adoption of Continental good faith in the British law of contracts. Teubner argues that transplants do not work mechanically in their new setting, the new rule triggers unexpected events:

> 'Legal irritants'. . . are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.[49]

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[47] Kahn-Freund (n 28).
[48] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 MLR 11.
[49] Ibid 12.

Although variances in the emphasis, there is certain level of consensus that legal comparison requires understanding of the context of rules and the features of legal families involved. Different contexts may trigger mutation of the rules and the expected results.[50]

Since whistleblowing is an original Anglo-American innovation without a functional equivalent in Chile, this Thesis faces the challenge of uneven grounds for comparison. For instance, in Anglo-American law whistleblower protection pertains to employment law. Thus, one challenge concerns the branch of the law to which whistleblowing belongs or should be placed in Chile. However, in civil law countries like Chile, branches of law are strictly separated by specific principles, whilst in Anglo-American systems, branches of the law are more permeable. Within the Chilean legal system, employment law is the set of rules to deal with the struggle between capital and labour. Consequently, locating whistleblowing law within employment law means it is limited to conflicts between employers and employees (i.e. workplace complaints), thereby obscuring its public interest dimension. Chilean practice often conflates disobedience of managerial instructions and public interest. Comparative analysis must level these differences to assess the fit between the imported legal rules and the local structures.[51]

This Thesis examines the transplantation of whistleblowing law by analysing how specific legal elements from the Anglo-American tradition interact with, and are reshaped by, the Chilean legal system. Rather than seeking to develop an abstract general theory, the chapters provide legal analysis and interpretation situated within the broader functional and contextual conditions that form the transplant process. The central hypothesis guiding this analysis is that the success or failure of the transplant depends on the way substantive rules, procedural mechanisms, and contextual elements interact. Each chapter tests this hypothesis by examining particular legal features, such as the public interest requirement, which perform different roles across jurisdictions. For instance, in the United States this requirement can ground wrongful dismissal claims or support constitutional free speech actions, whereas in Chilean litigation it is absent. Because certain elements play multiple roles, the discussion in

[50] From a substantive perspective, Mathias Siems has introduced the concept of 'malicious legal transplants' to refer reception of rules not just ill-fitted but harmful for the legal system, Mathias Siems, 'Malicious Legal Transplants' (2018) 38(1) Legal Studies 103.
[51] Kahn-Freund (n 28).

individual chapters often resonates with others. The Thesis is, therefore, unified not only by its focus on whistleblowing but also by its common analytical concern: how transplanted legal elements shift in meaning and function when situated in a different legal context.

### E. Whistleblowing in Chile: State of the Art and the US Influence

The enactment of Law 20.205[52] in 2007 marked the first specific legal framework for the protection of whistleblowers in the Chilean public sector. Similar to the fragmented architecture of the United States, Chile's protection regime remains dispersed. Since 2024, reprisals may be challenged through an administrative claim before the Office of the Comptroller General. However, the law does not establish a specialised jurisdictional procedure for whistleblowing complaints. Consequently, courts have relied on default mechanisms: (i) the complaint for infringement of fundamental rights under the Labour Code, adjudicated by employment tribunals, and (ii) the constitutional action of protection (*recurso de protección)*, an emergency injunction litigated before the courts of appeal.

By contrast, in the private sector no statute specifically regulates whistleblowing. Protection derives indirectly from the Labour Code and constitutional remedies. Additionally, Chilean employment tribunals have held that whistleblowing does not constitute disloyalty under the just cause regime for termination. Yet, in the absence of an express recognition of whistleblowing as a protected activity, claims must be framed through two existing fundamental rights. The first is freedom of expression in the workplace. In practice, however, case law demonstrates that only whistleblowers who engaged in public demonstrations or attracted media attention have prevailed under this ground. The second is the prohibition of moral harassment (*acoso moral*). This provision is not limited to protected categories but requires the claimant to prove a violation of physical or moral integrity.

A further, more general doctrine is the *ius resistendi*, which limits the employee's duty of obedience.[53] Where an employer orders an employee to commit an unlawful act or breach professional rules, Chilean labour law recognises that refusal does not constitute just cause

[52] Law No 20.205, 24 July 2007, Diario Oficial [DO] (Chile) (as amended by Law No 21.592, 21 August 2023, Diario Oficial [DO] (Chile)) consolidated in the *Estatuto Administrativo* of 1989.
[53] William Thayer and Patricio Novoa, *Manual de Derecho del Trabajo* (Editorial Juridica de Chile 2010) 183.

for dismissal.[54] While this doctrine could, in principle, provide a basis for public interest disclosures, in practice it has only been invoked in cases concerning infringements of employment rights rather than whistleblowing in the strict sense.

Following the U.S. model, Chile has recently introduced reward mechanisms. In 2021, Law No 21.314[55] reformed securities regulation and created the figure of the anonymous whistleblower (*denunciante anónimo*). This scheme allows whistleblowers in the corporate sector to receive a percentage of the fine imposed by the Financial Market Commission (the Chilean equivalent of the Securities and Exchange Commission), reflecting the influence of the SEC Whistleblower Programme under the Dodd–Frank Act. In 2024, Law 21.713[56] introduced a tax whistleblowing reward programme, inspired by the IRS Whistleblower Programme, enabling informants to receive a share of penalties imposed by the Internal Revenue Service. Notably, however, neither statute amended the Labour Code to provide specific anti-retaliation protection.

Despite this transnational influence, a significant gap persists between Chilean and U.S. law, particularly in relation to anti-retaliation protections. The difficulty lies in the fact that whistleblowing protections in the United States are embedded within the fabric of Anglo-American law. As Chapter 2 demonstrates, modern whistleblowing regimes are the product of what comparatists describe as 'cross-fertilization'[57] between English and U.S. law. England exported its legal traditions to the American colonies, where private collaboration with law enforcement and *qui tam* actions became central to the prosecution of wrongdoing. From these foundations, U.S. law elaborated the contemporary frameworks of whistleblowing. Crucially, anti-retaliation rules in the United States rest on a set of common law assumptions that are not easily replicable in civil law systems.

[54] ibid.
[55] Law No 21.314, 13 April 2021, Diario Oficial [DO] (Chile).
[56] Law No 21.713, 24 October 2024, Diario Oficial [DO] (Chile).
[57] Esin Örücü, 'Law as Transposition' (2002) 51 ICLQ 205.

The prominence of Anglo-American whistleblowing law has not gone unnoticed by global governance institutions. The OECD,[58] the United Nations,[59] and the Organization of American States (OAS),[60] together with non-governmental organisations, such as the Government Accountability Project[61] and Transparency International,[62] have elaborated international standards and best practices. Nonetheless, to avoid the pitfall of 'paper rights', the transplantation of whistleblower protections requires careful adaptation to the domestic legal context.

### F. Structure and Findings

Chapter 1 addresses contextual considerations before turning to a discussion of black letter law on whistleblowing. The first consideration is obvious: the issue of translation and whether the concept of whistleblowing has any corresponding term in Spanish. This research shows that in legal Spanish a concept equivalent to the function of whistleblowing was never developed; hence, in Chile and other countries inheriting Spanish civil law, there is no specific term for whistleblowing.[63] This challenge is shared by other countries from the continental tradition that have adopted whistleblowing protection. For example, France, after some resistance, adopted a specific word for whistleblowing: *lanceur d'alerte*.[64] The absence of a term in French or Spanish is rooted in the history of their legal traditions; it is not a mere vocabulary issue. This chapter's main insight is the historical contextual analysis that explains how the old English law is the antecedent of whistleblowing.

Chapter 1 also provides a substantive definition of whistleblowing to set out its boundaries from other categories. In this Thesis, it is not assumed that what is called 'whistleblowing' in Chile would be considered so in the Anglo-American tradition. The term 'whistleblowing' is

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[58] OECD, *Committing to Effective Whistleblower Protection* (OECD Publishing, Paris 2016) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/03/committing-to-effective-whistleblower-protection_g1g65d0a/9789264252639-en.pdf> accessed 30 September 2025.
[59] UNODC (n 12).
[60] Thomas Devine, Robert Vaughn and Keith Henderson, *Model Law Protecting Freedom of Expression Against Corruption* (OAS 2013) <www.oas.org/juridico/english/model_law_whistle.htm> accessed 30 September 2025.
[61] Devine and Walden (n 12).
[62] Transparency International (n 12).
[63] See Vivian Grosswald Curran, 'Comparative Law and Language' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019), 675.
[64] Vincent Rebeyrol, 'La réception du "whistleblowing" par le droit français' [2012] La Semaine Juridique Entreprise et Affaires; Florence Chaltiel Terral, *Les lanceurs d'alerte* (Dalloz 2018) 6.

not used in the same way in Chile and other civil law countries. To avoid misunderstandings, the chapter identifies some essential elements for a comparable concept of whistleblowing. Whilst most elements of a substantial definition of whistleblowing are straightforward for comparative analysis, we have identified two that may create confusion. First, a whistleblowing disclosure should comprise some form of public interest concern; it is not just a workplace claim. This is especially true in the UK, where PIDA explicitly differentiates these disclosures from other forms of dissent in the workplace. Second, the whistleblower is an insider, usually an employee or a former employee, not a bystander, spy, or journalist/reporter. Although there seems to be a consensus that this should be the case, in this Thesis a tendency is identified towards widening the scope of the persons protected as whistleblowers.

Chapter 2 assesses the suitability of Chilean law to receive the whistleblower anti-retaliation framework. The evidence shows that whistleblowing protection in the US has been embedded in employment discrimination law and in the UK, the regime in the PIDA also exhibits clear connections with discrimination principles. Retaliation claims in Anglo-American law resemble a case of direct discrimination, where the employee should prove the causal link between the detrimental decision and the protected status/activity. In contrast, under Chilean law, a case of discrimination is a breach of the constitutional principle of equality, where the employee must prove that the employer's decision is disproportionate. Therefore, hardwiring whistleblower protection into the Chilean employment law framework would require the legal reform of the Chilean employment discrimination system.

Chapter 2 also analyses the doctrinal reasons for this mismatch between the Chilean and Anglo-American discrimination systems. The argument in the chapter is that, when constructing discrimination law, in Chile it was mistakenly assumed that the US Constitution (the Fourteenth Amendment) is the primary source of employment discrimination rather than Title VII, which is the principal source of discrimination law in the US. The natural consequence of this misalignment has been the use of inadequate causes of action to litigate discrimination and retaliation cases. As a result, whistleblowing cases in Chile have been associated with infringement of the employee's physical and moral integrity (harassment) or the right to free speech when employees have disclosed publicly to the press. None of these actions can be

considered equivalent to whistleblowing litigation because under existing Chilean law, the public interest element of disclosure is irrelevant to the cause of action. Indeed, the distinction between public interest disclosures and workplace complaints is not present in Chilean employment law.

Chapter 3 thoroughly examines the relationship between employment discrimination and whistleblower protection. Whilst other comparative studies have focused on feasibility of whistleblowing reception, this Thesis demonstrates that the statutes and case law exhibit significant differences with Chilean institutions that make the transplant of whistleblowing questionable. By studying American treatises on whistleblowing for practitioners (a source usually ignored by comparatists), we conclude that replicating whistleblowing litigation requires a legal ecosystem akin to the American one. The False Claim Act (FCA) in the US is a vivid example of how modern whistleblowing protection is inextricably connected with the *old qui tam* statutes. Indeed, modern statutory protection for whistleblowers is linked with cultural and legal circumstances that are impossible to replicate in jurisdictions like Chile. Concepts like private law enforcement – central to *qui tam* actions – are absent in civil law countries like Chile.

Therefore, Chapter 3 highlights the common issue of 'over-projection' in comparative law. It challenges some functionalist assumptions about rules performing equivalent roles in different jurisdictions. This Thesis suggests that common law phenomena, such as *private law enforcement*, have no equivalent role in civil law countries like Chile, thus affecting the understanding of whistleblowing. This finding stresses the issue of the historical context of the law in the importer jurisdiction to evaluate the suitability of the transplant.

Chapter 4 focuses on the requirement for a third-party interest in Anglo-American whistleblowing protection regimes. Analysing the cause of action for wrongful discharge against public policy, it is found that reporting wrongdoing beyond the employment relationship is necessary to trigger whistleblowing protection. In contrast to other Western industrial countries, the US has not followed the just-cause dismissal system, adopting the at-will termination rule instead: both parties may terminate the employment relationship for good, bad or no reason. To prevent the abuse of this rule, the action of wrongful discharge against public policy makes the employer responsible in tort for dismissals when the

employee participates in activities recognised by public policy (e.g. reporting and opposing illegal orders in the workplace).

In the US, the protected activity expressly considers reporting wrongdoing against the public interest. In contrast, under Chilean law, where the rule of dismissal is just cause, anti-retaliation protection is only granted for workplace complaints. Therefore, the chapter explores how, in the absence of a just-cause system, the US common law originated a system of control of dismissal oriented to protect third parties beyond the employment relationship, not only conflicts of dismissals involving employee interests. An original feature of the American system is that employees can attain exceptional protection against dismissal if they blow the whistle about wrongdoing where they are not the victim. In contrast, the Chilean system only provides anti-retaliation protection when the employee is the victim of wrongdoing, such as when they complain about a violation of employment legislation or breaches of contract. The Chilean Labour Code does not recognise the distinction between workplace conflicts and public interest in employment law cases.

This chapter also explores how the Chilean institution of *ius resistendi* may be considered a possible functional equivalent to passive whistleblowing. *Ius resistendi* protects employees against retaliation when they refuse to comply with illegal orders, which is an exception to the implied duty of obedience. In contrast to active whistleblowing, there is no actual disclosure to a third person in passive whistleblowing. The study shows that passive whistleblowing is relevant and applicable in common law regimes, but Anglo-American statutes and international best practices have focused on actual disclosures (i.e. active whistleblowing), not mere resistance. In Chilean employment law, employees have historically been protected from disobeying illegal orders (*ius resistendi*). A dismissal for not complying with illegal orders would be considered unfair. However, in practice, the relevant case law shows that employees have used *ius resistendi* to resist orders affecting their own employment rights rather than to resist orders against the wider public interests of third parties or the community. Thus, cases of passive whistleblowing in the US, where actual public interest is involved, differ from the Chilean *ius resistendi*, even though both institutions seem similar.

Chapter 5 explores the enforcement of anti-retaliation protection for whistleblowers in the Chilean legal system. The chapter begins by stating that substantive anti-retaliation protections should be embedded in the direct discrimination framework and then underlines the challenges of hardwiring this legal framework into a system with diverse employment discrimination rules. In Chile, cases of direct discrimination are not considered the same as under Anglo-American law (i.e. a detrimental employment decision because of a protected characteristic). In Chile, employment discrimination cases are misaligned with the Anglo-American tradition because the Chilean employment discrimination system is an open constitutional system (as discussed in Chapter 2).

International best practices, inspired by US law, have assumed that substantive protection may be hardwired in domestic enforcement bodies, procedures and evidentiary rules. The Chilean case shows that this assumption is not always true, even though these American procedural rules are indispensable for the substantive rules to work. For example, the rules regulating pretrial discovery under US law have no equivalent in Chilean employment litigation. Since Chilean litigation focuses on workplace issues, instead of the public interest, compulsory disclosure of evidence is limited to employment documents, which are usually useless to prove public interest wrongdoing and involvement in protected activity. The Chilean case illustrates how a legal transplant may require adjustment far beyond the substantive rules to comply with its intended function and not become paper rights.

Chapter 6 challenges the widespread hypothesis of the just-cause system as a substitute for whistleblowing protection. A common assumption is that the US led the development of whistleblowing because of its weak dismissal protection (in terms of the employment at-will rule) and countries with a just-cause system already protect whistleblowers. The Chilean case suggests that this assumption misuses the functional method. The research in this Thesis shows that whistleblowing is a legal category that originated in the Anglo-American tradition and is a component of a unique system of law enforcement. It is concerned with the public interest rather than labour policy.

This chapter examines the UK before it adopted the PIDA and the problem of *ius resistendi* and passive whistleblowing. In Chile, opposition to illegal orders only arises in the form of complaints for contractual breaches. In the UK, before PIDA, the unfair dismissal system

protected employees who opposed illegal orders or disclosed wrongdoing in the public interest. The research in this Thesis shows that whilst the PIDA in effect followed the direct discrimination framework from the US and codified case law, the UK unfair dismissal system had already dealt with public interest in the workplace as a distinct category. The evidence suggests that the historical ties between the US and UK systems produced a seamless adoption of modern statutory whistleblowing protection. These comparisons shed light on the challenges other jurisdictions face when importing whistleblowing law, especially non-common law jurisdictions.

In conclusion, from a comparative perspective, this Thesis identifies challenges that have not been sufficiently explored regarding the process of transplanting Anglo-American whistleblowing protections into Chilean law. The comparative scope is deliberately limited to the Anglo-American legal tradition, construed here as a *tertium comparationis*, which reflects the origin of whistleblowing in English law and its reshaping into its modern legal form in the US. This eclectic methodological choice responds to the fact that whistleblowing is not a native legal category in the civil law tradition, making the Anglo-American law the natural donor framework within the logic of legal transplants. The analysis focuses on the Chilean legal context and questions of anti-retaliation protection.

Whilst primarily dogmatic, the work is informed by the author's direct engagement with Anglo-American law and legal culture as a reference point for legal reform of his native jurisdiction. Although grounded in black-letter law, the Thesis engages critically with legal transplants and functionalism theories whilst recognising the cultural limits of legal migration highlighted by comparatists, such as Watson, Kahn-Freud, Legrand, and Sacco. It further incorporates interdisciplinary insights, particularly in Chapter 1, where the concept of whistleblowing is substantively defined through contributions from non-legal fields to clarify what is being transplanted.

# Chapter 1: Initial Considerations Shaping the Transplant of Whistleblowing Laws in Chile

## A. Introduction

This chapter presents a contextual basis for a comparative study of whistleblowing law in Chile. The first part analyses the challenges of transplanting public interest disclosures into the Chilean legal system, explaining why this legal category has remained neglected. Linguistic, historical and comparative approaches are used to provide context and compare Chile, as a civil law country, with the development of whistleblowing in the Anglo-American legal tradition. The second part provides a concept of whistleblowing that may be used to differentiate this legal category from those already present in Chilean law. The chapter relays the most widely accepted definitions in law and social sciences, isolating the core elements of whistleblowing and how they interplay within relevant legislation. The chapter concludes by proposing a set of essential elements of whistleblowing for comparative purposes, centred on three questions: (1) What is blowing the whistle, (2) Why is the whistle blown and (3) Who is blowing it?

## B. Terminology: Does Whistleblowing Mean the Same Thing in English and Spanish?

The idea of 'blowing the whistle' as a means of disclosing or reporting public interest concerns in the workplace comes from the Anglo-American tradition. The first challenge in analysing whistleblowing in Chile is the lack of a word in Spanish to convey the concept.[65] But we are not referring only to the lack of a special word; it is also symptomatic that Chilean society has attributed little importance to employees denouncing wrongdoing within their organisations.

To address the challenge of adopting the whistleblowing concept, three solutions have been implemented in non-English speaking civil law jurisdictions: (1) to use the original English term and so assume that whistleblowing is a technical Anglicism; (2) to create a specific term on the basis that whistleblowing is a legal category with no equivalent in the domestic legal

[65] See Curran (n 63).

system; and (3) to translate the English term into Spanish using the most proximate legal words to describe the action of blowing the whistle.[66] The first and second preserve the original meaning of the concept without projecting domestic connotations onto it, but it can be harder to disseminate the new idea to the public. The third option is easier to integrate into domestic law but risks distorting the foreign concept with unwanted local connotations.

Whilst the EU Directive 2019/2037 uses the word *denunciante* (denouncer) for whistleblower in its Spanish version, scholars seem to prefer the original English term. Thus, Professor Carmen Jover Ramírez named her book on the topic *La protección de los whistleblowers en el seno de la relación jurídico laboral* (*The Protection of Whistleblowers in the Employment Relationship*).[67] The same applies to David Martínez Saldías, who named his book *La protección del whistleblower* (*The Protection of the Whistleblower*);[68] and Professor Beatriz García Moreno, who chose to name her book *Del whistleblower al alertador* (*From the Whistleblower to the Launcher of an Alert*).[69] The preference for the English term is understandable, when we consider that the term *denunciante* is polysemic in legal Spanish. The word *denunciante* already means denouncer, whistleblower, reporter, informer, or claimant. Therefore, whistleblower is more precise.

Recognising the confusion that the term *denunciate* may create, Spanish lawmakers changed the term to *informante* (informer) in the transposition bill.[70] To differentiate whistleblowing from other legal categories, the English term 'whistleblower' has been replaced by the term *'*informante'. Given the influence of Spanish legislation in Latin America, it is likely that the term *informante* will become the standard term for whistleblowers in Spanish-speaking countries.

[66] This reality is consistent with the observations of Rodolfo Sacco on translation of legal concepts, see Rodolfo Sacco (n 36).
[67] Carmen Jover Ramírez, *La protección de los whistleblowers en el seno de la relación jurídico laboral* (Laborum 2020).
[68] David Martínez Saldías, *La protección del whistleblower* (Tirant lo Blanch 2020).
[69] Beatriz García Moreno, *Del whistleblower al alertador* (Tirant lo Blanch 2020).
[70] Law No 2/2023, de 20 de febrero, reguladora de la protección de las personas que informen sobre infracciones normativas y de lucha contra la corrupción (Spain).

France uses the term *les lanceurs d'alerte* (the launchers of an alert) for whistleblowers.[71] The creation of this specific expression makes sense when we consider that reporting wrongdoing without a legal duty to do so has a negative cultural connotation in France.[72] Indeed, the closest words, *dénonciation* (accusation against someone) or *délation* (informing), bring back memories of the German occupation when the Nazis encouraged anonymous denunciations.[73]

This negative connotation arose in 2005 when the French data protection authority, *Commission nationale de l'informatique et des libertés* (CNIL), rejected the corporate whistleblowing systems created by two American corporations doing business in France. Under the Sarbanes-Oxley Act,[74] publicly traded companies are obliged to issue measures for 'the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters'.[75] McDonald's France and Exide Technologies set up anonymous hotlines for their French employees to file reports under the Sarbanes–Oxley Act (SOX) 2002 rules.[76] Whilst these hotlines are normal in the US, they elicited a strong adverse reaction from the CNIL, who called the system of anonymous denounces *un système organisé de délation professionnelle*[77] (an organised system of snitching). As such, to deal with the pejorative connotation of the term *dénonciation/délation,*[78] France has adopted *lancement d'alerte* as a more neutral and precise term to name whistleblowing.

In contrast, Chile has opted to translate the English term whistleblower to the most proximate legal category. The result has been the expression *denunciante anónimo* (anonymous denouncer) to designate a whistleblower. The Chilean Congress adopted this term through Law No 21.314 of 2021,[79] where the *denunciate anónimo* was introduced for corporate

[71] Law No 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte [2022] JORF n°0068 (France).
[72] Rebeyrol (n 64).
[73] Katrin Deckert and Morgan Sweeney, 'Whistleblowing: National Report of France' in Gregor Thüsing and Gerrit Forst (eds), *Whistleblowing – A Comparative Study* (Springer 2016) 127.
[74] See s 301 Sarbanes-Oxley Act ('SOX rules').
[75] 15 USC s 78j-1(m)(4).
[76] Michael Delikat and Renee Phillips, *Corporate Whistleblowing in the Sarbanes Oxley/Dodd Frank Era* (Practising Law Institute 2019) ss 7:2–7:3.
[77] Rebeyrol (n 64).
[78] Terral (n 64) 6.
[79] Law No 21.314 (n 55).

whistleblowing. In a prior statute, the Chilean Congress used the term *denunciate*[80] for whistleblowers in the public sector. Remarkably, the Congress did not give any technical reason to introduce a different nomenclature for corporate whistleblowers, which also goes against the grain of the comparative experience, with two words for the same legal concept.

The inconsistent terminology regarding whistleblowing in Chile is rooted in the reactive character of the legislation. Whistleblowing statutes have not emerged from some kind of preordained, serious plan to transplant Anglo-American law but instead as Chilean governmental reactions to corruption scandals. Thus, the Chilean Congress enacted Law No 20.205 of 2007 to protect *denunciantes* (denouncers) in the public sector after it was discovered that certain political parties were defrauding the public purse in their campaigns.[81] Due to this scandal, the Chilean President Michele Bachelet appointed a commission of seven experts to provide advice on new anticorruption legislation. The commission recommended protection for *denunciantes* (denouncers), among other transparency measures.[82]

In 2021, after collusion scandals among big pharmaceutical companies and stock market abuses, the government reacted with an 'anti-abuse' legislative agenda. Law No 21.234 of 2021 introduced bounties for corporate whistleblowers under the heading of *denunciante anónimo*. This expression was specifically affirmed in a recent 2024 law introducing rewards for reporting tax fraud.[83]

From a comparative perspective, the Chilean translation *denunciante anónimo* is objectionable on three grounds. First, as noted above, the expression *denuncia* (denounce) is polysemic in legal Spanish. It is difficult to convey the specific English meaning of whistleblowing in terms of, or through, a word that has multiple meanings in Spanish. Second, anonymity is a contingent characteristic of whistleblowing.[84] Third, it is confusing to have two

[80] Law No 20.205, 24 July 2007, Diario Oficial [DO] (Chile) (as amended by Law No 21.592, 21 August 2023, Diario Oficial [DO] (Chile)) consolidated in the *Estatuto Administrativo* of 1989.
[81] Alberto Arellano and Víctor Carvajal, 'Así murió en el Congreso la agenda de probidad del primer gobierno de Bachelet' (*Ciper*, 8 June 2015) <www.ciperchile.cl/2015/06/08/asi-murio-en-el-congreso-la-agenda-de-probidad-del-primer-gobierno-de-bachelet/> accessed 30 September 2025.
[82] OAS, 'Informe sobre medidas para favorecer la probidad y eficiencia de la gestión pública, encargado por S.E. la Presidenta de la República' (2007) <https://www.oas.org/juridico/spanish/mesicic2_chl_sc_anexo_1_sp.pdf> accessed 30 September 2025.
[83] Law No 21.713, 24 October 2024, Diario Oficial [DO] (Chile).
[84] For example, in France, the French Data Protection Authority discourages anonymous whistleblowers because of the risk of frivolous reports, and only exceptionally will the whistleblower remain anonymous: Deckert and

terms for the same activity depending on whether it happens in the corporate world or the public sector.

Although translating 'whistleblower' into Spanish seems more straightforward, the result is misleading. There is no semantic connection in Spanish between the expression *denunciante anónimo* (anonymous denouncer) and the dilemma between the duty of loyalty owed to an employer and the moral imperative of alerting the community about the existence of wrongdoing. Whilst everybody can remember the phrase *denunciate anónimo*, it fails to convey the intended meaning adequately to the public. As Viven Curran has warned, the problems involved with translation may come at the cost of the concept.[85] Other Chilean scholars have used the term *denunciante recompensado* (rewarded denouncer),[86] but this is inaccurate, too, because a reward – just like anonymity – is not an essential part of this concept either.

Given its cultural connotations, this Thesis argues that whistleblowing is a legal concept that cannot be translated adequately from English to Spanish. One way of alerting readers to this alien category is to use italics and explanatory footnotes.[87] As French and Spanish lawmakers have done, it is advisable that Chile either adopts a specific term, or at least for research purposes, retains the English word rather than a literal translation or a mix with other polysemic words, such as *denunciante anónimo* (anonymous denouncer).

### C. The Whistleblowing Context: The Duty of Collaboration with Law Enforcement Authorities in Anglo-American Law

Chile's civil law system amounts to a second challenge in analysing whistleblowing. In particular, as noted above, whistleblowing is an Anglo-American legal device. Not only is that the case, but common law systems also embrace direct citizen participation in law

Sweeney (n 73) 31. In the US, under the Sarbanes Oxley Act 2002, the whistleblower has the option to remain anonymous. See Sarbanes–Oxley Act of 2002, § 301(4).

[85] Curran (n 63) 681, 684.

[86] Danae Fenner and Francisco Agüero, 'Propuesta de Whistleblower para la Detección de Prácticas de Corrupción y Otros Ilícitos' (9 April 2015) <www.academia.edu/45620033/Propuesta_de_Whistlerblower_para_la_detecci%C3%B3n_de_pr%C3%A1cticas_de_corrupci%C3%B3n_y_otros_il%C3%ADcitos> accessed 30 September 2025.

[87] ibid.

enforcement.[88] This is in direct contrast to the civil law world, where there has been a tendency to the exclude private individuals from the business of prosecuting crimes or legal claims. As Mirjan Damaška has noted: '[T]he judicial apparatus – dominated by professional bureaucrats – was inclined to regard the administration of justice as a technical pursuit, unsuitable for dilettante meddling, even if dilettantes were given no share in decision-making authority.'[89]

This kind of legal environment prevalent in civil legal systems is not suited to support whistleblowers. As Nancy Modesitt, Janie Schulman and Daniel Westman have accurately claimed, whistleblowing reflects the English conception of citizens as having duties as aiders in law enforcement.[90] In the same way, in his *History of Continental Criminal Procedure*, Adhemar Esmein argued that even the US adopted the French public prosecutor model in order to avoid 'the insecurity and impunity' of the English system of prosecution, which 'leaves the repression to the initiative of the citizens'.[91]

John Beattie, a more contemporary scholar, describes the situation of prosecution in his book *Policing and Punishment in London*:

> No public body had the responsibility to investigate crimes, to detect offenders, or to gather evidence that would sustain a prosecution. All of that was left to the victim. The state provided the machinery of criminal justice, but there was no expectation

[88] Regarding the Middle Ages in England, Poole asserts that '[t]he burden of detection of crime and of the capture of criminals, and bringing them to justice, rested almost entirely on the unassisted and unremunerated labors of the local community of peasants and townsmen, vested with little or no authority or with the means to carry out the obligations imposed upon them'. See Austin Lane Poole, *Obligations of Society in the XII and XIII Centuries:* The *Ford Lectures Delivered in the University of Oxford in Michaelmas Term 1944* (Clarendon Press 1946) 81–82. See also Modesitt, Schulman and Westman, who observe: 'The qualified nature of the duties of obedience, loyalty, and confidentiality, which recognises that employees may disclose illegal conduct, reflects a longstanding theme of the common law that encourages citizens to report criminal conduct to appropriate authorities.' Nancy M Modesitt, Janie F Schulman and Daniel P Westman, *Whistleblowing*: *The Law of Retaliatory Discharge* (Bloomberg 2015) 2-14. See also Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986).

[89] Damaška (n 88) 38–41.

[90] Modesitt, Schulman and Westman (n 88) 2-15.

[91] Adhemar Esmein, *History of Continental Criminal Procedure* (Murray 1914) 7.

> that constables, or other public officials, would act as detectives or prosecutors – not, at least, with respect to the serious offences that harmed individual victims.[92]

Another expression of these cultural differences is found in the legal meaning of silencing a crime. In Chile and other civil law jurisdictions, a false accusation has always been penalised much more strongly than the failure to reveal a crime.[93] However, in Anglo-American law, silencing a crime has been historically considered an offence under the doctrine of misprision of felony.[94] This offence has its roots in Medieval England and was later adopted in the US.[95] Although some had argued that this old common law offence had fallen into desuetude, in 1960 the House of Lords held that it was still a prosecutable common law misdemeanour. In *Sykes v DPP*,[96] Lord Denning set out the core of the offence:

> The accused man must have 'concealed or kept secret' his knowledge. He need not have done anything active, but it is his duty by law to disclose to proper authority all material facts about the offence. It is insufficient to tell the police that a felony has been committed. He must tell the name of the man who did it, if he knows it; the place, and so forth.[97]

In Chile, the Penal Code does not have an offence equivalent to the misprision of felony.[98] Instead, the duty to report a crime is rare and applies only to specific individuals, such as policemen, judges, doctors, school directors, and in general public officials.

The historical evidence suggests that public interest disclosures have not received particular attention in the civil law tradition because the investigation of crimes and misdemeanours

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[92] J M Beattie, *Policing and Punishment in London* 1660–1750 (OUP 2003) 226. See also W. L. Melville Lee, *A History of Police in England* (Methuen & Co. 1901). Douglas Hay and Francis G. Snyder (eds), *Policing and Prosecution in Britain*, 1750–1850 (Clarendon Press 1989).

[93] For instance, in Chile, under the Penal Code defamation and false reports are criminal offences. *Código Penal* [Penal Code] (Chile) arts 211, 412–431.

[94] P R Glazebrook, 'Misprision of Felony – Shadow of Phantom – Part 2' (1964) 8(3) Am J Legal Hist 283.

[95] The Misprison of Felony is a federal offence in the US, see 18 USC s 4: *Whoever, having knowledge of the actual commission of a felony cognisable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both*.

[96] *Sykes v DPP* [1962] AC 528.

[97] ibid 563.

[98] Enrique Cury Urzúa, *Derecho Penal* (Universidad Católica de Chile 2008). Indeed, under the Chilean Code of Criminal Procedure (Código Procesal Penal), denunciations are voluntary and only by exception some qualified people are obligated to report crimes. See art 175 Code of Criminal Procedure (Chile).

was seen as the exclusive function of the state. John Henry Merryman and Rogelio Pérez-Perdomo have noted how the centralised prosecution of offences was developed later in the common law system: 'The creation of a professional police force and a public prosecutor to investigate the commission of crimes, compile evidence, seek authority to prosecute, and conduct the criminal proceeding on behalf of the state are comparatively recent developments in the common law world.'[99]

In the 18th century, the idea of a police force was considered 'French' and incompatible with English liberty. British authors, such as Blackstone, Paley and Smith, had expressed strong views against the institution of the police.[100] Explaining the English suspiciousness and hostility towards the Continental police system, John Stuart Mill observed: 'In England, there has always been more liberty, but worse organisation, while in other countries there is better organisation, but less liberty.'[101] Moreover, English authors in the 18th century used the word 'police' with diverse meanings not necessarily associated with the maintenance of public order and the prevention of crime.[102]

Two additional institutions in the history of the common law world where private citizens collaborated with law enforcement are also noteworthy. Neither has a parallel in the civil law. The first is the *hue and crie* of the Early Middle Ages. Pollock and Maitland[103] describe colourfully how this process used to work in such times: 'When a felony is committed, the hue and cry should be raised. If, for example, a man comes upon a dead body and omits to raise the hue, he commits an amerceable offence, besides laying himself open to ugly suspicions. Possibly the proper cry is "Out! Out!".'[104]

As a result of the hue and cry, neighbours were expected to take action to pursue the criminal, bringing 'bows, arrows, and knives that they are bound to keep and, besides much shouting, there will be horn-blowing . . .'.[105] Summerson illustrates the metaphor of noisiness to alert

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[99] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press 2007) 129.
[100] Radzinowicz (n 4) 425.
[101] JS Mill, *On Representative Government* (A D Lindsay 1936) 347, quoted by Radzinowicz (n 4) 425.
[102] Radzinowicz (n 4) 1–5.
[103] Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I,* vol 2 (2nd edn, 1898) 578–79.
[104] ibid.
[105] ibid.

the public about the wrongdoing: 'Raised by shouting, by blowing the horn that many peasants carried, even by ringing church bells . . . . Anything suspicious, any robbery or house broken into, indeed, any disturbance involving bloodshed, required the raising of the hue.'[106] Not too long ago, the hue and cry had remained a reliable source of interpretation of the law in US statutory and case law.[107]

Finally, the old *qui tam* statutes are seen as a direct antecedent of modern whistleblowing.[108] The term comes from the Latin phrase *quin tam pro domino rege quam pro se ipso in hac parte sequitur,* which in modern English means 'who as well for the king as for himself sues in this matter'.[109] These statutes originated in the 14th century[110] 'to supplement England's insufficient legal machinery in order to bring more offenses to the cognisance of the courts'.[111] They were intended to encourage people to report wrongdoing to the authorities, usually not so obvious to be discovered otherwise. Under this action, the individual discloser did not need a standing interest in the wrongdoing to file a suit on behalf of the king and keep part of the penalty as a reward.

*Qui tam actions* were a legal device to advance law enforcement when there was no centralised prosecution or police force. Multiple criminal statutes included *qui tam* provisions, but they were usually restricted to matters of public order and safety.[112] People who collaborated with law enforcement through *qui tam actions* were called 'collaborators' or 'common informers'. They pursued the offenders in the name of the Crown and were rewarded with a part (in some cases, the whole) of the fine imposed.

Common informers were an original law enforcement tool under the old English law. As Leon Radzinowicz points out, their goal was personal gain rather than to secure justice: 'A common informer was a person who brought certain transgressions to the authorities' attention and

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[106] H R T Summerson, 'The Structure of Law Enforcement in Thirteenth Century England' (1979) 23 Am J Legal Hist 313, 317.
[107] Quoting Pollock and Maitland, Judge Cardozo contextualises the New York penal statute that mandates collaboration with the police when chasing a runaway criminal. See *Babington v Yellow Taxi Corp*, 164 NE 726 (NY 1928).
[108] Modesitt, Schulman and Westman (n 88) 1-5.
[109] Bryan Garner (ed), *Black's Law Dictionary* (Thomson Reuters 2019).
[110] Note, 'The History and Development of Qui Tam' (1972) Wash U L Q 81.
[111] Dan D Pitzer, 'The Qui Tam Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth' (1972) 7 Tex Int'l L J 415, 418.
[112] ibid 418.

instituted proceedings not because he personally had been aggrieved or wished to see justice done but because, under the law, he was entitled to a part of any fine that might be imposed.'[113]

Even though their job was critical to the machinery of law enforcement, the public resented the informers. Their job of enforcing unpopular laws made them the target of harsh condemnation, and they were called 'unprincipled pettifoggers' and 'instrument[s] of individual extortion, caprice and tyranny'.[114] They were sometimes victims of violence from the public, and just as modern whistleblowers, legislation was enacted to protect them from or 'against the rage of the populace'.[115]

The abuses provoked by the informers, who cared more about bounties than about the administration of justice, led to the end of the *qui tam* system in English law. Thus, in 1951, the Parliament abolished the discredited system of common informers.[116] During the discussion of the Bill in the House of Lords, Lord Simon described the general opinion of the system: '[T]he offence must be prosecuted by, and the penalty must be ordered as a result of, ordinary criminal proceedings, and not by this antiquated and, I think, now shameful method of some individual thinking this is a way in which he can add to his resources for his private pocket.'[117]

Currently, the *qui tam* system is not valid law in the UK but has remained good law in the US. It has been present there since at least 1692.[118] The *qui tam* system has been a permanent feature of the US legal system. Its importance has been recognised since the First US Congress in 1789, where the first *qui tam* provisions for informers in different areas were established.[119]

[113] Radzinowicz (n 4) 138.
[114] ibid.
[115] ibid 147.
[116] The Common Informers Act 1951.
[117] Common Informers HL Bill (1951) 1049–56.
[118] Claire M Sylvia, *The False Claims Act: Fraud Against the Government* (Thomson Reuters 2016) 39–40.
[119] ibid.

Yet, the FCA is the most frequently cited American statute on whistleblowing under the *qui tam* doctrine.[120] Enacted during the Civil War to prevent the commission of fraud by government contractors, the FCA allows private citizens to sue companies (committing fraud) on behalf of the US Government. Like the old English *qui tam* statutes, under the FCA, the informers are entitled to keep a part of the amount recovered by the government. In contrast to modern whistleblowing statutes, the original FCA contained no provision to protect whistleblowers from retaliation. As recently as 1986, the US Congress amended the FCA to introduce anti-retaliation protection for informers who blow the whistle under the Act.[121] The anticorruption community sees the FCA as one of the most effective tools for fighting government fraud.[122]

Collaborators and informers remain unknown in civil law countries where the state has monopolised law enforcement.[123] For instance, Chilean law does not recognise the idea of citizens pursuing offences on behalf of the state and obtaining a reward in exchange. For centuries, Chile has followed inquisitorial procedures where judges pursue criminal prosecutions *ex officio,* records are kept in secret and there is no legal equivalent to a *qui tam action.*[124] All of these elements deprived the relevant actors in the legal system of the necessary context about the significance of private collaborators for law enforcement.[125]

Damaška has theorised about why there are different approaches to law enforcement in civil and common law countries. He remarks that the concept of *hierarchy* is the foundation of the continental system, whilst *coordination* inspires the English one.[126] In summary, current

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[120] Pitzer (n 111) 418. There are four more *qui tam* provisions at the federal level and uncountable state versions of the False Claims Act.

[121] Modesitt, Schulman and Westman (n 88) 1-5.

[122] Even books have been written to teach the public to become 'rich' by denouncing fraud against the government, see Joel D Hesch, *Whistleblowing: Rewards for Reporting Fraud Against the Government, Step by Step Guidance for Applying for a Whistleblower Reward* (4th edn, Goshen Press 2017).

[123] Merryman and Pérez-Perdomo (n 99).

[124] In this Thesis, the term inquisitorial procedure does not refer to the religious tribunal called 'Santo Oficio de la Inquisición' in Spanish, but to a form of procedure developed in civil and ecclesiastic courts in Europe from the XIII century. As Henry Kelly points out, 'Even though the inquisitorial form of procedure is still used in most non-English European and European based courts of the world, "inquisition" has acquired a bad name because it is often thought of exclusively as the form of trial used in heresy cases.' Henry Ansgar Kelly, *Inquisition and Other Trial Procedures in the Medieval West* (Ashgate 2001) viii et seq.

[125] The inquisitorial criminal prosecution system was repealed in Chile only in 2000. See Law No 19.696, 12 October 2000, Diario Oficial [DO] (Chile).

[126] Damaška (n 88) 38–41.

whistleblowing statutes are an expression of these different visions of law enforcement: 'Private individuals could sue at once in their private capacity and in the public interest (*qui tam* actions), or in the public interest alone (criminal prosecution in the name of the King), even as Continental judicial bureaucracies established a virtual monopoly of action in the public interest.'[127]

The legal effect of this difference has not been sufficiently researched. Without any background in comparative legal history, it is easy to reach a dead end in one's understanding and analysis of whistleblowing. The explanation for this phenomenon is that comparative researchers who lack the historical background of foreign legal institutions, rules, or categories tend to over-project their own legal culture onto the subject matter of study.[128] Ultimately, the evidence suggests that the whistleblowing laws' inability to fit neatly within the Chilean legal regime is deeply rooted in the inquisitorial procedure system. Seen from this perspective, civil law lawyers lack the context to understand whistleblowing. The absence of a term in Spanish for whistleblowing is not a mere issue of vocabulary since it reflects the substantive differences in the conception of law enforcement and the role of the individuals collaborating in it.

## D. Conceptual Considerations in the Design of a Comparatively Appropriate Legal Definition of Whistleblowing

### 1. Whistleblowing and Similar Categories

To effectively analyse how whistleblowing can be adapted to Chile's legal system, it is essential to distinguish whistleblowing from other related concepts. This starts with addressing the fundamental question: what core elements define whistleblowing? Identifying these common elements is critical in order to craft a substantive definition of whistleblowing. If any of these elements are absent in a given legal framework, it can be concluded that the law in question does not constitute an authentic case of whistleblowing, even if the domestic

[127] ibid.
[128] Masferrer, Modéer and Moréteau (n 21) 9.

or donor legislation claims otherwise. This substantive definition will ensure the comparative integrity of whistleblowing across different jurisdictions.

From a comparative law perspective, the concept of *tertium comparationis*[129] must be applied – a shared standard of comparison — to identify the essential components of whistleblowing. This approach allows us to identify the key elements of the concept that are universally recognised across legal systems, providing a common framework for comparison. By establishing a *tertium comparationis*, whether a specific legal system adheres to the core principles of whistleblowing may be assessed and it may also be determined whether the transplant for Chile preserves the institution's fundamental identity.

What constitutes this common basis of comparison? Modern whistleblowing laws universally provide legal protections for individuals who disclose wrongdoing. As discussed above, historically, whistleblowing draws parallels with the protection granted to informers against retaliatory conduct from aggrieved parties. In the context of the old *qui tam* statutes, the primary focus was on incentivising informers through monetary rewards and enabling them to act on behalf of the Crown. In contrast, modern whistleblowing laws prioritise extraordinary legal protections for whistleblowers as their central feature. Although rewards and the ability to act on behalf of the state through *qui tam* actions persist in some jurisdictions, they are now secondary or contingent aspects from a comparative perspective.[130]

At its core, whistleblowing involves exposing wrongdoing that affects the public interest. However, not all disclosures of misconduct or public interest issues qualify as whistleblowing under the law. Scholars have emphasised that some individuals, who claim to be whistleblowers may be nothing of the sort on the basis that they do not meet the relevant criteria.[131] By relying on a *tertium comparationis* to distinguish whistleblowing from related

[129] Michaels (n 44) 346, 362; Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 32.
[130] Contrasted with the FCA of the US, the PIDA (Public Interest Disclosure Act 1998) in the United Kingdom does not allow bounties or private lawsuits on behalf of the state.
[131] The press has treated Edward Snowden and Julian Assange as whistleblowers, but their disclosures were not protected. See, e.g. Stephen Moss, 'Interview: Julian Assange: The Whistleblower' *The Guardian* (13 July 2010) <www.theguardian.com/media/2010/jul/14/julian-assange-whistleblower-wikileaks> accessed 30 September 2025; Glenn Greenwald, Ewen MacAskill and Laura Poitras, 'Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations' *The Guardian* (11 June 2013)

disclosure categories, it can be ensured that the analysis can remain objective and consistent among the analysed jurisdictions. In the following sections, these distinctions are explored in greater detail in order to clarify the criteria for whistleblowing protection and guide the transplantation of whistleblowing legislation into Chile.

### *2.* Leakers and Bellringers

The difference between whistleblowers and outsiders, such as leakers or bellringers, has been the subject of extensive debate. A key question is whether individuals outside an organisation can be considered whistleblowers in the strict sense. Conceptually, whistleblowers are defined as individuals with a legal or moral obligation of loyalty to the organisation they are exposing. In this context, outsiders, such as journalists, leakers or private citizens who report wrongdoing without any legal connection to the organisation, fall outside the formal definition of whistleblowers,[132] even if their actions may serve similar public interest purposes.

For example, figures, such as Julian Assange and his WikiLeaks initiative, illustrate the role of outsiders in exposing wrongdoing. However, these actions lack the organisational loyalty duty that is central to the concept of whistleblowing. Scholars, such as Marcia Miceli, have introduced the term 'bellringers' to describe individuals who disclose perceived organisational wrongdoing despite having no formal ties to the organisation.[133] Harry Markopolos, who exposed Bernard Madoff's multi-billion-dollar Ponzi scheme, is a quintessential bellringer.[134] Though his efforts aligned with the objectives of whistleblowing – alerting the public and collaborating with law enforcement – Markopolos was not legally bound to Madoff's organisation by any employment or agency relationships.

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<www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> accessed 30 September 2025.

[132] Against the notion of leakers as whistleblowers, see Daniele Santoro and Manohar Kumar, *Speaking Truth to Power – A Theory of Whistleblowing* (Springer 2018) 46–48. See also Peter B Jubb, 'Whistleblowing: A Restrictive Definition and Interpretation' (1999) 21 J Bus Ethics 77, 78 and Janet P Near and Marcia P Miceli, 'Organizational Dissidence: The Case of Whistle-blowing' (1985) 4(1) J Bus Ethics 1-16.

[133] MP Miceli, S. Dreyfus and JP Near, 'Outsider "Whistleblowers": Conceptualizing and Distinguishing "Bell-Ringing" Behavior' in AJ Brown, David Lewis, Richard E Moberly and Wim Vandekerckhove (eds), *International Handbook on Whistleblowing Research* (Edward Elgar Publishing 2014) 71.

[134] Ibid 73.

This distinction has significant legal implications. Unlike whistleblowers, bellringers are not subject to employment-based loyalty or agency duties, which means they are often excluded from anti-reprisal protections such as reinstatement, back pay or injunctive relief. Whilst bellringers may be eligible for bounties in jurisdictions that permit them, they lack access to internal corporate or organisational disclosure or reporting mechanisms and cannot disclose information publicly without help of an insider.

On the other hand, leakers, whose disclosures are typically not afforded the same protections as whistleblowers, may resort to leaking information as an alternative to formal whistleblowing. For Fasterling and Lewis, '[L]eaking commonly refers to the situation where an insider gives ('leaks') an organization's confidential or unpublished information to an outsider'.[135] This often happens when an employee fears significant retaliation or believes a cover-up is in play, rendering internal or regulatory reporting impractical or unsafe. Certain legal frameworks aim to discourage leaking by establishing escalating thresholds for disclosure, which require employees to report concerns internally or to regulators before publicising their claims.[136] However, when these formal channels fail, leaking becomes the measure of last resort for exposing wrongdoing and protecting the public interest. [137]

Whilst bellringers, leakers and whistleblowers share the overlapping goals of exposing misconduct, their differing legal obligations and available protections underscore the importance of maintaining a conceptual and legal distinction between these categories.

### *3.* Espionage and whistleblowing

Whistleblowing must be distinguished from espionage, as these two concepts differ fundamentally in motivation and purpose. Espionage involves individuals, often employed by governments or organisations, who clandestinely gather information about the activities of a perceived adversary.[138] Spies may infiltrate the targeted entity and, in doing so, become

[135] Björn Fasterling and David Lewis, 'Leaks, legislation and freedom of speech: How can the law effectively promote public-interest whistleblowing?' (2014) 153 International Labour Review 71.
[136] Santoro and Kumar (n 132) 47.
[137] For a complete analysis on leaks and unprotected disclosures, see Ashley Savage, *Leaks, Whistleblowing and the Public Interest: The Law of Unauthorised Disclosures* (Edward Elgar Publishing 2016).
[138] Stephen I. Vladeck, 'The Espionage Act and National Security Whistleblowing after *Garcetti*' (2008) 57 Am U L Rev 1531.

members of the organisation they are investigating. However, this membership is incidental to the spy's primary mission which is to obtain sensitive information to serve the interests of their state, corporate or organisational employer.[139]

The critical distinction lies in intent and the alignment of interests. As Kumar and Santoro have argued, espionage serves the interests of the hiring party, whether a government or a competing organisation.[140] In contrast, whistleblowing arises from a commitment to the public interest. Whistleblowers are individuals hired to perform legitimate roles within an organisation who later expose misconduct because they believe it harms society. Their motivation is to safeguard the community or the public good, rather than to benefit a third party.[141]

The motivation underlying the action is, therefore, the defining difference. Espionage is driven by the interests of the hiring entity, whilst whistleblowing stems from a moral or civic obligation to expose wrongdoing for the benefit of the public. Understanding this distinction is crucial for delineating the legal and ethical frameworks that govern each.

## E. Towards a Comparative Definition of Whistleblowing

### 1. The Ethical Dilemma and Public Interest Dimension

Whistleblowers struggle with an ethical dilemma.[142] Without this dilemma, whistleblowing can easily be confused with other legal categories, especially in countries where public interest disclosures are not recognised by the law. A whistleblower should weigh the pros and cons of staying loyal to the organisation or speaking out and risking retaliation. Given the public interest in the information, the law aims to make it easier for whistleblowers to speak out by providing a legal shield. Protective shields against retaliation are common in employment law, but whistleblowing cases are different because they involve an ethical dilemma.

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[139] Santoro and Kumar (n 132) 47.
[140] ibid.
[141] See Savage (n 137)
[142] Jubb (n 132) 82.

There is a notable contrast between cases involving public interest and those that pertain solely to workplace complaints. Whilst both civil law and common law jurisdictions protect employees who raise concerns about working conditions, cases with broader public implications may carry additional ethical considerations, namely, the whistleblowing dilemma. But when an employee seeks to address unpaid wages, it is a typical instance of protected activity (i.e. asserting their rights) without the ethical dilemma.

Therefore, retaliation against employees who engage in whistleblowing is not just another form of victimisation or harassment. Comparative law shows that employers can retaliate against employees for different reasons under different circumstances and in different ways. It becomes a whistleblowing issue when there is a conflict between the obligations owed to the employer and to parties outside the employment relationship. As Peter Jubb observes, 'Persons contemplating whistleblowing face a dilemma because their roles entail loyalties to the targeted organisation that conflict, not just with integrity, that is loyalty to self, but also with perceived responsibilities to others, for instance their professional association or the general public.'[143]

This ethical dilemma makes whistleblowing a form of dissent within an organisation. The employee has the information about wrongdoing but lacks the power to resolve the issue. If they could resolve the wrongdoing, the dilemma would disappear, and no real whistleblowing would occur. Speaking out is the only way to alert the community to the wrongdoing inside the organisation.

Whistleblowing should not be confused with other protected activities in employment law. For instance, in Chile, employees who sue their employers in court, file grievances with the Labour Inspectorate (Inspección del Trabajo), or testify and produce evidence against the employer cannot suffer any detriment in respect of their employment terms or conditions, but this is not the same thing as whistleblowing.[144] However, even when they look similar, public interest disclosures are not the same as the right to not suffer retaliation (*derecho a la*

[143] ibid.
[144] Labour Code (Chile), art 485.

*indemnidad*) when participating in job-related complaints. Both have legislation that defines them as protected activities, but only whistleblowing involves an ethical dilemma.

From a legal perspective, the implied duties of fidelity and loyalty owed to the employer make whistleblowing exceptional under the law. In the regular course of the employment relationship, employees have no right to disclose the confidential information of their employer even when third-party interests are involved (usually, the employer fortifies these implied duties through express confidentiality clauses in the employment contract).[145] Consequently, the law must contemplate specific requirements to distinguish public interest disclosures from a breach of contractual confidentiality obligations by the employee. For instance, the UK's PIDA requires the existence of a public interest for the employee to access the extraordinary remedies available to whistleblowers. In other words, disclosures are not protected when made for personal interests.[146]

### 2. The Employment Relationship and the Scope of Protection

Researchers agree about the social value of whistleblowing.[147] However, there is some disagreement about the boundaries of the concept. In the last four decades, scholars have provided various definitions, often listing particular elements of whistleblowing rather than developing theorisations about the concept. For instance, in the 1980s, Elliston and others have defined whistleblowing as: (1) an individual performing an action intended to make information public; (2) the information is made a matter of public record; (3) the information is about non-trivial wrongdoing; and (4) the individual disclosing the information is a current or former member of the organisation.[148] Their definition emphasises the fact that only employees carry out real whistleblowing, asserting that: '[I]f I come across information about wrongdoing in an organisation that I do not work in, and I deliberately make the information public, I would not be considered a whistleblower.'[149]

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[145] Zoe Adams and others, *Deakin and Morris' Labour Law* (Hart 2021) 342.
[146] Jeremy Lewis and others, *Whistleblowing: Law and Practice* (4th edn, OUP 2022) 175 et seq.
[147] Marcia P Miceli, Janet P Near and Charles R Schwenk, 'Who Blows the Whistle and Why?' (1991) 45 Indus & Lab Rel Rev 113, 115.
[148] Frederick Elliston and others, *Whistleblowing Research: Methodological and Moral Issues* (Praeger 1985) 15.
[149] ibid.

The justification for keeping the term 'whistleblowing' within the boundary of employee disclosures relies on the whistleblowing dilemma. Only agents with loyalty duties owed to their organisation need the intervention of the law to speak out without committing a breach of contract. Because those duties are regulated by employment law (and agency law), whistleblowing is an integral and relevant part of employment law in the Anglo-American tradition, where it is framed as a protection against retaliation.

Marcia Miceli and Janet Near's widely cited and accepted definition of whistleblowing also relies on the same ethical dilemma: whistleblowing is (1) the disclosure of illegal, immoral or illegitimate practices; (2) under the control of their employers; (3) by current or former members of the organisation; (4) to persons or organisations that may be able to take action.[150] Their definition reinforces the idea that only current or former members of the organisation can be regarded as whistleblowers.

As the literature shows, the necessity for employees to struggle between two opposing interests has been at the core of whistleblowing. The classic tension involves the loyalty owed to the employer, which conflict with the moral imperative towards the public. This orthodox view is not always adopted in civil law countries. For instance, the Chilean corporate whistleblowing statute[151] introduced bounties for those who 'anonymously' report breaches of securities regulation or anti-trust legislation. However, the statute did not introduce any protection for employees. Instead, the Chilean legal version of corporate whistleblowing relies on bounties and the anonymity of the report. The whistleblower, as an employee in need of specific legal protection, is not considered. This is a crucial difference between the UK's PIDA, part of the Employment Rights Act 1996 (ERA), and the US statute on corporate whistleblowing set out in SOX; both contain specific anti-retaliation provisions for employees.

Whilst employees who blow the whistle in Chile still receive indirect protection under the Labour Code, there is no specific protection as a whistleblower. For instance, the Chilean Labour Code[152] assumes that employees only have standing to complain when their own

[150] Marcia P Miceli and Janet P Near, *Blowing the Whistle* (Lexington Books 1992) 15.
[151] Art. 82, Law No 21.314.
[152] Labour Code (Chile), art 485.

interest are at stake. This absence highlights the strong need for specific protection for whistleblowers in the workplace in Chile.

## F. Three Basic Grounds for a Comparative Study of Whistleblowing: The What, Why and Who of Whistleblowing

In the absence of the whistleblowing dilemma between the public interest and loyalty to the organisation, the Chilean version of whistleblowing struggles to satisfy comparative standards.[153] No provision of the Labour Code protects employees facing the whistleblowing dilemma; only protection for workplace grievances is regulated. To fill this legislative gap, we need a clear definition of whistleblowing that answers three key questions: (a) What is whistleblowing, (b) Why is the whistle blown and (c) Who is blowing it?[154]

### 1. What is whistleblowing?

A comprehensive definition of whistleblowing will provide a common denominator that allows Chilean law to be compared and contrasted with Anglo-American law.[155] Our comparative goal is to go beyond the mere juxtaposition of legislation and focus on identifying the key theoretical markers of this phenomenon. In essence, as noted above, whistleblowing is the action of disclosing information about wrongdoing in the public interest. It is important to consider that information consists only of the revelation of facts. When an employee delivers their opinion or expresses mere discontent about labour conditions, they are not blowing the whistle.

Some philosophy scholars also argue that the disclosure should be voluntary. In 'Whistleblowing: A Restrictive Definition and Interpretation', Jubb defends the claim that a requirement for 'non-obligatory' disclosure must be an essential element.[156] Staff whose duty inside the organisation is to prevent deviation from best practices, such as supervisors, auditors, safety managers, and the like, are not blowing the whistle whilst carrying out their

[153] See Chapter 2.
[154] Elliston and others (n 148) 4–5. See also Wim Vandekerckhove and David Lewis, 'The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines' (2012) 108(2) Journal of Business Ethics 253.
[155] Michaels (n 44) 346, 362. See Siems (n 129) 32.
[156] Jubb (n 132) 83–84.

duties.[157] The US Supreme Court upheld this view in *Garcetti v Ceballos*, where a district attorney's complaints regarding a warrant were found not to constitute protected speech. The Court stated that Ceballos' allegation of wrongdoing 'owe[d] its existence to a public employee's professional responsibilities'.[158] In contrast, Devine and Massarani are dismissive of this view and defend the claim that 'duty speech' should be considered protected under whistleblowing laws. They emphasise that '[i]t is necessary to specify that disclosures during job duties are protected because most retaliation is in response to "duty speech" by those whose institutional role is blowing the whistle as part of organisational checks and balances.'[159] In response to the Supreme Court's ruling in *Garcetti*, the US Congress passed the Whistleblower Protection Enhancement Act of 2012, which extended legal remedies for whistleblowing by public servants '[i]f a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing. . . '.[160] In this way, legal definitions of whistleblowing may differ from those suggested by social science scholars.

### 2. Why is the whistle blown?

The reason why the whistle is blown lies in the public interest in the disclosure. Whistleblowing occurs when the community is in peril due to the illegality or wrongdoing that the organisation has committed. Public interest is the motivation for the disclosure. In that way, in cases where only the employee's personal interests are involved, there is no whistleblowing. For example, an employee is not a whistleblower when they sue their employer in court for unpaid salaries or proceed against their employer with a governmental agency to claim a debt. Challenging the employer in court is a protected activity in both civil and common law jurisdictions, but it lacks the public interest dimension of whistleblowing.[161]

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[157] Jos Leys and Wim Vandekerckhove, 'Whistleblowing duties' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 123.
[158] *Garcetti v Ceballos*, 547 US 410 (2006).
[159] Devine and Massarani (n 1) 257.
[160] 5 USC s 2302(f)(2).
[161] How public and private interests can be intertwined in a whistleblowing case is analysed in detail by David Lewis, 'Is a Public Interest Test for Workplace Whistleblowing in Society's Interest?' (2015) 57(2) International Journal of Law and Management 141.

This public interest dimension is crucial when we consider that in civil law jurisdictions whistleblowing has been presented as a form of free speech (i.e. as a constitutional right). As such, there is a bias in favour of treating all forms of dissent inside the workplace as whistleblowing. Conversely, in the Anglo-American system, whistleblowing relies mainly upon statutes promoting the public policy of combating crime and wrongdoing rather than protecting an employee's fundamental rights. This system tends to be more restrictive because of this public policy component.

Bad faith or ulterior motivations do not exclude protection when the disclosure involves the public interest. The ideal depiction of a whistleblower is an employee fighting against the wrongdoer for altruistic reasons, but what if the employee reveals the information purely motivated by revenge or personal gain? Most social science scholars agree that altruism is not required for whistleblowing.[162] The requirement of good faith has been addressed in the UK's PIDA, where 'a worker may act in bad faith or for ulterior motives and yet be able to show a belief that the disclosure was made in the public interest.'[163]

### 3. Who is blowing it?

Finally, we must assess who is blowing the whistle. As Jubb has pointed out, only individuals with privileged access to the organisation can be whistleblowers.[164] As noted above, the whistleblowing dilemma lies at the core of the definition. For ethics researchers, there is no doubt that only members of the organisation can be whistleblowers. Miceli and Near claim that '[t]here is general agreement among theorists that the whistle-blower must at some time have been a member of the organisation against which the complaint is lodged.'[165] For legal

[162] See Jubb (n 132) 83–84. Arriving to the conclusion that ill motivations show an organisational problem but should not exclude protection, see the survey study of Peter Roberts, 'Motivations for whistleblowing: Personal, private and public interests' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 207.

[163] Lewis and others, *Whistleblowing: Law and Practice* (4th edn) (n 146) 192. See Section 18 ERRA.

[164] Jubb (n 132) 86.

[165] Miceli and Near (n 132) 16. In a more recent study, the same authors have stated: 'By definition, whistleblowers must be current or former workers, in order to separate them from outsiders who report wrongdoing about an organisation of which they are not a member . . .' Marcia P Miceli and Janet P Near, 'When Do Observers of Organisational Wrongdoing Step Up? Recent US Research on the Factors Associated with Whistleblowing' in David B Lewis (ed), *A Global Approach to Public Interest Disclosure* (Edward Elgar 2010) 75.

comparison, we consider only members of the organisation to be people who have received access to the organisation and are bound by reciprocal agency or loyalty duties.

Whilst 'members of the organisation' is a non-legal concept, agency and loyalty duties provide a specific legal category to provide an answer to the 'who blows the whistle' question. According to the US *Restatement of the Law, Agency*, generally, '[t]he elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner'.[166] What each of these relationships have in common is that the agent must behave loyally to the principal, albeit that it is only the employment relationship that has been systematically recognised as a source of whistleblowing in the Anglo-American law.

Accordingly, the controlling element in determining who is a whistleblower should be the degree of confidence and trust placed by the owner of the information in the whistleblower. In developing this element, Yvonne Cripps claims that the justification for focusing on employees 'lays in the fact that employees are in a unique position to acquire information which their employer would not wish them to disclose'.[167] However, this does not mean that only employees are possible whistleblowers. Employers grant access to potentially harmful information to a wider range of individuals. Thus, the whistleblowing dilemma may be present for independent contractors, professional advisers working for clients, employees of public corporations and company directors,[168] who all have in common the fact that they receive access to information to use in the interests of the organisation.

Yet, why do whistleblowing laws regulate employees and not about other recipients of information? The first consideration is whether special rules forbid the disclosure for certain professionals. For example, doctors, lawyers and therapists can access information relevant to the public and have fiduciary duties, but the law governing those relationships outweighs confidentiality over the public interest (i.e. the public interest is better served by

[166] *Restatement of the Law, Agency* (American Law Institute 2006) s 1.01. For a comparative approach to Agency Law, see HLE Verhagen and Laura Macgregor, 'Agency and Representation' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2012) 37–63.
[167] Yvonne Cripps, *The Legal Implications of Disclosure in the Public Interest* (Sweet & Maxwell 1994) 1.
[168] ibid 3.

confidentiality rather than speaking out). Generally, the law does not protect disclosures made by these professionals.

The second consideration is that the absence of any whistleblowing legislation protecting the disclosure does not necessarily mean that there is no regulation. Usually, those cases are litigated under the rules of the common law, equity, or special statutes governing confidential or private information.[169] The legislation seems to focus on protecting employees because they are in a position of economic subordination to, and dependence, on the organisation of the employer.[170] In addition, they are reliant on an employer to sustain a basic level of subsistence and livelihood, whereas the employer is not as reliant on them for labour.[171] Therefore, the risk of retaliatory action by the employer will have a much greater and more serious impact on the potential whistleblower.

Today, there is a tendency to expand whistleblowing protection beyond the employment relationship. For instance, the UK's PIDA protects workers, agency workers and trainees. EU Directive 2019/1937 goes further and expressly includes classes of legal persons in which the existence of economic dependence is less obvious: self-employed contractors, subcontractors, managers, shareholders, volunteers and trainees.[172] The same tendency is found in the US FCA (as amended in 2009), which protects employees, contractors, agents and associated others (family members, close relationships) against retaliation.[173]

In summary, in light of the above discussion, for comparative purposes, it is argued that whistleblowing occurs when these three elements concur:

(1) An insider discloses information about wrongdoing;

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[169] Bowers QC and others, *Whistleblowing: Law and Practice* (3rd edn, OUP 2017) 458.

[170] From a non-legal perspective, William and Vandekerckhove agree that the reason employees who blow the whistle are retaliated is because they lack power. Employment law should correct these imbalances of power. See Laura William and Wim Vandekerckhove, 'Fairly and Justly? Are Employment Tribunals Able to Even Out Whistleblower Power Imbalances' (2023) Journal of Business Ethics 365.

[171] Highlighting whistleblowers as employees or ex-employees, David Lewis discusses the principles underpinning whistleblowing legislation in '*Whistleblowing at Work: On What Principles Should Legislation Be Based?*` (2001) 30(2) Industrial Law Journal 169, and the essential elements for effective whistleblowing procedures in David Lewis, '*Whistleblowing at Work: Ingredients for an Effective Procedure'* (1997) 7(4) Human Resource Management Journal 5.

[172] Directive 2019/1937, art 4.

[173] Banks and Schwartz (n 7) 1–39.

(2) There is a public interest involved in the wrongdoing; and

(3) The individual who performs the action is legally subordinated to, and/or economically dependent on or within, the organisation.

## G. Conclusion

This chapter highlights the strong connection between cultural and historical elements in the transplantation of whistleblowing into the Chilean context. The absence of a dedicated term for whistleblowing in Spanish and the societal tendency in Chile to overlook the importance of reporting wrongdoing is the result of cultural and legal differences that are indelibly tied to the notion of legal families. The divergence in the conceptions of law enforcement in civil and common law play a vital role in the under-development of public interest disclosure regulation in Chile.

To carry out a fruitful comparison between whistleblowing law in Chile and the Anglo-American law, it is crucial to develop a *tertium comparationis* in the form of a common definition. This chapter provides a clear definition of whistleblowing as the act of reporting misconduct or illegal activities within an organisation to protect the public interest. This definition is pivotal, as it sets whistleblowing apart from other forms of complaint or denunciation and emphasises its unique significance within the legal framework.

# Chapter 2: The Legal Status of Whistleblowers' Protection in Chilean Law: A Comparative Analysis

## A. Introduction

As discussed in the introduction and in Chapter 1, Chile has introduced laws to establish reporting channels and protections against retaliation for whistleblowers, thus aligning itself with international best practices. However, as argued in Chapter 1, there are significant differences in the legal frameworks in Chile compared to the US and UK (which are the sources of those best practices). This chapter explores these different legal approaches in more detail to establish their doctrinal origins, and their effect on civil procedure and litigation.

The first section explores how employee anti-retaliation protection in the Anglo-American tradition is rooted in employment discrimination laws, particularly Title VII in the US and the PIDA in the UK. These protections share the same structure as direct discrimination claims, requiring the proof of a protected activity, an adverse employment action and a causal link between the two.

The second section compares Chile's anti-retaliation protection with the standard Anglo-American approach. As explained in the preceding paragraph, in Anglo-American jurisdictions anti-retaliation protections for whistleblowers are closely tied to employment discrimination laws, safeguarding employees against reprisals for reporting wrongdoing. In contrast, Chile's framework is rooted in constitutional legal principles, such as the right of access to justice and the court system. As such, the Chilean whistleblowing regime lacks a similar cohesive structure.

Section three explores the origins of these different approaches and explains how Chilean scholars have been confused as to the content of the sources of employment and constitutional discrimination in the United States. This misinterpretation has prevented the adoption of an appropriate foundation for anti-retaliation protections for whistleblowers In Chile.

Finally, section four analyses the diverse legal techniques that define Chile's approach to whistleblowing and distinguishes the approaches it has taken with respect to the public and private sectors. It also describes how whistleblowers have used general (unspecific) causes of action to engage in litigation against employers who have retaliated against them as a result of disclosing public interest information. The chapter ends pointing out obstacles for the alignment of Chilean law with international best practices.

### B. Whistleblowing and Employment Discrimination: The Anglo-American Tie

There is consensus among comparatists that modern whistleblower laws fall into three categories: (1) laws that establish secure channels for reporting misconduct; (2) laws that regulate protections against retaliation; and (3) laws that provide rewards for whistleblowers.[174] International best practices provide that secure reporting channels and anti-retaliation measures should exist in any jurisdiction that is seeking to implement a whistleblower protection regime.[175] The US is the main proponent of reward systems, but relatively few other countries have followed this trend.[176]

These laws fall under the umbrella of whistleblowing laws but differ significantly in terms of legal techniques and structural frameworks. Understanding these distinctions is critical when considering whether they should be adopted within the Chilean context. For instance, reporting channels may be internal (existing within organisations) or external (involving public law enforcement mechanisms). External channels for whistleblowing are typically part of criminal, civil or administrative legal proceedings, whilst internal channels are usually part of corporate compliance systems. Anti-retaliation protections generally form part of employment law, while, in the Anglo-American legal tradition, these are often structured in a similar manner as direct discrimination claims. Laws that reward whistleblowers are generally part of the administrative processes of enforcement agencies to incentivise the provision of information.

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[174] See Gregor Thüsing and Gerrit Forst (eds), *Whistleblowing: A Comparative Study* (Springer 2016); Lewis, Brown and Moberly (n 27), 1-36.
[175] See Chapter 1.
[176] See Chapter 3.

Chile has developed whistleblower laws in all three areas. For example, Law No 20.205 added anti-retaliation protections for public sector employees, whilst Law No 21.592 of 2023 introduced an official reporting channel for public sector workers managed by the Comptroller General's Office. Additionally, Law No 21.314 introduced rewards for corporate whistleblowers. Over the past two decades, Chilean courts have ruled in favour of whistleblowers based on claims of fundamental rights violations in the workplace.[177] However, despite these legislative innovations, private sector employees still lack specific whistleblower protection.

To assess the reception of anti-retaliation protections under Chilean law, it is helpful to compare the structure of the protections available within the Chilean and Anglo-American legal systems. A typical Anglo-American anti-retaliation statute includes the following key elements: (1) a description of the protected activity; (2) a required detrimental employment action; and (3) a causal link between the activity and the adverse employment decision. In the US and the UK, these claims are framed within employment law and share the structure of direct discrimination claims. In an employment discrimination and retaliation claim, the employee must prove that the employer's reason for the detrimental treatment or decision was their participation in the protected activity (i.e. the reporting of the wrongdoing).

The elements of the cause of action for retaliation give rise to distinct evidentiary challenges. Thus, whilst participation in the protected activity and the adverse employment action will be easily proven at trial through direct evidence, the causal link will usually be subtle or hidden. Consider the following hypothetical: an employee is fired after reporting to an enforcement agency that their employer is involved in bribery. The employee usually will have direct evidence of the disclosure/reporting that they have made (e.g. a form from a government agency or an email sent to the agency). They will also have evidence of the adverse employment action (typically, a dismissal letter). However, direct evidence regarding the causal connection between the dismissal and the report is usually unavailable. The employee

[177] Corte de Apelaciones de Santiago [C Apel] [Courts of Appeals], '*Martínez con Contraloría General de la República*', Rol de la causa: 7841-2019 (Chile) (Physical and psychological integrity). Juzgado de Letras del Trabajo de La Serena [JT] [Labour Courts], '*González con Pesquera Sunrise'*, Rol de la causa: T-47-2014 (Chile) (feedom of speech in the media).

will often have to rely on inferences drawn from indirect evidence to establish the influence of the disclosure on their dismissal.

It is argued here that these challenges that are raised are similar to those that apply in cases of direct discrimination. Consequently, an analysis of the status of employment discrimination law is crucial for having an understanding of the suitability of whistleblowing protection in Chile.

Title VII in the US includes five protected characteristics for employment discrimination, namely race, colour, religious, sex or national origin.[178] Likewise, in the UK, the Equality Act 2010 lists nine protected characteristics: 'age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.'[179] In both the US and the UK, the protected characteristics lie at the core of the protection against discrimination, as well as the anti-retaliation protection (which is referred to as 'victimisation' in section 27 of the UK Equality Act 2010). Legislation distinguishes these protected characteristics ('protected status' in the US) from protected activities, although both are considered part of employment discrimination law. In other words, protections against retaliation for employees are derived from the prohibition of discrimination based on protected characteristics. This distinction between legal actions taken by employees against directly discriminatory conduct based on protected characteristics and legal actions taken by employees against employers' retaliatory conduct based on the employees' protected activities was evident in the case of *Burlington v White*, where the US Supreme Court explained the rationale for both legal categories:

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantee.[180]

[178] 42 USC s 2000e–2(a)(1).
[179] Equality Act 2010, s 4.
[180] *Burlington Northern & Santa Fe Railway Co v White* 548 US 53 (2006), 63.

Employee enforcement of anti-discrimination law is a protected activity in both jurisdictions. Employers are prohibited from retaliating against employees for exercising their rights under these laws. In the US, this prohibition takes the form of protection against retaliation (US),[181] whilst in the UK, it is referred to as 'victimisation'.[182]

Title VII in the US protects employees who engage in two kinds of activities:

> It shall be an unlawful employment practice for an employee to discriminate against any of his employees or applicants of employment. . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title.[183]

There is substantive protection against status-based discrimination and an enforcement provision that protects against retaliation. In *Burlington*, the Supreme Court clarified the difference between them: 'The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.'[184]

The same distinction is present in UK law. As the authoritative barrister and KC, Karon Monaghan has observed:

> Victimisation is a quite different form of treatment as compared to those forms of discrimination described previously. It is not concerned with protecting against adverse treatment connected to the protected characteristics, and nor is it concerned with an individual's status. The prohibition against victimisation protects those who have a relationship with some matter pertaining to the enforcement of the EA [Equality Act] 2010, as claimants or witnesses or those assisting them.[185]

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[181] 42 USC s 2000e–3(a). See Chapter 5.
[182] Equality Act 2010, s 27(1).
[183] 42 USC s 2000e–3(a).
[184] *Burlington Northern v White* (n 180) 63.
[185] Karon Monaghan, *Equality Law* (OUP 2013) 393.

Notwithstanding the different legal language, both jurisdictions share the structure of a direct discrimination claim for anti-retaliation (victimisation) claims. Monaghan describes this basic legal framework, noting that: '[f]or victimisation [retaliation in the US], any detriment must be because of a protected act. . . . Since *because of*, now seen in direct discrimination, is intended to correspond to *ground of*, its meaning will be the same for victimisation as for direct discrimination.'[186]

It is generally overlooked the fact that whistleblower protection is simply an extension of anti-retaliation protection in employment anti-discrimination laws. In essence, in the US and the UK the anti-retaliation protection available for whistleblowers shares the same legal framework with direct discrimination claims. Therefore, jurisdictions adopting international best practices on whistleblowing should embed this in their domestic anti-discrimination laws. However, owing to material differences in the configuration of employment discrimination law, adopting whistleblower protection in Chile requires an appreciable level of careful consideration. To determine the suitability of whistleblower protection, the Chilean employment discrimination system must provide a foundation that aligns with international best practices, which are mainly based on US law.

The following sections illustrate how the Chilean anti-discrimination laws fail to function in the same way as the Anglo-American ones. And most significantly, the principal deviations in the performance of whistleblower protection laws may be attributed to the different approaches taken towards discrimination law in Chile.

### C. Is the Chilean Employment Discrimination Law Regime Capable of Incorporating a Suitable Framework of Whistleblower Protection?

There are two sources of employment discrimination law in Chile. The first source is the Chilean Constitution. Article 19 Nº 16 regulates the 'freedom to work' and provides for a general ban on discrimination:

> 16°. Freedom of work and its protection.

[186] ibid 397.

> Every person has the right to free employment and the free choice of work with fair compensation.
>
> Any discrimination that is not based on personal skills or fitness is prohibited, without prejudice to the fact that the law may require Chilean nationality or age limits in certain cases.[187]

This article was originally intended as a specific mandate to the legislative branch not to create discriminatory laws. However, since the 1990s Chilean scholars have interpreted this article as a general ban on discrimination in the workplace by employers, subject to the exceptions for 'personal skills or fitness'.[188]

The second source of employment discrimination is the Labour Code. The Labour Code contains a list of protected characteristics rather than a general ban. More specifically, in Article 2, paragraph 4, it is provided that:

> Acts of employment discrimination are distinctions, exclusions, or preferences based on reasons of race, colour, sex, gender, maternity, breastfeeding, nursing, age, marital status, union membership, religion, political opinion, nationality, national origin, socioeconomic status, language, beliefs, participation in labour organisations, sexual orientation, gender identity, affiliation, personal appearance, illness or disability, social origin, or any other reason, aimed at nullifying or altering equality of opportunities or treatment in employment and occupation.[189]

As such, Chilean employment discrimination law has adopted the same approach as the US and the UK by listing a series of protected characteristics. Under the Chilean Labour Code, the three elements of a direct discrimination claim are (a) one of the protected statuses, (b) a detrimental employment decision and (c) a causal link between the two.

It is striking that the Constitution and the Labour Code provide for two ostensibly incompatible discrimination systems. The Constitution sets out a general ban on

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[187] Constitution of Chile, art 19 no 16.
[188] Luis Lizama and José Luis Ugarte, *Interpretación y derechos fundamentales en la empresa* (Conosur 1998) 239.
[189] Labour Code (Chile), art 2 para 4.

discrimination in the workplace, with two qualified exceptions. In contrast, the Labour Code contains a list of protected characteristics; any employment decisions motivated by them are considered unlawful. Chilean scholars, such as Luis Lizama and José Luis Ugarte, have argued that the Constitutional model prevails over the Labour Code:

> In our opinion, there is no such contradiction, as there is no doubt that the rule establishing the anti-discriminatory model in the labour law in Chile is, naturally, due to its hierarchical nature, Article 19, number 16, of the Constitution. Article 2nd of the Labour Code should simply be understood as a specification [or gloss] made by the legislature on the constitutional principle.[190]

They claim that the Chilean employment discrimination regime is 'open-ended', which means that it does not matter whether the employer's detrimental decision is attributable to a specific protected characteristic listed in the Labour Code.[191] Instead, any personal characteristic or criterion not covered by, or related to, the constitutional criteria of 'personal skills or fitness' will always constitute unlawful discrimination. As Lizama and Ugarte observe, '[I]n the field of employment, there is no doubt that any distinction in treatment based on a criterion that does not correspond to 'personal skills or fitness' must be considered discriminatory, even if it is not one of those mentioned in Article 2 of the Labor Code.'[192]

Some scholars have contested the argument that an 'open-ended' discrimination regime exists in Chile. For example, Sergio Gamonal has argued that although an open-ended system may seem attractive to employees, the idea that any employer decision that is not based on 'personal skills or fitness' amounts to illegal discrimination seems illogical:

> This interpretation [that Chile has adopted an open-ended system of discrimination law] is very appealing to us but is not acceptable due to its broad scope. . . This would make the employment contract practically unworkable. For example, if an employer must promote a worker and the two candidates have the same abilities, the choice

[190] Lizama and Ugarte (n 188) 239.
[191] For a discussion of such 'open-ended' discrimination law regimes, see Sandra Fredman, *Discrimination Law* (3rd edn, OUP 2022) 171–73 and 183–95; Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81 Mod L Rev 598; Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017) 47–49; and Bob Hepple, *Equality: The New Legal Framework* (2nd edn, Hart Publishing 2014) 35–36.
[192] Lizama and Ugarte (n 188) 239–40.

> would be considered discriminatory. Alternatively, if a worker needs to be dismissed due to the company's needs and is chosen from among four workers with the same abilities, that too would be considered discriminatory. What happens if the employer wants to hire his son, who has the necessary ability, but another candidate is more suitable?[193]

Whilst Gamonal argues that the discrimination law regime is predicated on a fixed list or catalogue of limited protected characteristics, Chilean case law has not followed this interpretation. For example, the Chilean Supreme Court has recognised that the open-ended system of the Constitution prevails over the protected characteristics listed in the Labour Code. In *Sindicato Dos con Sociedad Aramak*,[194] an employee was dismissed because she could not operate an industrial vacuum throughout the building whilst using a wheel rollator. At the time, the Labour Code did not include 'disability' as a protected characteristic, so the Supreme Court had to determine whether the open-ended system of the Constitution should prevail over the specific list of protected characteristics contained in the Labour Code. The Court reasoned that:

> [I]f the interpretation applied by the lower courts were upheld, this Court would be authorising a distinction whose justification and reasonableness are entirely questionable, by granting protection through this procedure to those who suffer discrimination based on '. . . race, colour, sex, age, marital status, union membership, religion, political opinion, nationality, national ancestry, or social origin . . . ' and denying it to those who are victims of discrimination for other reasons, apart from 'personal ability or suitability,' even if those reasons may be as or more illegitimate than the ones mentioned. It is entirely evident that the list contained in Article 2 of the Labour Code cannot, in any case, be considered exhaustive, not only because it is more limited than the protection provided by the constitutional rule.[195]

Following this precedent, the Court of Appeal of Santiago has recently ruled that employees do not need a protected characteristic to prevail in a discrimination claim. In *Sindicato Ripley*

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[193] Sergio Gamonal, *Fundamentos de Derecho Laboral* (Legal Publishing 2008) 47.
[194] Corte Suprema [CSJ] [Supreme Court], 5 August 2014, '*Sindicato Dos Central de Restaurantes Aramark con Sociedad Aramark Servicios Mineros y Remotos Ltda'*, Rol de la causa: 2308-2014 (Chile).
[195] ibid.

*con Ripley*,[196] a union representing workers at a retail company raised legal proceedings against the company for discrimination in the allocation of benefits. In 2020, during the Covid pandemic, the employer proposed a contract suspension plan for employees. In March 2020, the employer provided additional compensation to those who agreed to suspend their contracts. The union contended that this offer constituted coercion and amounted to discrimination. The Court of Appeal found that differentiating between employees based on their acceptance or refusal of the suspension agreement constituted employment discrimination. In its decision, the Court of Appeal did not consider whether the plaintiffs belonged to a protected characteristic group 'because of' their differential treatment; the mere unreasonableness of the employer's actions was sufficient for ruling in favour of the employees. The Supreme Court upheld the ruling, rejecting the employer's appeal.

As such rooted in its constitutional framework, the Chilean employment discrimination system controls the reasonableness of employer actions rather than simply prohibiting decision-making based on a defined set of discriminatory statuses. This system is intended to intervene more directly in business management practices rather than solely safeguard employees against the misuse of protected characteristics.

## D. Incompatibility of the Chilean Model of Employment Discrimination with Anglo-American Practices

### 1. The problem of an 'open-ended' system

Whether the certain characteristics or status should be considered part of employment discrimination law is ultimately a policy decision. Sandra Fredman[197] describes three possible models regarding discrimination grounds/protected characteristics: an exhaustive list, an open-ended regime and a mixed system. The following sections summarise each of these models.

[196] Corte de Apelaciones de Santiago [C Apel] [Courts of Appeals], '*Sindicato Ripley con Ripley'*, Rol de la causa 1357-2022, appeal rejected, Corte Suprema [CSJ] [Supreme Court], Rol de la causa 1923-2023 (Chile).
[197] Fredman (n 191) 171 et seq.

### a) The Exhaustive List Model

In the exhaustive list model, '[by] specifying grounds, this method utilises an exhaustive set of grounds which cannot be extended by the judiciary'.[198] These grounds are listed in statutory law and subject to change through constitutional or legislative amendments. In the second edition of her book (influential among Chilean authors), Fredman includes EU and UK equality laws in this category.[199] In the third edition, she includes Title VII. This reference is significant because in the US employment discrimination law is separate from constitutional law based on 'grounds of discrimination'.

### b) Open-ended Grounds of Discrimination

A second common model is an open-ended one, where it is left to the judiciary to decide on the specific protected statuses.[200] Typically, this legal framework stems from an open-ended constitutional equality provision rather than legislation that provides an exhaustive list of protected characteristics. Fredman cites the Fourteenth Amendment of the US Constitution as an example of this approach. In its Equal Protection Clause, the amendment plainly states that: '[n]o State shall make or enforce any law . . . [that] den[ies] to any person within its jurisdiction the equal protection of the laws.'[201] For comparative purposes, it is crucial to note that the US Constitution does not limit the actions of private individuals; any restrictions on private conduct must be specifically prescribed by legislation or the common law.[202] Therefore, the Equal Protection Clause is part of US constitutional law and applies to government actions rather than private employment relationships.[203]

In light of the Equal Protection Clause, the US Supreme Court has developed different intensities/levels of judicial review to address governmental classifications of its citizens. To carry out its functions, the government must classify citizens for various purposes, e.g. to

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[198] ibid 172.
[199] ibid 113–18.
[200] ibid 183.
[201] US Const amend XIV.
[202] Gregory E Maggs and Peter J Smith, *Constitutional Law: A Contemporary Approach* (West 2015) 1360.
[203] To fill the gap, the US Congress enacted section 1981 of the Civil Rights Act of 1966 that bans among private individuals racial discrimination 'to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other'. Nevertheless, this Act is not considered part of employment discrimination law.

determine who is entitled to receive public benefits. The same process applies in relation to deciding who can access government jobs, who should pay taxes, or who should be exempt. To tackle the challenges posed by an open-ended equality clause, the American judiciary has developed three levels of scrutiny to review government classifications. These standards serve to weigh the justifications for discrimination against the purported public benefits associated with the classification in question.

Strict scrutiny, which is the highest level of scrutiny, applies to laws, regulations and policies that discriminate on the basis of race or national origin. In *Johnson v California*,[204] the US Supreme Court considered whether California's policy of racial segregation in prisons complied with the Equal Protection Clause. To survive this level of scrutiny, the challenged law had to 'serve a compelling governmental interest and… be narrowly tailored to further that interest'.[205] In this case, the Court found that the government's concern over racial violence was insufficient to meet this standard.

Intermediate scrutiny, which is the second level in terms of its intensity, applies to government policies that classify people based on gender. Since gender has less of a negative association than race,[206] the balancing test is less stringent. In the case of *United States v Virginia*, the Supreme Court considered whether the all-male Virginia Military Institute (VMI) could exclude women and still comply with the Equal Protection Clause. The Court ruled that Virginia's creation of a women's-only academy (Virginia Women's Leadership Institute) did not offer the same opportunities, prestige or connections as VMI. As such, VMI's gender-biased admissions policy failed to satisfy the requirement that 'the classification serves important governmental objectives and that the discriminatory means employed are substantially related to achieving those objectives'.[207]

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[204] *Johnson v California*, 545 US 162 (2005).

[205] *Adarand Constructors, Inc v Peña*, 515 US 200 (1995).

[206] Maggs and Smith (n 202). Chemerinsky summarises the arguments for considering gender less protected than race: 'Those who argue for intermediate scrutiny rather than strict scrutiny for gender classifications make several arguments: In part, the argument is historical: The Fourteenth Amendment meant only to outlaw race discrimination. Also, it is argued that biological differences between men and women make it more likely that gender classifications will be justified and thus less than strict scrutiny is appropriate to increase the chances that desirable laws will be upheld. . . [I]t is claimed that women are a political majority who are not isolated from men and thus cannot be considered a discrete and insular minority.' See Erwin Chemerinsky, *Constitutional Law* (Wolters Kluwer 2011) 776.

[207] *United States v Virginia*, 518 US 515 (1996) 531.

Finally, the rational basis is the third level of scrutiny and applies when government classifications are based on factors such as age. This is the most deferential standard; a law will be upheld if it is 'rationally related' to a 'legitimate' government interest. In the case of *Massachusetts Board of Retirement v Murgia*,[208] the US Supreme Court upheld a law requiring police officers to retire at age 50. Here, the Court reasoned that the law was rationally related to the state's legitimate interest in protecting public safety by ensuring the physical fitness of its officers.

c) Mixed System

Fredman recognises the existence of a middle system between the exhaustive list and open-ended regimes. This middle system operates through a list of protected characteristics and an open clause with the style 'grounds such as', 'including' or 'other status'.[209] The EU Charter of Fundamental Rights[210] and the European Convention of Human Rights (ECHR)[211] are two examples of this regime.

As discussed above, the US has two separate systems of discrimination law. One system has a statutory source (Title VII of the Civil Rights Act), which provides an exhaustive list of protected characteristics and applies to public and private employment relationships. Title VII and case law from higher courts are the foundation of US employment discrimination law. The other system is constitutional, based on the 14th Amendment's Equal Protection Clause, which is open-ended and has been interpreted through three standards of judicial review (i.e. strict scrutiny, intermediate scrutiny and rational basis, as discussed earlier). This constitutional regime applies mainly to government actions and is rarely used in private employment disputes.

From a comparative perspective, whistleblower protection in the US has evolved as an extension of the statutory employment discrimination regime rather than the constitutional rights framework. The protected activity of disclosing or reporting wrongdoing falls under the same framework as direct discrimination cases under Title VII, such as claims involving

[208] *Massachusetts Bd of Retirement v Murgia*, 427 US 307 (1976).
[209] Fredman (n 191) 172.
[210] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 21.
[211] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 14.

participation in legal proceedings or opposing discriminatory practices (known as the 'participation clause' and 'opposition clause').

### 2. The Place of Balancing Tests

Balancing tests are the typical form of adjudication in equal protection cases. According to Erwin Chemerinsky: '[t]he level of scrutiny provides instructions for balancing. It informs courts as to how to arrange the weights on the constitutional scale in evaluating particular laws'.[212] A balancing test is a legal doctrine that the US courts use to weigh competing interests in a case and determine whether the law is constitutional.[213] As noted above, in constitutional law, the courts apply different levels of scrutiny – strict scrutiny, intermediate scrutiny and rational basis —as balancing tests to assess whether a law or government action is justified given the rights at stake.[214]

In contrast with constitutional equal protection cases, there is no balancing test when a protected characteristic or activity is regulated by employment law. In these cases, the employee must prove a causal connection between the protected characteristic or activity and the adverse employment action. Exceptionally, there are two statutory scenarios where a balancing test may be used in employment discrimination cases: *bona fide* occupational qualifications (BFOQ) and cases of disparate impact discrimination (i.e. indirect discrimination).

#### a) Bona Fide Occupational Qualifications (BFOQ)

The BFOQ concept applies when an employer admits having used a protected characteristic as a part of a hiring decision. Section 703(e) of Title VII provides:

> Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances where religion, sex, or

[212] Chemerinsky (n 206) 551.
[213] 'Balancing Test' in Bryan Garner (ed), *Black's Law Dictionary* (11th edn, West 2019).
[214] Chemerinsky (n 206) 551–55.

> national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.[215]

Courts have developed balancing tests to determine what constitutes a reasonable use of religion, sex or national origin in employment practices. One such test – the 'essence of the business' standard – was articulated in the case of *Dothard v Rawlison*.[216] This test requires the employer to demonstrate that a particular characteristic is essential to job performance and integral to the business's core mission.[217]

In practice, cases where employers successfully invoke the BFOQ defence are rare. More commonly, by showing a legitimate non-discriminatory reason for the adverse employment action, employers will often rebut a *prima facie* case presented by employees that there has been a discriminatory treatment by the employer based on a protected characteristic. This non-discriminatory rationale typically eliminates any claims of motivation based on a protected characteristic. In contrast, in constitutional cases the defendant (usually the government) will argue that the challenged statute, law or policy fairly employs the characteristic in question according to established balancing tests. The critical distinction between employment discrimination cases and constitutional cases lies in the existence of an exhaustive list of protected characteristics in the former, as opposed to the open-ended nature of the latter.

Judicial standards are essential in constitutional cases because there is no preordained or predetermined list of protected characteristics. These cases resemble conflicts of rights, which must be resolved through a balancing test: on the one hand, there is the government's interest in implementing a particular policy, and, on the other, there is the question of the extent to which the policy intrudes on equal treatment irrespective of immutable

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[215] 42 USC s 2000e–2(e).

[216] *Dothard v Rawlinson*, 433 US 321 (1977).

[217] In the United Kingdom, the functional equivalent of the BFOQ is 'Genuine Occupational Qualification' (GOQ) or 'Occupational Requirement' (OR), regulated in the Equality Act 2010, Sc 9, para 1: 'A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—
(a)it is an occupational requirement,
(b)the application of the requirement is a proportionate means of achieving a legitimate aim, and
(c)the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)'. See also, Adams and others (n 145) 614 et seq.

characteristics. Whilst this balancing approach is exceptional in employment discrimination cases, where there is an exhaustive list of protected traits, it is the norm in constitutional cases governed by open-ended constitutional provisions.

b) Cases of Disparate Impact Discrimination (Indirect Discrimination)

A case of disparate impact arises when a neutral employment practice or policy is applied and produces a discriminatory outcome for a particular group, even in the absence of any discriminatory intent on the employer's part. In direct discrimination cases, the employer's adverse employment decision is motivated by a protected characteristic. However, in disparate impact cases, the key issue is the employer's inability to reasonably justify the disproportionately negative effect on a protected group. In these cases, the judiciary's role is to determine what constitutes a reasonable justification for such neutral employment practices.

*Griggs v Duke Power*[218] serves as a classic example as to how the US Supreme Court has addressed indirect discrimination. In *Griggs*, as conditions for acceptance into employment, the employer required a high school diploma or that an applicant must have passed a standardised intelligence test. Importantly, neither of these criteria was related to successful job performance. In practice, despite being facially neutral, these standards disproportionately prejudiced black applicants compared to white ones. Although the Court noted that the company had implemented these requirements without any intent to discriminate, it ruled that 'good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability'.[219] The Court applied a balancing test of 'business necessity' to determine whether the employer's goals could have been achieved through less discriminatory means.

However, this approach to discrimination does not apply within the constitutional framework of equal protection. In *Washington v Davis*,[220] the Court ruled that employees must prove

[218] *Griggs v Duke Power Co*, 401 US 424 (1971).
[219] ibid.
[220] *Washington v Davis*, 426 US 229 (1976).

discriminatory intent to prevail in an Equal Protection Clause claim.[221] It reasoned that Title VII addresses a broader range of subtle forms of discrimination and applies specifically to employment, whilst the Equal Protection Clause governs a broader array of governmental activities. If the disparate impact were sufficient to render a governmental decision unconstitutional, the risk of over-litigation against the government would be significant, as mere statistical disparities in the impact of policies could provoke litigation. To avoid paralysing government action, the Court rejected the idea that disparate impact alone violates the Equal Protection Clause.

Furthermore, there are significant differences in litigating these two anti-discrimination systems. Title VII cases require employees to prove discriminatory intent, which means that they must show that the adverse employment decision was motivated by a protected characteristic or activity. Since direct evidence of discriminatory intent is rare, employees often rely on indirect evidence to establish a *prima facie* case and from which an inference of discrimination can be derived. In contrast, in constitutional discrimination cases the use of a characteristic or status is often explicit. The government's defence focuses on whether the use of the characteristic complies with the applicable standard of review (strict scrutiny, intermediate scrutiny or rational basis). As a result, unlike Title VII discrimination law cases, there is usually direct evidence of discriminatory intent in these cases.

## E. How Chilean Law Deviates from the Anglo-American Tradition

### 1. Common Misconceptions in Relation to Discrimination Cases and their Roots

Unfortunately, the constitutional review tests developed by the US Supreme Court have significantly influenced the development of Chilean employment discrimination law. In his book *El Derecho a la No Discriminación en el Trabajo* ('The Right to Non-Discrimination in the Workplace'), Chilean labour law professor Ugarte does not draw from Title VII to interpret workplace discrimination law in Chile. Instead, he references and analyses the US

[221] ibid 238. 'The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe,* 347 U. S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact'.

constitutional system. In addressing the conflict between the Chilean Labor Code's catalogue of protected characteristics and the open-ended equality provision of the Chilean Constitution, Ugarte opts to follow the US constitutional approach rather than the employment-specific framework of Title VII:

> [Under the American system], all discrimination criteria are considered defeasible and, therefore, subject to a balancing test. The difference [among the criteria of discrimination], then, lies in the burden of argumentation to which one or the other is subjected. The classified criteria require a higher level of justification to be overridden—what the U.S. Supreme Court calls a 'compelling interest'—compared to the unclassified criteria, which only require a 'legitimate interest'.[222]

Notably, Ugarte does not even make a reference to Title VII in his book on employment discrimination law, relying exclusively on the US Constitution, which limits government conduct, but does not apply to private employers.

This conflation of the US constitutional and employment discrimination systems is also prevalent among other Chilean scholars. For example, in her 2023 article on employment discrimination law, Victoria Plasencia asserts that the US anti-discrimination system is open-ended. Citing the Fourteenth Amendment, she argues that the US system does not contain an exhaustive list of protected characteristics:

> [Open-ended systems of] antidiscrimination law [have been] developed from a general equality clause, and the categories are constructed on a case-by-case basis through judicial precedent. The paradigmatic example is the United States, where under the constitutional guarantee of equality (14th Amendment), it is left to the Supreme Court to define which groups are protected.[223]

Like Ugarte, Plasencia mistakenly assumes that it is solely the Equal Protection Clause that governs employment discrimination in the US. This confusion appears to stem from the second edition of Fredman's book. Plasencia cites Fredman's earlier work, where she stated

[222] José Luis Ugarte, *El Derecho a la No Discriminación en el Trabajo* (Thomson 2013) 63.
[223] Victoria Martínez Placencia, 'Funciones de las Categorías de Discriminación en el Derecho del Trabajo Chileno' (2023) 50(2) Revista Chilena de Derecho 1, 12.

that the US legal system adopts an open-ended discrimination law regime.[224] However, in the third edition, Fredman clarified that: '[s]ome jurisdictions have a combination of models. Whereas the Fourteenth Amendment of the U.S. Constitution is open-ended, Title VII of the Civil Rights Act of 1964, which is at the centre of much seminal litigation, utilizes a closed list of grounds.'[225]

This distinction is not trivial; it is fundamental to understanding how the merger of both systems has created confusion in the understanding of discrimination law in Chile. As we have seen, employment discrimination laws do not normally require the application of a judicial balancing test to function; instead, a clear list of protected characteristics governs them. Constitutional equality provisions, however, necessitate judicial standards or proportionality tests because they lack such a fixed list/catalogue.[226] Thus, the protection offered by the exhaustive list in Title VII is stronger than the one provided by a general equality provision in the Constitution.

### 2. Consequences for the Concept of Indirect Discrimination in Chilean Law

Indirect discrimination is another area of confusion in Chilean law. It occurs when an employer's neutral policy disproportionately and adversely impacts a protected group. However, in Chile, since the list of protected groups in the Labour Code is subject to the superior authority of the Constitution, and all cases are resolved through a balancing test, the concept of indirect discrimination has not been properly developed. Instead, the legal community associates 'indirect discrimination' with pretextual defences to cover the discriminatory intent behind the employer's action, overlooking the requirement of a neutral policy that unintentionally impacts a protected group.

The failure to distinguish between direct and indirect discrimination is patent in cases, such as *Barckhann con Colegio Alemán*,[227] where an employee alleged age discrimination. The

[224] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 118.
[225] Fredman (n 191) 172.
[226] The US Supreme Court does not use the language of proportionality in its constitutional tests, eventhough proportionality is present in its rationale. See, Eileen Sullivan and Richard Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (OUP 2009) 53.
[227] Juzgado de Letras del Trabajo de Valparaíso [JT] [Labour Courts], '*Barckhann con Colegio Alemán de Valparaíso*' Rol de la causa: T-2-2009 (Chile).

plaintiff employee was fired after 30 years of services because of redundancy, but she claimed that the real motivation was her oldness. The employment tribunal found in the employee's favour but incorrectly labelled the dismissal as 'indirect discrimination' when it was direct discrimination based on age. Indeed, the tribunal found that the dismissal was motivated by her age. Similarly, in *Maldonado con Fundación Integra*,[228] the employee claimed political discrimination after being dismissed from a managerial position in a governmental institution. In *Maldonado*, the employee was dismissed when a new government was installed after successful elections, and she was replaced with a person closely tied to one of the ruling political parties. The tribunal miscategorised the employer's justification for new leadership as a 'neutral' decision, despite finding that it was politically motivated.

Confusion is also present among legal scholars. In her 2024 book, *La Prueba Indiciaria en el Procedimiento de Tutela Laboral Chileno,*[229] Lucía Debesa Arregui identifies the case of *Solar con Sonda*[230] as one of indirect discrimination. In *Solar,* the employment tribunal found for the plaintiff employee who was harassed and had her job relocated shortly after she returned to work from maternity leave. On its face, this was clearly a typical case of direct discrimination on the grounds of maternity with a pretextual defence on the employer's part to the effect that there was no discrimination, but a legitimate exercise of its right to alter the place of the provision of the services, which is recognised by article 12 of the Labour Code.[231] Nonetheless, Debesa seems to incorrectly assert that this was a case of indirect discrimination because the employer had a 'hidden' pretextual motivation.[232]

The source of this confusion is clear: the theory of indirect discrimination is inextricably linked to the existence of a protected characteristic. Indirect discrimination occurs when there is no intent to discriminate, but a neutral policy disproportionately affects a protected group.[233] When protected characteristics are irrelevant, it is impossible to determine whether

[228] Juzgado de Letras del Trabajo de Concepción [JT] {Labour Courts], '*Maldonado con Fundacion Integra'* Rol de la causa: 303-2018 (Chile).
[229] Lucía María Debesa Arregui, *La Prueba Indiciaria en el Procedimiento de Tutela Laboral Chileno* (Tirant 2024), 44.
[230] Juzgado de Letras del Trabajo de Concepción [JT] [Labour Courts], *'Solar con Sonda'* Rol de la causa: RIT T-135-2018 (Chile).
[231] Labour Code (Chile), art 12.
[232] Arregui (n 229) 44.
[233] Timothy Glynn, Charles Sullivan and Rachel Arnow-Risman, *Employment Law: Private Ordering and Its Limitations* (Wolters Kluwer 2015) 654-655.

disproportionate impact constitutes discrimination or is merely a statistical anomaly unrelated to the workplace. This is why the US Supreme Court accepted the disparate impact theory in the Title VII case *Griggs* but rejected its applicability in equal protection cases.[234] In other words, when a jurisdiction does not apply the exhaustive list model, indirect discrimination simply does not work as a legal concept.

Chilean legal scholars have praised the broad scope of the open-ended list of protected groups. They argue that this legal framework better protects employee rights by limiting the employer's prerogative to make distinctions.[235] However, the broader scope of this non-exhaustive list, which is designed to encompass more individuals or groups, comes at the cost of confusion between the commonly accepted concepts of direct and indirect discrimination in employment discrimination claims. Furthermore, this results in situations where trivial distinctions are treated like actual discrimination. For example, discriminating on the grounds of race or religion may be treated the same as discriminating based on mere preferences or familiarity.

### 3. Chilean Deviation from the Standard Model of Anti-retaliation Protection

Similar to the Anglo-American tradition, Chilean law recognises that employees who are retaliated against for exercising their rights against their employers are entitled to legal protection. Article 485 of the Chilean Labour Code prescribes and regulates the right to immunity ('garantía de indemnidad') that shields employees from retaliation:

> [The following are infringements of fundamental rights in the workplace and shall be deemed as retaliatory measures, namely], any conduct or action taken against workers for pursuing legal actions, for participating as witnesses or being offered as such, or as a consequence of the supervisory activities conducted by the Labour Inspection.[236]

[234] *Washington v Davis*, 426 US 229 (1976).
[235] Lizama and Ugarte (n 188) 239.
[236] Labour Code (Chile), art 485.

In the Anglo-American tradition, anti-retaliation protections that are found within employment discrimination laws have been used as the foundation for the protection of whistleblowers. However, in the Chilean legal system, this protection against retaliation for exercising one's rights is completely separate from the anti-discrimination system. The two are mutually exclusive and independent of each other.

To illustrate this point, there is an ongoing discussion amongst legal scholars in Chile about the root or basis of its anti-retaliation protections. Most scholars agree that the Chilean model of protection was a legal transplant from Spain rather than the US.[237] Unlike the US, the right to immunity in Spain is not linked to employment laws or their enforcement, as described in *Burlington*.[238] Instead, it is rooted in the constitutional right to 'effective judicial protection', which consists of the right of individuals to access justice and the court system to resolve their conflicts. For Spanish scholars, such as Gerardo Ruiz-Rico and María José Carazo,[239] this constitutional right carries a specific meaning within the employment context. They observe that '[t]he right of access to justice includes the guarantee that no person shall be prosecuted or harmed for turning to the courts in defence of their rights.'[240] Notably, the right to immunity (the right of access to the court system) has been litigated in Spanish constitutional case law as part of the due process guarantee.

Although Chile's constitution frames due process differently, legal scholars in Chile have adopted the Spanish rationale for anti-retaliation protection.[241] As a result, the anti-retaliation protection in the Chilean Labour Code involves employer interference with an employee's right to access the court system or the administrative labour inspection process. Ugarte states that to prevail in a right to immunity claim, the retaliation must occur in the context of the 'intervention of a public institution', which may be an 'administrative intervention' (e.g. a labour inspection) or 'judicial proceedings' (e.g. raising legal proceedings or acting as a witness in court).[242] Because of this constitutional rationale, the Chilean right to

[237] Gonzalo Martínez Merino, 'La Garantía de Indemnidad en Chile: Análisis Normativo y Comparativo desde el Derecho Comparado y el Common Law' (2012) 19(2) Revista de Derecho UCN 333.
[238] *Burlington Northern v White* (n 180) 63.
[239] Gerardo Ruiz-Rico and María José Carazo, *El derecho a la tutela judicial efectiva* (Tirant 2013).
[240] ibid 53–54.
[241] Martínez Merino (n 237).
[242] Ugarte (n 222) 10(b).

immunity is narrower than the anti-retaliation protection found in the American system. In the US, the participation clause protects employees who are involved in legal proceedings under Title VII. Like the Chilean indemnity right, the participation clause requires the employee to be involved in judicial or administrative proceedings to enforce anti-discrimination law. However, the opposition clause in US law also protects employees who resist or protest against discrimination or harassment in the workplace. As there is no involvement of public authorities, no equivalent to the opposition clause exists in the Chilean anti-retaliation system.[243]

Another consequence of the differing rationales for anti-retaliation protection affects the availability of employee protection for reporting through internal channels. To avoid liability, employers must take steps to prevent and correct discrimination and harassment in the workplace. They may establish internal channels (e.g. hotlines) to enable employees to report discrimination and investigate misconduct, all without the intervention of the judiciary or administrative authorities. In Chile, the possibility of retaliation claims for using internal reporting channels is excluded because the anti-retaliation protection is directly linked to access to the court system. This situation can be contrasted with the US, where the Supreme Court has extended anti-retaliation protection to employees who make internal reports or participate in internal investigations.[244] This difference arises from the American legal system's focus on compliance with the law, whereas the emphasis in the Chilean system is limited to the right of employees to access the court system.

Beyond employment anti-discrimination law, in the US two additional sources of anti-retaliation protection exist to safeguard dissenting activities in the workplace. The first is the Fair Labor Standards Act of 1938, which regulates minimum wages, overtime pay and child labour. It is a violation of this statute to:

> [D]ischarge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any

[243] In Chapter 4, we present *ius resistendi*, which is an exception to the duty of obedience to the employer. This could be a weak equivalent to the opposition clause in the Chilean legal system.
[244] *Crawford v Metropolitan Government of Nashville and Davidson County*, 555 US 271 (2009).

> proceedings under or related to this Act, or has testified or is about to testify in any such proceedings, or has served or is about to serve on an industry committee.[245]

US case law interpreting and applying this provision has reaffirmed the point that the goal of anti-retaliation protections is to enforce the substantive rules of the statute. For example, in *Mitchell v Robert DeMario*,[246] the US Supreme Court emphasised that anti-retaliation protection encourages employees to report violations without fear of retaliation. As a result, internal complaints and oral complaints are protected activities, even though there is no public authority involvement and/or no legal proceedings have been raised.

The second source of anti-retaliation protection in the US is state common law. For example, the *Restatement of the Law, Employment Law* recognises a public policy exception for employees who engage in certain socially valuable activities. Specifically, it is provided that '[a]n employer that discharges an employee because the employee engages in activity protected by a well-established public policy . . . is subject to liability in tort for wrongful discharge in violation of public policy.'[247]

Under the section titled 'Wrongful Discharge in Violation of Public Policy: Protected Activities', Section 5.2 of the Restatement lists six causes for wrongful discharge. Thus, it is wrongful to dismiss an employee who (1) refuses to violate the law, (2) performs a public duty, (3) files a charge or claims a benefit, (4) refuses to waive a nonwaivable right, (5) discloses, reports or enquires about conduct that the employee reasonably believes violates the law (whistleblowing), or (6) engages in other activity directly furthering a well-established public policy. These are all protected activities related to legal compliance rather than simply access to courts.

In contrast to the US, anti-retaliation protection in Chile is linked to the right to access the courts. Therefore, protections in the workplace are much narrower in scope. In the US, anti-retaliation protection is tied to the enforcement of substantive laws, and the content of the dissent is crucial in triggering protection. The dissent must be related to the statute's

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[245] 29 USC s 215(a)(3).
[246] *Mitchell v Robert DeMario Jewelry, Inc*, 361 US 288 (1960).
[247] *Restatement of the Law, Employment Law* (American Law Institute 2015) s 5.01.

substance or the meaning of 'public policy'. Through anti-retaliation protection, employees enforce the law through opposition or reporting violations. In the Chilean system, however, anti-retaliation protection concerns the employee's right to seek recourse through the court system or labour administration rather than to oppose employer policies beyond the employment relationship. The challenge for whistleblowing protection in Chile is whether and how it can reposition itself as a form of law enforcement rather than merely as a tool for claiming employment rights before the authorities.

## F. Constitutional Rights: A Deficient Substitute to Tailored Workplace Anti-Retaliation Protection for Whistleblowers in Chile

### 1. Anti-retaliation Protection for Whistleblowers in Chile: The Public Sector

In Chile, special protection for whistleblowers is available only in the public sector; it is not connected to either employment discrimination laws or the Labour Code's anti-retaliation protections. Protection for whistleblowers in the public sector was established by Law No 20.205,[248] which stipulates that:

> Art. 61. It is mandatory for public servants:
>
> k) To report, with due promptness, to the Public Prosecutor's Office, the police, or any court with criminal jurisdiction, any acts of which they become aware in the course of their duties, and which bear the characteristics of a criminal offence.
>
> l) To report, with due promptness, to the competent authority any acts of which they become aware in the course of their duties that constitute administrative violations or disciplinary infractions, particularly those that violate the principle of administrative probity.

Under the Public Servant Law, reporting criminal offences and administrative violations is a protected (mandatory) activity. For a disclosure to be protected, it must be made to the competent authorities in a timely manner. An example of protected reporting would be a

[248] Law No 20.205, 24 July 2007, Diario Oficial [DO] (Chile) (as amended by Law No 21.592, 21 August 2023, Diario Oficial [DO] (Chile)) consolidated in the *Estatuto Administrativo* of 1989.

public servant disclosing a bribery scheme involving their superiors to the police or reporting the misuse of official resources to the Office of the Comptroller General.

Under article 90-A of the Public Servant Law, whistleblowers in the public sector have the following rights: (1) they cannot be disciplined with suspension or dismissal from their position; (2) they are exempt from an annual review/assessment; and (3) they have the right to a note of commendation in their record when providing reliable information about misuse of public funds. The listed protections are enforceable from when the authority receives the report and continue for 90 days after the administrative investigation is closed.[249] However, the law does not provide for specific proceedings or a forum to litigate these rights in the case of employer reprisals.

Consequently, retaliation cases in Chile have been litigated in two general causes of action. First, there is the Constitutional Action of Protection (*acción constitucional de protección*).[250] This cause of action is raised before the courts of appeal for the protection of the most fundamental constitutional rights. If the violation of fundamental rights is proven, the court orders an injunction to protect the plaintiff (since damages are not available in this cause of action). For those cases involving public servants who have been retaliated against the violation of rights under article 90-A of the Public Servant Law has been interpreted broadly to enable employees to argue that this constitutes a form of constitutional infringement.

In *Harvey con Ejército de Chile*,[251] an army captain was harassed after reporting abuses committed by his superiors. He raised a legal action, arguing that the harassment violated several constitutional rights: the right to physical and psychological integrity (article 19 Nº 1 of the Constitution), equality before the law (article 19 Nº 2), the right to honour (article 19 Nº 4), the right to freedom of expression (article 19 Nº 12), and the right to property (article 19 Nº 24). However, the Chilean Supreme Court ruled that Law No 20.205 did not protect members of the military.[252]

[249] Law 18.834, art 90A *Estatuto Administrativo* (Chile).
[250] Constitución Política de la República de Chile, art 20.
[251] Corte Suprema [Supreme Court], 'Harvey con Ejército de Chile', Rol de la causa: 37.817-2018 (Chile).
[252] Law No 21.480 of 2022 (Chile) (extended the protection of Law No 20.205 to the staff of the army).

*Yáñez con Policía de Investigaciones*[253] is another case where a whistleblower used the Constitutional Action of Protection. Here, a police officer claimed retaliation after reporting abuses by his superiors. The Chilean Supreme Court held that the violation of Law No 20.205 was actionable under the 'equality before the law' clause of the Chilean Constitution (article 19 Nº 2). In Chile, the Constitutional Action of Protection has become a non-specific cause of action for whistleblowers only because Law No 20.205 does not establish a specific judicial enforcement procedure.

Second, there is the claim of an infringement of fundamental rights. This suit is governed by article 485 of the Labour Code, which establishes that employment tribunals are competent to resolve claims alleging a violation of the following rights in the workplace:

(1) Physical and psychological integrity (article 19 Nº 1 of the Constitution);

(2) Right to honour (article 19 Nº 4 of the Constitution);

(3) Privacy of communication (article 19 Nº 5 of the Constitution);

(4) Freedom of religion (article 19 Nº 6);

(5) Freedom of expression (article 19 Nº 12);

(6) Freedom to choose employment (article 19 Nº 16 of the Constitution);

(7) Employment discrimination; and

(8) Retaliation for filing claims in court, to the Labour Inspection authorities, or being called as a witness.

None of these protected rights specifically address the case of an employee who has been retaliated against because they have made a public interest disclosure. Instead, the interpretation of Law No 20.205 has been extended to fit claims brought by employees under

[253] Corte Suprema [Supreme Court], '*Yáñez con Policía de Investigaciones*', Rol de la causa: 5156-2018 (Chile).

one or more of the rights enumerated above and where the employee has been retaliated against by the employer for attempting to vindicate these rights.

To illustrate, from 2019 to 2024 a whistleblowing case in Chile was litigated consecutively under both the Constitutional Action of Protection and the rules contained in the Labour Code. In *Martínez con Contraloría General de la República*,[254] an employee argued that she was demoted after reporting wrongdoing by her superiors. The plaintiff, an Office of the Comptroller General employee, claimed that she was retaliated against after she reported that other staff members were participating in safaris during working hours whilst auditing the United Nations offices in Kenya. Two days after her anonymous disclosure, the General Comptroller downgraded her from team leader in New York to a less desirable role in Chile. The whistleblower raised a constitutional legal action, arguing that the General Comptroller infringed her rights to equal treatment, free expression and property. The Court of Appeal issued an injunction ordering her reinstatement. It reasoned that Law No 20.205 protected whistleblowers from retaliation from the moment the disclosure or report was received until 90 days after the investigation concluded. Therefore, the Comptroller General initiated an investigation of the wrongdoing.

However, in 2021 and 93 days after the conclusion of the internal investigation, the General Comptroller relocated the employee to the same detrimental position. The employee, who had been receiving mental health treatment due to the harassment, raised a second legal action under the Labour Code for a violation of her rights to physical and psychological integrity and freedom of expression.[255] She argued that, after her anonymous disclosure, the General Comptroller and staff had victimised her and that a second relocation occurred just three days after her legal protection expired. The employment tribunal initially ruled against the whistleblower, deciding that the case should be heard under the law of occupational diseases. However, the Court of Appeal reversed the tribunal's decision after finding there was sufficient medical evidence to show that she had suffered health consequences as a result

[254] Corte de Apelaciones de Santiago [Court of Appeals], '*Martínez con Contraloría General de la República'*, Rol de la causa: 7841-2019 (Chile).
[255] Corte de Apelaciones de Santiago [Court of Appeals], '*Martínez con Contraloría General de la República'*, Rol de la causa: 3990-2022 (Chile).

of the retaliation. The Court held that the whistleblower had been the victim of a violation of her constitutional right to physical and psychological integrity.

*Mendoza con Universidad de Chile* is another case in which a public servant sought protection under the Chilean Labour Code.[256] In this case, a professor at the Business School of the University of Chile was dismissed after reporting that the Dean had misused the funds of the Business School. After the disclosure, his employment contract was terminated. In his claim for the protection of his fundamental rights under the Labour Code, he argued that the reprisals taken against him violated his right to physical and psychological integrity (harassment). The University of Chile contended that the professor had been dismissed because he had failed a periodic academic assessment. The Court of Appeal ruled in favour of the university, holding that, although there had been a protected disclosure of a violation of the principle of probity under Law No 20.205, the 90-day protection had expired, and the university had valid grounds for dismissal due to poor performance.

Cases, such as *Martinez* and *Mendoza*, demonstrate how non-specific constitutional rights can be a functional substitute, albeit a deficient one, for proper anti-retaliation protection. Such cases were raised as violations of constitutional rights rather than workplace retaliation claims, owing to the fact that the Labour Code only recognises retaliation claims when an employee has raised legal proceedings, made a complaint to the Labour Inspectorate or served as a witness in a claim against the employer.[257] Although there is specific legal protection for disclosures in the public sector, public officials must litigate retaliation cases as violations of their physical and psychological integrity (harassment).

Presenting evidence of personal injury, such depression, anxiety, post-traumatic stress disorder, is crucial to succeed in these claims in Chile. In contrast, the critical element in Anglo-American jurisdictions is the causal connection between the protected activity and a detriment specifically within an employment context. In these systems, there is no need to prove emotional distress or physical harm to prevail in a retaliation case. The key

[256] Segundo Juzgado de Letras del Trabajo de Santiago [JT] [Labour Courts], '*Mendoza con Universidad de Chile'*, Rol de la causa: T-1138-2016 (Chile).

[257] On the role of Labour Inspectorate and other agencies on whistleblowing, see David Lewis, 'Labour Market Enforcement in the 21st Century: Should Whistleblowers Have a Greater Role?' (2019) 50(3) Industrial Relations Journal 256.

consideration is the disclosure of information in the public interest. Another consequence of viewing retaliation through the lens of constitutional rights is that the public interest element of the disclosure is irrelevant for triggering protection. Anti-retaliation protection in the Chilean Labour Code is tied to the exercise of labour rights (private interest conflicts) rather than public interest disclosures.[258]

### 2. Protection for Whistleblowers in the Private Sector: A Patchwork

In Chile, the Labour Code is the primary regulation of employment and relations between employers and employees in the private sector. Unlike the public sector, whistleblowers in the private sector are not given any specific recognition. The Chilean employment system was designed to address conflicts of private interest, which is why whistleblowers in the private sector must litigate their cases as violations of constitutional rights – a much broader form of protection. Cases of retaliation against whistleblowers in the private sector have often been litigated under the umbrella of freedom of speech in the workplace.

For example, in *González con Pesquera Sunrise*,[259] the plaintiff, a fisherman, filmed his employer illegally capturing codfish. The employer claimed that the video recording was just cause for the disciplinary dismissal of the employee based on a 'lack of integrity'. The employment tribunal held that the recording was protected speech because it was an attempt to inform the community about predatory practices by industrial fisheries. Notably, the dismissal letter acknowledged the video as the reason for the dismissal, providing direct evidence of retaliatory intent. However, the tribunal rejected the claim of retaliatory dismissal because the employee's complaint was not specifically connected to his right to access the courts. Thus, free speech has become a secondary source of protection when anti-retaliation laws are unavailable.

Although whistleblowing cases in Chile's private sector are rare, there are other instances that have been resolved under the Labour Code. For example, in the case of *Rojas con Conservas*

[258] See Chapter 2.

[259] Juzgado de Letras del Trabajo de La Serena [JT] [Labour Courts], '*González con Pesquera Sunrise'*, Rol de la causa: T-47-2014 (Chile).

*Puerto Montt*,[260] an employee alerted her superiors about the decomposition of some seafood that the employer had been processing. Because there was no response to her concerns, the employee publicly denounced her employer's actions in an interview on national television by claiming that they were threatening public health. Following the broadcast, the general manager asked her to retract her statement and sign a letter of apology, which she refused. Five days later, she was dismissed for 'lack of integrity' and 'defamation' against her employer. In response, the employee raised legal proceedings against the employer for the violation of her constitutional right to free speech under the Labour Code. The tribunal ruled in favour of the employee, stating that the interview involved an intention to communicate, and it was sufficient '*indicia'* evidence to establish a causal connection between the dismissal and the televised interview. However, the dismissal letter explicitly mentioned the interview as the reason for the termination, thus providing direct evidence that linked her removal to the public disclosure. Therefore, the tribunal erred in describing this as '*indicia'* (indirect) evidence of retaliatory motivation. In fact, the employer had explicitly acknowledged the retaliatory motive, but had attempted to reframe the issue through a different legal characterisation.

Similarly, in *Ayala con Farmacias Cruz Verde*,[261] the employment tribunal ruled in favour of the plaintiff employees on the grounds of free speech. In this case, a group of workers staged a protest against their employer, a pharmacy chain, regarding poor working conditions and customer mistreatment. During the employer's annual dinner, the employees displayed placards calling for higher wages and an end to the promotion of more expensive branded medicines over less costly generics. The employees involved in the protest were subsequently dismissed for 'lack of integrity' and 'defamation' against the employer. The tribunal found that the dismissals amounted to retaliatory conduct in response to the employees' exercise of their freedom of speech in the workplace.

*Ayala, Rojas* and *González* demonstrate how private-sector employees can successfully secure protection in a system where dismissals for public interest disclosures have not

[260] Juzgado de Letras del Trabajo de Puerto Montt [JT] [Labour Courts], '*Rojas con Conservas Puerto Montt'*, Rol de la causa: T-5-2012 (Chile).
[261] Juzgado de Letras del Trabajo de Valparaíso [JT] [Labour Courts], '*Ayala con Farmacias Cruz Verde'*, Rol de la causa: T-6-2013 (Chile).

specifically been made unlawful. However, despite the favourable outcomes for the employees concerned in these cases, the need for more specific protection for whistleblowers in Chile remains evident. Whistleblowers often struggle to secure anti-retaliation protection within the framework of constitutional rights, as the constitutional guarantee of free speech is too broad and fails to specifically recognise public interest disclosures as a distinct form of speech. Therefore, they may face uncertainty regarding the protection of their rights against retaliation.

Furthermore, the effectiveness of whistleblowing depends on whether the disclosure meets certain standards. In the three cases analysed above – *González*, *Rojas* and *Ayala* – the employees did not report their concerns to the appropriate authorities who could have addressed the reported issues. For whistleblowing to benefit society, it is crucial that the whistleblower directs their complaint to the person capable of remedying the wrongdoing.

Finally, it is noteworthy that in each of these three cases the employer acknowledged that the whistleblowers' disclosure was the primary reason for the dismissal. This recognition suggests that employers do not necessarily view dismissals based on public interest disclosures as wrong; in each case, the employers defended the dismissals on the basis that they were legally justified. This underscores the need for legislation that makes these types of dismissal unlawful as well as other forms of retaliation, but also specifies the requirements for disclosures, outlines proper procedures, and establishes specific remedies for whistleblowers. Such legislation would serve not only to protect whistleblowers but also to raise awareness about the role of whistleblowers within the workplace.

## G. Conclusion

Whilst Chile has made progress in providing protection for public sector whistleblowers, the current framework remains inadequate in comparison with Anglo-American systems of whistleblower protection. Chile's reliance on constitutional rights, rather than a comprehensive employment discrimination framework, limits the scope of protection in the public and private sectors. Whistleblowers must navigate through a patchwork of constitutional provisions and general labour rights. None of these constitutional rights are a specific source of protection for employees who have made public interest disclosures.

This chapter demonstrates that to fully embrace international best practices in whistleblowing protection, Chile must consider a more structured approach to its employment discrimination regime akin to the Anglo-American model. The constitutional alternatives developed under Chilean law are poor substitutes for best practices. Legal reforms must include recognising public interest disclosures as a distinct category of protected activity in the workplace and embedding it as an anti-retaliation provision within the Labour Code. Such reforms must deal with the current structural deficiencies in Chile's employment discrimination laws.

# Chapter 3: Comparative Significance of US Statutory Whistleblowing Law

## A. Introduction

Although comparative studies in US whistleblowing law are abundant, only a few are actually comprehensive. Whilst US scholars are in the best position to describe their own law, a comparative analysis also requires competence and understanding of the legal comparator system. Comparatists have highlighted the importance of immersion in foreign law to avoid the problem of over-projection of one's institutions in the alien jurisdiction.

To overcome these issues, this chapter aims to provide an overview of the main statutory causes of actions for whistleblower protection as developed in case law, litigation and US treatises. In the context of the law in practice, the chapter draws on US legal treatises usually overlooked in comparative studies. Obviously, what is important for a comparatist is not necessarily important to a practitioner, but treatises provide context in an area of the law that is often unsystematic and fragmented. Throughout these sources, it is possible to identify the common elements of whistleblowing law and evaluate the advantages and disadvantages of transplanting US developments into Latin American countries such as Chile.

This chapter has five sections providing a comparative explanation of US whistleblowing statutes. The first section focuses on why US developments have become a standard for the rest of the world and how employment discrimination law has influenced these developments. Comparative law studies have scarcely examined the relationship between employment discrimination law and the protection of whistleblowers in donor countries. The second section is dedicated to the FCA, which is the last embodiment of the old English *qui tam* statutes. To study the FCA is also to study private law enforcement where whistleblowing originated from. In countries of civil law tradition, the notion of private individuals enforcing the law on behalf of the state in return for a reward is an unknown concept. The third section explains how whistleblowing has become a central area of public employment through the

Whistleblower Protection Act (WPA) of 1978. Remarkably, the standards of evidence of this Act have been adopted by international institutions, such as the Organization of American States (OAS), as a model for the rest of the Americas. The fourth section is dedicated to corporate whistleblowing. The two major corporate whistleblowing laws are SOX and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The standards in both statutes have been globally influential as a result of their promotion by American transnational companies. For comparative purposes, we have analysed the anti-retaliation protection for corporate whistleblowers and the US Securities and Exchange Commission (SEC) Whistleblower Programme.

Finally, the fifth section covers the First Amendment protection for whistleblowers. For countries without statutory protection, but where human rights are binding on both private individuals and the government, freedom of expression may be an ancillary source of protection for whistleblowers. Accordingly, we present the requirements that are necessary to be met in a whistleblowing case for infringement of the First Amendment, evaluating why the US approach is more fitting than that developed by French comparatists.

## B. The Position of US Whistleblowing Law in the World

### 1. Why Is the US a Model of Whistleblowing Law?

For legal comparatists, the US is the most frequently mentioned jurisdiction in the study of whistleblowing laws. Irrespective of whether the legal comparison concerns corporate whistleblowing or whistleblowing and human rights, the US law is always regarded as a key standard for comparison. For example, in the book *Corporate Whistleblowing Regulation*, which hosts a collection of papers devoted to whistleblowing in corporations, Lombard, Brand and Austin consider the US as a key comparator jurisdiction.[262] Likewise, Fasterling's comparative study of whistleblowing law focuses on US law, pointing out that it does not adequately protect whistleblowers' free speech and recommending a different approach for other countries.[263] Moreover, the FCA is regarded as the last robust version of the old English *qui tam* statutes, which can be seen as the ancestors of the modern whistleblowing laws.

[262] Sulette Lombard, Vivienne Brand and Janet Austin, *Corporate Whistleblowing Regulation* (Springer 2020).
[263] Fasterling (n 3) 335.

From this perspective, the natural question is why US law is so omnipresent in discussing public interest disclosures.

Several factors explain the pervasive attention that legal comparatists have devoted to US whistleblowing law. First, whistleblowing plays a significant role in American legal culture, with a large number of specific statutes in the field. In their treatise for practitioners, *Whistleblowing: The Law of Retaliatory Discharge*, Modesitt, Schulman and Westman count 43 federal statutes devoted to the subject and 23 statutes at state level,[264] which deal with whistleblower protection. These statutes interact with the common law protection afforded through the tort of wrongful discharge against public policy (also known as the public policy exception)[265] and constitutional protections (e.g. the section 1983 cause of action for an infringement of the First Amendment).[266] Thus, it is normal for legal scholars to pay prominent attention to developments in the US.

Second, US whistleblowing law has had an important effect on other countries. Before the EU Directive, two well-documented cases of the transnational application of US whistleblowing law have been documented in Europe.[267] The first involved a conflict between privacy regulation in France and the content of the US SOX. The conflict occurred in 2005 when the French data protection authorities declared the whistleblowing systems of two US companies illegal on the grounds of causing an 'organised system of denouncement'.[268] The French authors Katrin Deckert and Morgan Sweeney[269] have claimed that the rejection of the US 'anonymous hotlines' stemmed from France's preference for a system of open whistleblowing (revealing an employee's identity). For these authors, anonymity 'represents too many risks and could too easily undermine one's reputation.'[270] They add that 'anonymous denouncement' can be ill-motivated: 'by jealousy and resentment'.[271]

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[264] Modesitt, Schulman and Westman (n 88), A-1.
[265] See Chapter 4.
[266] 42 USC s 1983.
[267] Delikat and Phillips (n 76), 7:2. For a complete overview on whistleblowing in Europe before the EU Directive, see Wim Vandekerckhove, 'European Whistleblower Protection: Tiers or Tears?' in David B Lewis (ed), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research* (Edward Elgar 2010) 15.
[268] CNIL Decision 2005-110 of 26 May 2005.
[269] Deckert and Sweeney (n 73).
[270] ibid 127.
[271] ibid.

The second conflict between compliance with SOX and European prescriptions on whistleblowing law occurred in Germany. There, the large American retailer Walmart released a Code of Ethics to comply with the requirements of SOX. However, employees were not consulted, owing to the fact that German law requires them to participate in decisions concerning the company's policies that affect labour conditions. As a result, a German labour court declared Walmart's Ethics Code illegal, which included provisions governing whistleblowing channels for employees.[272] These cases illustrate how US law may clash with the values of other legal systems. The notions of honour and participation in management decision-making should be considered first before a foreign legal jurisdiction borrows the US model of corporate whistleblowing.

Finally, in their study of US law, researchers have found several original solutions for whistleblowing. One of the most controversial is the incentive programme that rewards whistleblowers when they provide useful information about wrongdoing in areas like taxes and corporate fraud. The potential award of bounties to whistleblowers under these incentive programmes attracts academic attention and study. Not long ago (May 2023), the SEC paid its biggest reward (279 million USD) to a whistleblower through its Whistleblower Programme.[273] In a press release, the SEC highlighted how this reward had enabled the agency to recover 4 billion USD in ill-got gains and interest.[274] Yet, despite the benefits, few jurisdictions have adopted incentive programmes similar to those in place in the US.[275] In 2021, Chile became one of the few countries to adopt a statute resembling the SEC Whistleblower Programme, which was established by the Dodd-Frank Act.[276]

Beyond basic academic interests, the reward system has created a 'bounty' industry that is unknown elsewhere. US lawyers specialising in corporate whistleblowing are unapologetic in

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[272] *Landesarbeitsgericht Niedersachsen*, 9 November 2005, 3 Sa 875/05 (*Wal-Mart*), discussed in Delikat and Philips (n 76) 7:2–7:3.
[273] Patrick Temple-West, 'SEC Pays Whistleblower $279mn in Largest-ever Award' *Financial Times* (5 May 2023) <www.ft.com/content/c0ae06b0-1b18-4976-a904-5c9bb827db2d> accessed 30 September 2025.
[274] US Securities and Exchange Commission, 'SEC Press Release No 2023-89' (5 May 2023) <www.sec.gov/news/press-release/2023-89> accessed 30 September 2025.
[275] An updated discussion about the advantages and disadvantages of the SEC Incentive Programme is available in Daniel J Hurson, 'The United States Securities and Exchange Commission Whistleblower Program: A Long and Winding Road' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice and Design* (Springer 2020), 159-184.
[276] 15 USC s 78u-6(a)(6).

writing books for the general public with titles, such as the following: *Reward: Collect Millions for Reporting Tax Evasion*[277] or *Whistleblowing: Step by Step Guidance for Applying for a Whistleblower Reward*.[278] The openness to the possibility of denouncing someone else in exchange for money sharply contrasts with the more conservative view that other jurisdictions hold in respect of the honour and reputation of the persons denounced.

### 2. Identifying the US Whistleblowing Law Framework

Despite the significant attention it has received, particularly crucial areas of US whistleblowing law have been overlooked. Most studies have focused on the requirements for obtaining protection as a whistleblower or to obtain a reward, thus ignoring the rest of the legal context. The interaction among the relevant legal sources that shape the development of US whistleblowing law has remained unexplored.

One such example is the US anti-retaliation system for whistleblowers, which is closely connected with employment discrimination law precedents under Title VII. The 'anti-retaliation' provisions of US anti-discrimination law confer protection on employees whose employers victimise them because they have raised discrimination proceedings against their employer or are proposing to do so. Even though Title VII does not protect 'whistleblowers', its legal framework is the antecedent of the statutes protecting whistleblowers and is the model on which whistleblowing protection has been based.

An illustration of this point lies in the method used to prove causation. Under Title VII, the employee must demonstrate that participation in the protected activity was the 'but for' reason for the challenged decision. This requirement can be contrasted with most modern statutes regulating whistleblowing, which only require that the plaintiff shows that the protected activity was a 'contributing factor' (the WPA and SOX). 'Mixed-motives cases' are expressly protected. Seen from this angle, modern statutes on whistleblowing are enhanced incarnations of the anti-retaliation system found in Title VII. Consequently, US whistleblowing treatises include a special section on the anti-retaliation provisions of the anti-discrimination regime regulated by Title VII. The two regimes are closely connected. Modesitt, Schulman and

[277] Joel D Hesch, *Reward: Collecting Millions for Reporting Tax Evasion* (LU 2009).
[278] Hesch, *Whistleblowing* (n 122).

Westman dedicate a chapter of their treatise on whistleblowing to the anti-retaliation provisions of the anti-discrimination statute:

> Because many of the whistleblower protections. . .were enacted more recently than Title VII, the courts have often found interpretations of Title VII's antiretaliation provisions to be persuasive precedents when interpreting the recent whistleblower protection laws.[279]

Causation is one area where anti-discrimination precedents have exerted a controlling influence on whistleblowing legal doctrine.

Whilst American authors have focused on the retaliatory provisions of discrimination law to develop whistleblowing law, many comparative legal researchers have failed to notice this significant link. The adoption of the US standard of proof is a typical case in which US legislation is also difficult to understand divorced from its context. For instance, the current standard of proof for whistleblowing legislation has closed a loophole in the anti-discrimination (Title VII) case law, making it easier for whistleblowers to prevail in their claims. US scholars attribute the success or failure of whistleblowing statutes to the standard of proof adopted.

In their *International Best Practices for Whistleblower Policies*, Devine and Massarani highlight how the WPA has improved the traditional 'but-for' standard of employment anti-discrimination, noting that: '[t]he US Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights.'[280] Further, Devine and Massarani defend the international adoption of the 'contributing factor' test as developed by the WPA:

> This emerging global standard is that a whistleblower establishes a prima facie case of violation by establishing through a preponderance of the evidence that the protected conduct was a 'contributing factor' in the challenged discrimination. The discrimination need not involve retaliation but occur only 'because of' the

[279] Modesitt, Schulman and Westman (n 88) 5-2, 5-3.
[280] Devine and Massarani (n 1) 256–69.

> whistleblowing. Once a prima facie case is made, the burden of proof shifts to the organisation to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reason in the absence of protected activity.[281]

In light of Devine and Massarani's claim, we have found no comparative study on whistleblowing law that addresses how the US framework can be adapted for other countries. This absence is crucial for countries, such as Chile, where employment discrimination law does not follow the same structure developed in the US. In Chile, neither the Labour Code nor the existing employment discrimination case law recognises 'retaliation cases' in terms of a causal connection between a protected activity and an adverse employment action. Neither does the notion of 'clear and convincing evidence' form part of the Chilean standard of evidence in civil or employment cases.

Therefore, this chapter aims to analyse the structure of whistleblowing cases as developed in US litigation. We understand the term 'litigation' to comprise the elements of fact and law that the parties should consider prevailing in their legal claim or defence. These elements should be compared with Chilean law to determine whether a similar form of whistleblowing regime is feasible for transplantation into the Chilean legal system. We do not focus on the rules of civil procedure because these will be addressed in another chapter.[282] Our focus is on the US law because Chile has already adopted the fragmented US model rather than a systematic one, as it would have been the UK. Furthermore, as it will become apparent from the discussion in Chapter 6, the UK PIDA is a variant of the US law.

It is interesting to note that the topical and 'hot' areas of US whistleblowing law and litigation have not received particular attention from legal comparatists. In the field of bounty litigation, the FCA is the most praised piece of legislation that fights fraud against the government,[283] but it has not influenced other countries. On the other hand, the bounty

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[281] ibid. See also Devine and Walden (n 12) and David Lewis, Tom Devine and Paul Harpur, 'The Key to Protection: Civil and Employment Law Remedies' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 350-380.

[282] See Chapter 5.

[283] The Department of Justice has published that through the False Claims Act of 1863, the federal government recovered 72 billion USD in 36 years. Office of Public Affairs, 'False Claims Act Settlements and Judgments Exceed

programme for corporate whistleblowers, namely, the SEC Whistleblower Programme, – has influenced other countries. As it was pointed out earlier, Chile has adopted part of this incentive programme. Regarding the anti-retaliation litigation, the tort of wrongful discharge for violation of public policy is analysed in depth in the relevant US treatises on whistleblowing and employment law, yet legal comparativists have overlooked it.[284] This sharply contrasts with the constitutional litigation (also known as section 1983), the SOX, and the WPA, which have received considerable attention from comparatists.

In the following sections, we analyse the different statutory protection for whistleblowers in the US. We emphasise the framework of anti-retaliation protection and the contrast with Chilean law.

## C. The Last Survivor of the Qui Tam Statutes: The False Claims Act of 1863

### 1. Origins of the FCA

Enacted during the American Civil War,[285] the FCA is a manifestation of the old English *qui tam* statutes.[286] The main feature of *qui tam* statutes is that they allow whistleblowers to privately enforce the law by filing a suit on behalf of the state. Common informers, who bring *qui tam* actions to the courts, receive a bounty for their services. This law enforcement method can trace its origins to the beginning of the English colonial era in America. Claire Sylvia states that '[i]n the early years of the Nation, the *qui tam* mechanism served a need at a time when federal and state government were fairly small and unable to devote significant resources to law enforcement.'[287]

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$2 Billion in Fiscal Year 2022' (*US Department of Justice*, 7 February 2023) <www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022> accessed 30 September 2025.

[284] See Chapter 4.

[285] A congressional committee described the widespread fraud in army procurement as follows: 'Through haste carelessness, or criminal collusion, the state and federal officers accepted almost every offer and paid almost any price for the commodities, regardless of character, quality, or quantity . . . . For sugar it [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for service-able muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories'. Sylvia (n 118) 46.

[286] *Qui tam* is a short form for the Latin '*qui tam pro domino rege quam pro se ipso hac parte sequitur*'. This phrase in English means 'who sues on behalf of the King as well as for himself': see Chapter 1.

[287] Sylvia (n 118) 43.

*Qui tam* statutes allocate the function of law enforcement to private individuals. Under this system, every citizen is a potential informer. Informers became a distinctive element of law enforcement mechanisms developed in the large English-influenced area of the American continent. Conversely, *qui tam* enforcement did not develop in those areas of the American continent that were influenced by the Spanish and Portuguese inquisitorial system.[288] There, law enforcement historically has been considered a monopoly of the state.[289]

At its inception, the FCA provided criminal and civil penalties against individuals who brought deceitful claims to the government. Wrongdoers could be condemned to pay 2,000 USD for every violation plus damages equal to twice the amount deceitfully obtained. As is commonly the case in *qui tam* statutes, private 'relators' were called to enforce these penalties. Rewards for successful relators could amount to 50% of the sum recovered. To proceed with the reward, relators had to file a civil lawsuit against the wrongdoer in a federal district court on behalf of the US. To express the relationship between the state and the relator, these cases are styled 'United States ex rel [name of relator] v [name of defendant]'.[290] The original enforcement mechanism in the FCA was quite simple but allowed abuses by the relators.

When the FCA was passed, the problem of the sources of the information was not addressed. Therefore, it became common for whistleblowers to file suits not based on their personal knowledge but on publicly available information, such as criminal indictments. Additionally, the conditions in the US changed with the institutionalisation of law enforcement in the hands of the government, making *qui tam* whistleblowers a nuisance to public prosecutors. In the landmark case *United States ex rel Marcus v Hess*,[291] the government opposed a relator who relied on information from a criminal indictment. The argument was that control of litigation should be left to the Attorney General and that relators should not profit from the

[288] About the influence of Spain and Portugal in Latin American law, see Ángel Oquendo, *Latin American Law* (Foundation Press 2006); René Millar, *Inquisición y sociedad en el virreinato peruano* (Ediciones Universidad Católica de Chile 1997).
[289] Esmein (n 91) 295–301.
[290] Sylvia (n 118) 24.
[291] *United States ex rel Marcus v Hess*, 317 US 537 (1943).

government's investigation.[292] Nevertheless, the US Supreme Court rejected the argument because it was based on policy rather than law.[293]

In 1943, Congress amended the FCA to tackle the problem of parasitic lawsuits. During the pre-legislative debate, the Senate Judicial Committee stated that the *qui tam* system, as set out in the FCA, belonged to a time when law enforcement was under-developed in the US:

> At [the Civil War] time the office of the Attorney General was not staffed sufficiently to handle the many matters that arose and was not possessed of investigative facilities now at the disposal of that office. Now adequate facilities in respect to handling such matters exist and through the Federal Bureau of Investigation and many other investigative agencies of the government, adequate investigations of fraud against the United States are being made.[294]

Accordingly, Congress made major amendments to the FCA, banning whistleblowers from bringing *qui tam* lawsuits when they attempted to use information already known by the government. The relator must now be the original source of the information. In addition, in the 1943 amendments, bounties were reduced from 50% to a 'fair and reasonable compensation' standard, not exceeding 10% or 25%, depending on whether the government intervened in the litigation or not.

### 2. Comparative Interest in the FCA

At this point, we can compare two characteristics of the FCA. First, the amendment of the FCA confirms that whistleblowing in the US is considered a law enforcement mechanism. The role of whistleblowers should fit with the job of the law enforcement agencies. When countries adopt the US whistleblowing approach, they should consider how they can integrate the newly imported whistleblowing into their domestic law enforcement rules.

Second, the US experience shows that *qui tam* whistleblowers have been used when public law enforcement is weak. Researchers agree that in old England and its American colonies,

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[292] ibid 547.
[293] Ibid.
[294] S Rep No 291, Senate Committee on the Judiciary, 78th Cong, 1st Sess (1943).

private law enforcement supplemented public law enforcement.[295] Surprisingly, we have found no evidence that countries with poor law enforcement have adopted *qui tam* whistleblowing (e.g. the US FCA) to protect the integrity of public spending.

The closest to international adoption of the FCA is the OAS Model Law Protecting Freedom of Expression against Corruption.[296] This model law comprises a proposal for *qui tam* action for the Americas to promote whistleblowing. Article 28 of the Second Part of this model law has a Citizen Enforcement provision comparable to that contained in the FCA:

> Article 28. Citizens Enforcement Act. Any party may file an action to challenge corruption exposed by a protected disclosure under this law, in the court of jurisdiction over the matters in the disclosure. The court may order injunctive relief, actual and punitive damages, and treble damages for repayment of the national Treasury in an action against fraud in a government contract, in which case the party filing the action shall receive 25% of the recovery. Additionally, the Office of Ombudsman shall receive 25% of the recovery, reserved for direct service to protected witnesses. With the consent of both parties, any action under this Article may be pursued through Alternative Disputes Resolution under the procedures available for the Ombudsman in Article 12 and to a person in Article 27. Filing a suit under this Article is activity protected by this Law.[297]

Although there is no specific reference to a *qui tam* action, this provision includes all its key elements. First, any citizen may file an action to recover the damage suffered by the public purse; second, in exchange the plaintiff (whistleblower) receives a reward of 25% of the recovery. The provision does not require the plaintiff to be the original source of the information.

There is no evidence that any Latin American country has adopted the OAS model law. In a publication of the Inter-American Bar Association,[298] Loren Jacobson and Caitlyn Silhan

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[295] Sylvia (n 118); Banks and Schwartz (n 7); Pitzer (n 111) 418.
[296] Devine, Vaughn and Henderson (n 1).
[297] ibid.
[298] Loren Jacobson and Caitlyn Silhan, 'Qui Tam and Whistleblower Laws in Latin America' (Inter-American Bar Association 2014) <https://aldia.microjuris.com/wp-content/uploads/2014/06/ljacobsonwhistleblowerlaws.pdf> accessed 30 September 2025.

suggest some reasons why the *qui tam* model has not been implemented in the Americas. First, they point out that the common law legal tradition plays a role in the success of the *qui tam* statutes in the US. There, *qui tam* has been part of the legal culture since the colonial times when the pilgrims brought the private law enforcement system from England. In contrast, most of Hispanic America developed under the civil law tradition.

Second, Jacobson and Silhan emphasise the balance between the resources of the whistleblower and the government as compared to those of the defendant. In a *qui tam* action, the whistleblower should be able to investigate, gather evidence and litigate the case against the wrongdoer. Third, the success of *qui tam* and whistleblowing provisions depends on the amount of risk the whistleblower assumes. Several Latin American countries have higher levels of organised crime than the US, and in such a case it is unlikely that a *qui tam* system would work when the rule of law is weak.[299]

Research on *qui tam* whistleblowing as an anti-corruption policy has also received attention in Europe. For example, the Centre for European Policy Studies issued a brief proposing the adoption of a European version of the FCA to tackle fraud against the EU's Budget.[300] However, to date, no European country has adopted the *qui tam* system, although the whistleblowing protection regime and reporting channels of the US SOX have gained traction. In Europe, as the EU Directive shows, the protection of whistleblowers through anti-retaliation measures has proven more acceptable than the use of *qui tam* actions and reward strategies.

### 3. The Modern Version of the FCA

The 1943 amendments to the FCA removed its allure for relators. Courts strictly interpreted the requirement that the relator must act upon information not already 'in the possession of the US'. Cases were dismissed even when the relator disclosed information directly to the government.[301] Reducing the bounties for whistleblowers also made *qui tam* actions risky and financially unattractive. The relator could secure at most 10% of the amount recovered, if the

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[299] ibid.

[300] Alan Riley, *The Civil False Claims Act: Using Lincoln's Law to Protect the European Community Budget* (CEPS Policy Brief No 43, December 2003) <https://cdn.ceps.eu/wp-content/uploads/2009/08/1078.pdf> accessed 30 September 2025.

[301] See *United States ex rel Weinberger v Florida*, 615 F2d 1370 (5th Cir 1980) (the relator is prevented from pursuing his *qui tam* action because he disclosed the evidence to the US Attorney General in a prior mail).

government intervened and 25% if the government did not. This amount paled in comparison to the 50% share of the recovery available under the original version of the FCA. These shortcomings prompted further calls for reform.

In 1986, the Congress amended the *qui tam* provisions to encourage more lawsuits. The rewards were increased to 15%–25% of the recovery if the government intervened in the lawsuit and 25%–30% if the relator pursued the case alone.[302] The ban on prior knowledge in the possession of the government was also relaxed: if the relator revealed the information about the fraud to the government before filing a lawsuit, the information was no longer considered to have been 'in the possession of the United States'.

From a comparative perspective, what is particularly interesting is the introduction of a new litigation model for the FCA. Until 1986, FCA litigation had no employment law implications. Typically, a relator was an individual with personal knowledge about fraud against the government who pursued a lawsuit on its behalf. FCA litigation was a civil case to recover money from the deceiver. The possibility that the workplace might be the source of the relator's personal knowledge was not considered relevant. As a result, there was no specific remedy for a relator when their employer retaliated because of their involvement in an FCA lawsuit.

According to Helmer, one of the more significative amendments to the FCA was protection for whistleblowers who bring or assist in *qui tam* actions.[303] Indeed, in 1986, the US Congress introduced amendments that added a special anti-retaliation cause of action in the FCA.[304] Thus, the FCA evolved from solely regulating a civil action for recovery to including a second cause of action against retaliation.

### 4. The Interaction Between FCA and Title VII

As discussed above, there is a connection between the protection afforded to whistleblowers and workplace anti-discrimination laws. Employment discrimination laws work as a default

[302] 31 USC s 3730(d)(2).
[303] James B. Helmer Jr., *The False Claims Act: Whistleblower Litigation* (8th edn, American Bar Association 2021) 1008.
[304] 31 USC s 3730(h).

system for the development and interpretation of whistleblowing anti-retaliation laws. Exploring this connection may be useful in understanding how best to introduce protection for employees who blow the whistle in the Chilean context. Section 3730(h) of the FCA helps illustrate this connection:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.[305]

According to Sylvia, under this cause of action, a plaintiff must prove that '(1) he was engaged in activity protected by the statute; (2) he was retaliated against; and (3) the retaliation was 'because of' a protected activity.'[306]

Notably, the legislative technique adopted to protect relators is quite similar to the anti-retaliation protection for employees under anti-discrimination law (Title VII). Anti-retaliation is regulated by section 2000e–3(a) of the 1964 Act as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[307]

According to the Roger Mastalir, the elements the plaintiff must establish in a Title VII anti-retaliation claim are that: '(1) [they] engaged in activity protected by the statute; (2)

[305] ibid. The anti-retaliation law was broadened in 2009 to include individuals beyond the traditional employment relationship and actions 'in furtherance of an action under this section. . . .'.
[306] Sylvia (n 118) 331.
[307] 42 USC s 2000e–3(a).

materially adverse action was taken by the employer; and (3) there is a but-for causation link between the participation in the protected activity and the retaliation'.[308]

Litigating an FCA whistleblower claim comprises the same elements found in a Title VII retaliation claim. Because of the similarities between them, US courts have adopted the Title VII anti-retaliation precedents to develop the FCA whistleblower protections. Therefore, practitioners and scholars must analyse the nuances of employment discrimination law (Title VII) to understand the protections for whistleblowers established by the FCA.

However, it is not only litigation under section 3730(h) of the FCA that is based on Title VII precedents. Modesitt, Schulman and Westman claim that, broadly, the interpretation and evolution of whistleblower protection laws rely upon employment anti-discrimination laws:

> The retaliation provisions in Title VII and other federal discrimination statutes have had significant effect on whistleblower litigation. Interpretations of these provisions, such as what constitutes retaliatory conduct, have been applied to other retaliation and whistleblower protection statutes.[309]

Nevertheless, this connection between whistleblowing statutes and employment anti-discrimination case law has confused legal comparatists to the extent that some have conflated or mistaken Title VII anti-retaliation protection with legislation specifically designed to protect whistleblowers. For example, in his paper 'A Comparison of the Freedom of Speech of Workers in French and American Law,' the French scholar Morvan remarks that: '[t]itle VII of the Civil Rights Act of 1964 offers extended protection to whistleblowers'.[310] This assertion seems inappropriate. US legal scholars distinguish between whistleblowers and employees who file discrimination claims. Modesitt, Schulman and Westman highlight this distinction in their treatise:

> At their core, the purpose of such retaliation provisions [Title VII] is to ensure that employees protected by the law's substantive provisions can assert their statutory rights without fear of employer reprisal. Thus, under Title VII, the central purpose of

[308] Roger Mastalir, *Employment Discrimination* (Wolters Kluwer 2022) 59.
[309] Modesitt, Schulman and Westman (n 88) 8-13, 8-14.
[310] Morvan (n 24) 1030.

> the retaliation provision is to prohibit the employer from 'discriminating' (i.e. retaliating) against an employee who files an employment discrimination charge against his or her employer. This promotes the enforcement of the statute's underlying goal –to decrease employment discrimination. It also encourages employees to be willing to provide information about discrimination against others in the workplace by protecting those who testify or otherwise participate in claims of employment discrimination.[311]

Furthermore, Modesitt, Schulman and Westman point out that Title VII does not protect 'classic whistleblowing', which refers to the act of reporting wrongdoing or illegal activity.[312] Moreover, and most importantly, unlike whistleblowing, Title VII protected activity does not involve a public interest element.

Despite the different types of protected activity covered by the FCA and Title VII, there is one area where the Title VII case law is crucial for retaliation claims under the FCA: the causative link between retaliation and participation in the protected activity. The next section focuses on this connection in particular.

### 5. Retaliation as Direct Discrimination under the FCA and beyond

Similar to other whistleblower statutes, litigation under section 3730(h) of the FCA falls within the direct discrimination framework, in particular the individual disparate treatment theory of discrimination[313] presented in the landmark case of *McDonnell Douglas v Green*.[314] According to this theory, the plaintiff employee must prove that the motive behind the challenged employment decision was the protected characteristic. However, this does not mean that malice on the part of the defendant employer or their subjective state of mind is relevant. As Judge Richard Posner cautions in *Forrester v Rauland-Borg Corp*: '[t]he question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright

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[311] Modesitt, Schulman and Westman (n 88) 3–7.
[312] ibid.
[313] Charles R Richey, *Manual of Employment Discrimination and Civil Rights Actions in Federal Court* (Thomson Reuters 2021) 1-84.12. See also Charles A Sullivan and Michael J Zimmer, *Cases and Materials on Employment Discrimination* (Wolters Kluwer 2017) 1–92.
[314] *McDonnell Douglas Corp v Green*, 411 US 792 (1973).

irrational in taking the action for the stated reason. . .'.[315] The motive, instead, is a question of legal causation.

Retaliation cases are unique because the plaintiff need not prove their claim with direct evidence to discharge the burden of proof. Indeed, in *McDonnell Douglas*, the claimant could only show that he was a black person whom the defendant had not hired after some labour incidents. The trial record showed no confession from the side of the employer, neither a testimony nor any racial remarks to prove that race played a role in the non-hiring decision. Owing to the fact that the employer controlled any and all direct evidence, the Supreme Court alleviated the position of the employee by ruling that: '[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.'[316] Therefore, the employees bear the burden of presenting indirect evidence for their *prima facie* case, creating a presumption of discrimination. This *McDonnell Douglas* burden-shifting analysis has been adopted by most countries' courts in employment discrimination cases. Once the plaintiff has established a *prima facie* case, the defendants must discharge the burden of proof by proving that they did not directly discriminate. In *McDonnell Douglas*, the Supreme Court ruled that to dislodge the presumption, the defendant had to 'articulate some legitimate, non-discriminatory reason for the employee's rejection.'[317]

The third step in the *McDonnell Douglas* analysis provides that the plaintiff can still prevail if they prove that the defendant's rebuttal was a pretext. The logic behind the shifting burden is to reduce the range of plausible reasons for the challenged decision, so that the court can make the right inferences. For example, in *Texas Department of Community Affairs v Burdine*, the Supreme Court observed that: '[i]n a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case are intended to progressively sharpen the inquiry into the elusive factual question of intentional [direct] discrimination'.[318] Ultimately, identifying the employee's *prima facie* case, the employer's

[315] *Forrester v Rauland-Borg Corp*, 453 F3d 416, 418 (7th Cir 2006).
[316] *McDonnell Douglas* (n 314) 802.
[317] ibid.
[318] *Texas Department of Community Affairs v Burdine,* 450 US 248, 260 (1981).

rebuttal and the employee's assertion of a pretext can discard or confirm if the protected status/activity played a role in the employer's decision.

The legal concept of causation is also relevant. Causation in an employment discrimination case helps resolve the question of how much interference bias might have had in the adverse employer decision or action. The US Supreme Court has established that the plaintiff must prove that the defendant acted 'because of' the plaintiff's protected characteristic, which 'typically imports, at a minimum, the traditional standard of but-for causation'.[319] 'But-for' (sole) causation is not as employee-friendly as the 'contributing factor' (one of the causes) standard developed later in the case law and statute.

The US Supreme Court addressed the difference between the 'but for causation' and the 'contributing factor' standards in *Price Waterhouse v Hopkins*. There, a female employee complained that she was excluded from admission to a partnership because of her sex. During the deliberations over her promotion application, the partners used sexual remarks to refer to her, such as 'macho' and '[she] should walk more femininely. . .', and they complained about how she spoke in 'profanities'. However, concurrently, Price Waterhouse was able to establish that the employee's application had been rejected owing to her lack of diplomacy required for the job: 'Judge Gesell found that Price Waterhouse legitimately emphasised interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination'.[320]

Under these circumstances, the Court of Appeal sided with the employer because the bias was just another factor in the decision-making process (but not the 'but for'), and the employer proved a legitimate and non-discriminatory reason for not promoting the plaintiff. However, the Supreme Court reversed the decision, holding that liability could be established 'even [for] those decisions based on a mixture of legitimate and illegitimate considerations'.[321] Those are also called 'mixed-motives'/contributing factor' cases.

[319] *EEOC v Abercrombie Fitch Stores, Inc*., 575 US 768, 772 (2015).
[320] *Price Waterhouse v Hopkins*, 490 US 228, 279 (1989).
[321] ibid.

Following *Price Waterhouse*, mixed-motive claims have become a recognised category of litigation in employment discrimination cases and, by doctrinal extension, statutes on whistleblowing retaliation. Congress codified this standard in the 1991 amendment to the Civil Rights Act, by providing that: '[a]n unlawful employment practice is established when the complaining party demonstrates that race, colour, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.'[322] Under this standard, an employee must demonstrate that the protected status or protected activity played at least a role in the challenged decision, even though it was not necessarily the 'but-for' cause. The distinction between these two causation standards has been litigated extensively in employment discrimination cases in the US.

In *University of Texas Southwestern Medical Center v Nassar*, the Supreme Court ruled that the mixed-motive standard does not apply to retaliation claims. Focusing on the statute's plain text (which refers only to discrimination rather than retaliation claims), the Supreme Court reasoned that it was risky to lower the causation standard for retaliation claims. Writing for the majority, Justice Kennedy emphasised that, unlike status-based discrimination, in retaliation claims, the employee can control the statutory protection at will. He suggested a hypothetical of 'an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment location'.[323] Justice Kennedy imagined that the employee could make unfounded allegations of status-based discrimination, and after the employer's detrimental decision, file a retaliation claim to gain statutory protection to shield himself from dismissal for poor performance.

This hypothetical shows the distinction between status-based discrimination and retaliation claims: the employee triggers the statutory protection in retaliation claims. In these cases, the employee must prove that 'but-for' the fact that the employee raised a discrimination claim, the employer would not have retaliated against them. If the employee cannot establish that but-for causation, the court can dismiss the employee's claim, even when the protected activity was a contributing factor. Lowering the standard of causation in retaliation claims

[322] 42 USC s 2000e–2(m).
[323] *University of Texas Southwestern Medical Center v Nassar*, 570 US 338, 358 (2013).

would make it more difficult to dismiss any opportunistic claims raised by employees at the summary judgment stage. Therefore, under Title VII, only status-based discrimination cases will benefit from mixed-motive causation (and as it will become apparent, the same favourable standard applies to whistleblowing claims).

This misalignment between the civil rights precedent of discrimination and retaliation claims has impacted the interpretation of the anti-retaliation provisions in the FCA. In retaliation cases, the motivating factor is usually satisfied by the timing between the reporting and the adverse action. However, after *Nassar*, the plaintiff must prove that 'the unlawful retaliation would not have occurred in the absence of the alleged wrongful actions of the employer'.[324] This heightened 'but-for standard' requires more evidence.

Although section 3730(h) of the FCA uses the same 'because of' language as the retaliation provision in Title VII (*Nassar* case), the adoption of the *Nassar* standard has been inconsistent. The US Circuit Courts are split on the issue of causation regarding section 3730(h) of the FCA. For example, in *DiFiore v CSL Behring*, the Third Circuit found in favour of the employer by upholding a district judge's 'but-for' instructions to the jury, reasoning that:

> [T]he language of the FCA antiretaliation provision uses the same 'because of' language that compelled the Supreme Court to require 'but-for' causation in *Nassar* and *Gross*. For this reason, the District Court correctly instructed the jury that to find retaliation, it had to find that DiFiore's protected conduct was the 'but-for' cause of the adverse employment action.[325]

However, a different outcome was reached in *Singletary v Howard University*, where the DC Circuit ruled in favour of the employee who engaged in protected activity under the FCA. The court recognised that her whistleblowing disclosure was a contributing factor to her dismissal, noting that 'the proposed complaint adequately alleges—and the University does not dispute—that as a matter of law Singletary's discharge was "motivated, at least in part", by her protected activity'.[326]

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[324] ibid 360.
[325] *DiFiore v CSL Behring LLC*, 879 F3d 71, 78 (3d Cir 2018).
[326] *Singletary v Howard Univ*, 939 F3d 287, 300 (DC Cir 2019).

Under the current case law, causation is one of the areas of employment discrimination where the principles of class-based discrimination partially transfer to retaliation claims. It is an exception to the unified structure of employment discrimination litigation. Most of the statutory elements that are present in discrimination and retaliation legislation are analytically similar. As Charles Richey explains: '[a] retaliation case is somewhat like a disparate treatment case in that the conduct at issue allegedly affected a particular individual . . .'[327] In other words, retaliation claims follow the same pattern as direct discrimination claims, with the exception of the causation standard.

To avoid these differing standards, other statutes protecting whistleblowers include a specific provision that adopts the less onerous (from the employee's perspective) mixed-motive test from direct discrimination. For example, in the public sector the WPA of 1989 (amended by the Whistleblower Protection Enhancement Act of 2012) includes the 'contributing factor' test as the causation threshold for the plaintiff's *prima facie* case.[328] Similarly, SOX has adopted the contributing factor test in the corporate sphere.[329] As Lisa Banks and Jason Schwartz observe, '[the] whistleblower's protected activity does not have to be the employer's sole reason or even a significant reason for the adverse action'.[330]

This interaction between statutes and causes of action is important in a comparative analysis of whistleblowing protection. Most countries adopting protection for whistleblowers already have statutes and causes of action for direct discrimination and employment-related retaliation. Transplanting whistleblowing legislation should fit within the domestic direct discrimination framework to achieve the intended outcome. However, as we analysed in Chapter 2, the Chilean anti-discrimination and labour-related anti-retaliation regimes do not follow the same framework as those in the US.

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[327] Richey (n 313) 1-84.12-13.
[328] 5 USC s 1214(B)(i).
[329] 29 CFR s 1980.104(e)(2)(iv); 49 USC s 42121(b)(2)(B)(i).
[330] Banks and Schwartz (n 7) 2–33.

## D. The US Whistleblower Protection Act of 1989: A Global Standard for Whistleblowing

### 1. The Origins of the WPA

In the US, federal employees who blow the whistle are protected by the WPA. The Act promotes a merit-based civil service system and prohibits hiring, promotion, and firing based on political affiliation or connection. Prior to the introduction of an organised civil service, the so-called 'spoils system' allowed politicians to exercise arbitrary influence over federal government appointments and employment decisions.[331] The Pendleton Act of 1883 and the Hatch Act of 1939 created the right conditions for a permanent, nonpartisan and merit-based civil service. These Acts also banned undue influence over federal employees and punished those who engaged in prohibited partisan activities.[332]

In this context, the Civil Service Reform Act of 1978 was the first statute to regulate anti-retaliation protection for whistleblowers working for the federal government. It also established two agencies – the Merit Systems Protection Board (MSPB) and, under its oversight, the Office of the Special Counsel (OSC) – to enforce the laws regulating the civil service. Under the original design, the OSC would act as both the investigator and the prosecutor of prohibited personnel practices and present cases to the MSPB for trial. Whistleblowing retaliation cases would be prosecuted and tried within the administrative branch.

However, this scheme failed, leading the Congress to pass the WPA.[333] As a Senate report from 1994 noted: '[t]he Whistleblower Protection Act was passed in large part because the Office of Special Counsel was perceived as ineffectual. At the same time, OSC had not brought a single corrective action to the Merit Systems Protection Board on behalf of a whistleblower since 1979'.[334]

One of the main features of the WPA is the administrative procedure for redressing whistleblowing retaliation claims. The MSPB's decisions can be reviewed by the Federal

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[331] Trevor Potter and Matthew Sanderson, *Political Activity, Lobbying Laws and Gift Rules Guide* (Thomson Reuters 2023) s 20:5.
[332] ibid.
[333] Pub. L. No. 101-12, 103 Stat. 16 (10 April 1989) (codified in various sections of Title 5 USC).
[334] US Senate Report 103-358, 2 (1994 USCCAN 3549, 3550).

Circuit Court of Appeal on a point of law. Issues of fact are to be resolved by the administration.

Under the WPA, federal employees are protected if they disclose illegal conduct, or engage in gross mismanagement, gross wastage of funds, or any actions that present substantial dangers to health and safety.[335]

### 2. The Comparative Impact of the WPA

Same as other anti-retaliation claims, a WPA case is similar to a direct discrimination case. According to Banks and Schwartz, a successful WPA claim requires the employee to demonstrate (1) engagement in a protected activity and (2) that this activity was a contributing factor in the adverse personnel action.[336] The WPA adopted the contributing factor test, which requires the establishment of a lowered causative link between the challenged employer's decision and the whistleblowing activity. Direct evidence is not necessary to prove the employer's ill motives; indirect evidence (*indicia*) is sufficient to establish a *prima facie* case.

Once the plaintiff has established a *prima facie* case, the burden of proof shifts to the employer to show by 'clear and convincing evidence' that it would have made the same decision regardless of the protected activity. Notably, the evidentiary standard for defendant employers is 'clear and convincing' evidence, whilst the standard for the *prima facie* case of the employee is 'preponderance of the evidence'.[337] The higher standard for the defendant employer provides an advantage to the whistleblower. In regular employment law cases, as in most civil cases, the preponderance of the evidence is the default evidentiary standard. Under the preponderance of the evidence, the burden of proof is met when the party presents evidence that is more likely to be true than not.[338] Under the stricter clear and convincing evidence standard, the burden of proof is met when the evidence is highly and

[335] 5 USC s 2302(b)(8)(A).
[336] Banks and Schwartz (n 7) 7-16, 7-17.
[337] *Langer v Department of Treasury*, 265 F3d 1259 (Fed Cir 2001).
[338] Christopher B Mueller and Laird C Kirkpatrick, *Federal Evidence* (Thomson Reuters 2023) s 3:5.

substantially more likely to be true than untrue.[339] The WPA uses a less onerous standard of evidence for whistleblowers compared with an anti-retaliation claim based on Title VII.

Legal scholars and transnational policymakers have recommended adopting the WPA standard of proof to protect whistleblowers. For example, Devine and Massarani defend the contributing factor causation test as a more onerous evidentiary standard for employer*s*:

> [A] whistleblower establishes a prima facie case of violation by establishing through a preponderance of the evidence that the protected conduct was a 'contributing factor' in the challenged discrimination. . . Once a prima facie case is made, the burden of proof shifts to the organisation to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.[340]

In its *Model Law Protecting Freedom of Expression Against Corruption*, the OAS has adopted the American WPA evidentiary standard for whistleblowing:

> Article 7: Burdens of proof -- general rule. If the record demonstrates by a preponderance of evidence that protected activity was a contributing factor in any alleged discrimination in violation of this law, the person shall prevail in an action taken to enforce rights under this law, unless the defendant demonstrates by clear and convincing evidence that it would have taken the same action for independent, lawful reasons.[341]

Meanwhile, Transparency International, in its *International Principles for Whistleblower Legislation*,[342] uses different phrasing. It proposes the 'contributing factor' and 'clear and convincing evidence' standards as follows:

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[339] Clear and convincing evidence is an intermediate standard, whereas preponderance of the evidence is a more lenient one. Beyond reasonable doubt is the highest-level burden of proof. See Michael Graham, *Handbook of Federal Evidence* (Thomson Reuters 2022) s 301:5.

[340] Devine and Massarani (n 1) 256–69. We have found the same recommendation in a study from the International Bar Association and Government Accountability Project. See Samantha Feinstein and others, *Are Whistleblowing Laws Working?* (International Bar Association 2021) <www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55> accessed 30 September 2025.

[341] Devine and Massarani (n 1).

[342] Transparency International (n 12).

> 8. Burden of proof on the employer – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure.[343]

Although well-meaning, these recommendations only make sense under two assumptions: (1) the host country should treat retaliation cases in the same way as direct discrimination cases, and (2) direct discrimination cases consist of a cause-effect link between a protected status/activity and the challenged decision. These recommendations work for countries with the US employment discrimination model. However, legal scholars and transnational organisations on whistleblowing have neglected to consider the case of countries that do not operate under, or comply with, these two assumptions. Therefore, the question of how a jurisdiction whose employment discrimination law that does not align with the US standard should transplant whistleblowing into its legal system has not been sufficiently addressed by these good practices.

As we discussed in Chapter 2, Chile is an example of a country whose employment discrimination system does not align with the US standards. In Chile, employment discrimination cases have a different framework. There is no correspondence between a direct discrimination case under Title VII and the Chilean Labour Code. Thus, under the Chilean Labour Code, the cause of action for prohibited discrimination does not require a protected characteristic or status. Yet, the Labour Code enumerates different protected classes (as many as 23), although most Chilean scholars contend that there is no absolute requirement that one of those protected characteristics to apply to a claimant to raise a discrimination case.[344]

For Chilean scholars, the employment discrimination system is 'open-ended' and bans all kind of unreasonable discrimination. Employment discrimination law is built upon the principle of 'equal treatment', which is recognised under the Chilean Constitution.[345] Accordingly, irrespective of any protected characteristic or ground, anyone who is unfairly discriminated

[343] ibid.
[344] Lizama and Ugarte (n 188).
[345] Constitución Política de la República de Chile [CP] art 19, No 16.

against in the workplace, has a cause of action against their employer for discrimination. Seen from this perspective, under Chilean law a causative link between the challenged employer's decision and a protected characteristic does not exist as a category of analysis. Instead, the plaintiffs must demonstrate that they have been unfairly discriminated against, without invoking any particular protected characteristic, status or category; thereafter, the burden of proof shifts to the employers to prove the reasonableness of their conduct or decision. The discussion of the causative link (i.e. the 'but-for' or 'contributing factor' tests) that is so precious in the US employment discrimination system plays no role in the legal analysis of the Chilean courts. Likewise, the distinction between two standards of evidence in relation to the burden of proof, with one test applicable to the plaintiff employee (preponderance of the evidence) and the other to the defendant employer (clear and convincing evidence) is unknown in Chilean employment law.

The above analysis of the US law provides useful insights into the extent to which the Chilean legal system can host the whistleblowing law as proposed by scholars and international organisations, since it is largely modelled on the US approach.

## E. Whistleblowing in the Corporate World: The Sarbanes-Oxley and the Dodd-Frank Acts

### 1. Whistleblower Protection through SOX

The corporate world is another area where US whistleblowing statutes have influenced the law globally. As discussed in Chapter 3, SOX[346] spread the practice of internal reporting channels in Europe. Given the prominence of US companies, SOX and Dodd-Frank have become reference points for assessing whistleblowing laws worldwide. For example, in *Corporate Whistleblowing Regulation*,[347] six of the chapters used SOX and Dodd-Frank whistleblowing regulations as benchmarks. The US corporate whistleblowing model has been studied for its regulation of internal channels of complaint, protection against retaliation and monetary rewards. In 2021, Chile passed Law No 21.314,[348] which includes a reward system

[346] 18 USC s 1514A (whistleblower protection for employees of publicly traded companies).
[347] Lombard, Austin and Brand (n 262).
[348] Law No 21.314 (n 55).

that has been inspired by Dodd-Frank. Surprisingly, this law reform did not include an anti-retaliation protection framework for employees, similar to the US donor system.

This chapter focuses on the protection for corporate whistleblowers against retaliation and the SEC Whistleblower Programme established by Dodd-Frank. This anti-retaliation protection framework is similar to that of the WPA in the US. Whistleblowers must first exhaust the administrative remedies with the Department of Labour, which investigates retaliation claims through the Occupational Safety and Health Administration (OSHA). The cases are heard by Administrative Law Judges at the US Department of Labour, whose decisions may be appealed to the Department's Administrative Review Board. SOX also provides a mechanism for whistleblowers to withdraw a claim and file it for *a de novo* hearing in a federal district court if the Department of Labour has not issued a decision within 180 days.[349]

Section 806 of SOX[350] gives the employees of publicly traded companies the right to file a legal action if they suffer adverse treatment or employment reprisals. They must 'provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes'[351] one or more of the following violations: (1) mail fraud,[352](2) wire fraud,[353] (3) bank fraud,[354] (4) securities fraud,[355] (5) any rule or regulation of the SEC or (6) any provision of federal law related to fraud against shareholders.

In their treatise on corporate whistleblowing,[356] Delikat and Phillips claim that an employee must prove the following four elements to be successful in a section 806 claim: (1) they must have engaged in a protected activity; (2) the employer knew about this protected activity; (3) the employee suffered adverse treatment or an employment action; and (4) the protected

[349] Delikat and Phillips (n 76) s 3:1 See 29 CFR Part 1980 (Procedures for the Handling of Retaliation Complaints under Section 806 of the Sarbanes-Oxley Act) (2015).
[350] 18 USC s 1514A(a).
[351] ibid s 1514A(a)(1).
[352] ibid s 1341.
[353] ibid s 1343.
[354] ibid s 1344.
[355] ibid s 1348.
[356] Delikat and Phillips (n 76). See also Modesitt, Schulman and Westman (n 88) 4-49.

activity was a contributing factor towards the adverse employment action.[357] Once the claimant has established a *prima facie* case, the burden shifts to the employer to prove by clear and convincing[358] evidence that it had a legitimate reason or motive for the adverse personnel action.[359] In contrast to the *McDonnell Douglas*' three-part analysis for individual disparate treatment (direct discrimination), SOX does not require the employee to prove any pretext for it to prevail in the context of the 'legitimate reason'.

Direct evidence is unusual in discrimination/retaliation cases. However, in the US system the burden of proof does not shift when direct evidence (of the link between the employer's challenged decision and the protected activity) is available.[360] For example, in *Kalkunte v DVI Financial Services Inc,*[361] a threat that the whistleblower would 'get her justice' after disclosing improprieties in financial statements was considered direct evidence of retaliation. The Administrative Law Judge ruled that: 'in cases where a complainant is able to produce direct evidence of discrimination (retaliation), the burden-shifting framework . . . does not apply'.[362] The shift in the burden of proof helps the employee make their case, even in the absence of direct evidence. Therefore, if the employer blatantly expresses their retaliatory motivation, the case should adhere to the normal burdens of proof. This solution highlights that the shift of the *onus probandi* is associated with the absence of direct evidence.

On the other hand, having two standards of evidence – 'preponderance of the evidence' for the employee's *prima facie* case and 'clear and convincing evidence' for the employer's defence – creates a more favourable framework for whistleblowers. Legal practitioners agree that applying these two standards offers greater protection to whistleblowers than the stricter 'but-for' causation standard under the case of *McDonnell Douglas*.[363] It ensures that employees cannot misuse SOX's whistleblower protection to unjustly claim retaliation.

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[357] Delikat and Phillips (n 76) s 3:2.2.
[358] 18 USC s 1514A(b)(1)(C) remands to the 49 USC s 42.121(b).
[359] *Welch v Cardinal Bankshares Corp*, 2003-SOX-15, at 35–36 (ALJ January 28, 2004).
[360] *Kalkunte v DVI Financial Services*, *Inc*, 2004-SOX-56, at 39 (ALJ July 18, 2005).
[361] ibid.
[362] ibid.
[363] Delikat and Phillips (n 76). See also Modesitt, Schulman and Westman (n 88) 4-52, 4-53.

A notable example is *Holloum v Intel Corp*,[364] where an employee on probation reported financial irregularities concerning corporate payments and subsequently filed a complaint for constructive discharge. The employee established by a preponderance of the evidence that his whistleblowing was a contributing factor to his discharge. Nevertheless, the employer successfully rebutted the *prima facie* case by presenting clear and convincing evidence that the same decision would have been made regardless of the employee's disclosure to the SEC:

> The protected disclosures were not factors that brought matters to a tipping point. He [the complainant] was on his way out for independent reasons. When the CAP [Corrective Action Plan] was modified, the complainant was perceived as an untrustworthy employee who consistently performed poorly, flouted important work rules, and alienated his subordinates and manager. It was appropriate to remove his supervisory duties and give him other assignments. Intel would have imposed onerous and unattainable modifications to his CAP without regard to his disclosures to the SEC or Intel's CEO Barrett.[365]

Thus, in mixed-motive cases the preponderance of the evidence *prima facie* case can be overcome by the employer's clear and convincing evidence in respect of a legitimate non-discriminatory reason. In essence, the employer must demonstrate that his reason alone (independent reason) would have produced the same outcome.

### 2. The Dodd-Frank Act: The SEC Whistleblower Program

Legal comparative analysis often focuses on the highly influential Dodd-Frank Act, specifically its successful section 922 and SEC Whistleblower Program.[366] Less attention is given to employment protection, which is also included in section 922. Chile adopted this approach through Law No 21.314, which created a reward programme for corporate whistleblowers. This reward programme, called Protection for '*Denunciante Anónimo*' (anonymous whistleblower), is run by the Financial Market Commission (the Chilean equivalent of the SEC)

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[364] *Halloum v Intel Corp*, 2003-SOX-7 (ALJ March 4, 2004).

[365] ibid.

[366] Beyond the corporate area, there is an IRS (Internal Revenue Service) Whistleblower Programme for whistleblowers denouncing tax illegalities. See 26 USC s 7623(b).

and does not provide protection to whistleblowers as employees.[367] This subchapter analyses the reward provisions of section 922 of Dodd-Frank, while the next subchapter focuses on the employment protection, so that this regulation is understood more clearly.[368]

For reward purposes, whistleblowers are defined in section 922 of Dodd-Frank as: '[a]ny individual who provides, or two or more individuals acting jointly who provide, information relating a violation of the securities laws to the Commission in a manner established, by rule or regulation, by the Commission.'[369] For policy reasons, this definition of a whistleblower is not linked to the employment relationship at all. To that extent, the whistleblowing dilemma[370] may not be present in the SEC Whistleblower Program. Anyone, whether an employee, contractor, bystander or member of the public, has the right to provide information to the SEC, which could make them eligible for a reward. Nonetheless, the requirements imposed for a person to gain a bounty under this programme are very strict. In order to be eligible for a reward, the whistleblowers must fulfil the following requirements:

> (1) they must have voluntarily provided information to the Commission,
>
> (2) information that is original,
>
> (3) information that leads to successful enforcement by the Commission or a federal court or administrative action,[371]
>
> (4) in terms of which the Commission obtains monetary sanctions totalling more than one million dollars.[372]

'Voluntarily' means that the information must be disclosed without any prior formal request. If the SEC, Congress, the Public Company Oversight Board, a self-regulatory body, or any other

[367] As of April 2024, the programme has paid 415,000 USD. See Comisión para el Mercado Financiero (CMF), 'Cuenta Pública 2024' <https://cmfchile.cl/portal/prensa/615/w3-article-93978.html> accessed 30 September 2025.
[368] For a deep understanding of the Dodd-Frank Act, see Delikat and Phillips (n 76) chs XVI, XVII, XVIII and XIX.
[369] 15 USC s 78u-6(a)(6).
[370] See Chapter 1.
[371] 15 USC s 78u-6(b).
[372] ibid s 78u-6(a)(1).

federal or state authority requests the information, the report will not be considered as having been made voluntarily under the Act.

In the same way as the FCA bounty provision, the SEC Whistleblower Program regulates the source of the information for the purposes of offering a reward. The whistleblower should be the original source of the information to avoid interfering with law enforcement. 'Original information' under the reward programme must meet three criteria. First, the information must come from the whistleblower's independent knowledge or analysis. Information obtained under the attorney-client privilege or legal representation, internal audits, or from a company hired to assist with compliance or a public accounting firm is excluded. Second, the information should not be known to the SEC from any other source. Third, the information should not come from public records, such as judicial or administrative hearings, indictments, governmental reports or the media, unless the whistleblower is the source of the media reports.[373] As discussed earlier in the present chapter of this Thesis, regulating the source of information in this way discourages whistleblowers from interfering with law enforcement with a view to obtain bounties.

Anonymity is the other cornerstone of the SEC Whistleblower Program. To maintain anonymity, the SEC has established a detailed procedure to prevent that the identity of the whistleblower is revealed. A whistleblower should hire a specialist attorney to submit the information to the SEC under the penalty of perjury. It is the attorney's responsibility to verify the whistleblower's identity and certify that to the best of their knowledge, the information and TCR (Tip, Complaint or Referral) form is complete and accurate. The filing and administrative procedures for the bounties are highly formalised in terms of SEC forms and regulations.[374]

### 3. The Comparative Significance of the Whistleblower Anti-Retaliation Protections under the Dodd-Frank Act

The anti-retaliation part of section 922 of the Dodd-Frank Act includes the following important protections for whistleblowers: '[n]o employer may discharge, demote, suspend,

[373] Delikat and Phillips (n 76) 17:3–17:3:1.
[374] These procedures are completely described in Delikat and Phillips (n 76).

threaten, harass, directly or indirectly, or in any other manner discriminate against a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower.'[375] This anti-retaliation protection includes participation in the following activities:

> (i) providing information to the Commission under the Incentive Programme;
>
> (ii) initiating, testifying in, or assisting in any investigation or judicial or administrative action of the commission based upon or related to such information;
>
> (iii) making disclosures that are required under SOX, the SEC Act of 1934, or other laws and regulations under the jurisdiction of the SEC.

Thus, under Dodd-Frank the anti-retaliation protections apply regardless of whether a monetary reward is available.[376] Interestingly, it is much easier to qualify for anti-retaliation protection than a bounty under the SEC Whistleblower Program.

Since the anti-retaliation provision uses the phrase 'because of' to attribute causation between the protected activity and the employer's decision, the causative link is more similar to that prescribed by Title VII than SOX. As discussed earlier in this chapter, the term '[b]ecause of' imposes a stricter standard than the alternative 'contributing factor' test. In *Lawrence v International Business Machine Corp*,[377] the Southern District of New York compared the Dodd-Frank anti-retaliation provisions with those contained in the FCA:

> Like the FCA, the Dodd-Frank whistleblower provision uses the phrase 'because of' to describe the causal connection that must be established between the protected conduct and the adverse employment action. Accordingly, for the reasons set forth above, the plaintiff must demonstrate that his employment would not have been terminated but for his protected conduct.[378]

[375] 15 USC s 78u-6(h)(1)(A).
[376] 17 CFR s 240.21F-2(b)(iii).
[377] *Lawrence v Int'l Bus Mach Corp*, No 12CV8433(DLC), 2017 WL 3278917, 1 (SDNY August 1, 2017).
[378] ibid 11.

Consequently, under the Dodd-Frank Act the claimant bears the more difficult burden of proving that the protected activity was the sole motive for the adverse employment action (i.e. that 'but-for' the protected activity, the employee claimant would not have been treated adversely). The employee cannot use the more favourable mixed-motive approach discussed earlier. Therefore, it is harder for whistleblowers to obtain relief under the Dodd-Frank Act than SOX or WPA.

Notwithstanding the fact that section 922 of the Dodd-Frank Act was the inspiration for the Chilean version of an SEC Whistleblower Program, the relevant Chilean law does not cater for anti-retaliation protection for employees. Article 86 of Law No 21.314 in Chile protects contractors but ignores employees:

> Article 86. It is prohibited to terminate the contracts of service of an anonymous denouncer [whistleblower], or suspend the operation of these contracts, because the whistleblower collaborated with an investigation [of the Commission].[379]

In comparative law, the protection for contractors is usually secondary. Contractors are usually corporations; however, their employees are protected against retaliation.[380] In general, employees are the primary focus of protection for whistleblowing rather than contractors. As such, the failure of Chilean law to extend the protection to employees is anomalous and this limited scope of protection only makes sense when considered in light of the general failure of Chilean lawyers, policymakers and politicians to understand the nature and statutory origins of whistleblowing.

## F. The Constitutional Protection for Whistleblowers in the US

### 1. Section 1983 of the Civil Rights Act of 1871

Since 1968 and the landmark case of *Pickering v Board of Education*,[381] whistleblowers in the public sector can rely on the US Constitution to provide redress in respect of retaliatory actions. Before *Pickering*, legal doctrine considered public employment a privilege, and the

[379] Law No 21.314 (n 55).
[380] For SOX, see *Lawson v FMR LLC*, 571 U.S. 429 (2014); for the FCA, see 31 U.S.C. § 3730(h).
[381] *Pickering v Bd of Ed*, 391 US 563 (1968).

US government was entitled to constrain speech at discretion. This doctrine was summarised in the opinion of Justice Holmes in a case of discrimination for political reasons:

> [T]here is nothing in the Constitution. . . to prevent the city from attaching obedience to this rule as a condition to the office of policeman. . . The petitioner may have a constitutional right to talk about politics, but he has no constitutional right to be a policeman.[382]

Such a restrictive position on free speech rights was overruled during the second part of the 20th century when the Supreme Court in the case of *Wieman v Updegraff* accepted that a public employee speaking as a citizen was protected by the Constitution.[383]

For context, it is important to stress that the US Constitution itself does not provide remedies to enforce rights. However, section 1983 of the Civil Rights Act of 1871 (part of which is known as the 'Ku Klux Klan Act') regulates a cause of action for deprivation of constitutional and legal rights committed by a person acting under colour of law.[384] The legal term '[u]nder colour of law' is a clear reference to 'state action'.[385] In terms of section 1983, a plaintiff can recover damages against the individual who acted under the colour of law or attain injunctive relief to stop the violation of his rights. In its original conception, the Ku Klux Klan Act aimed to enforce the 14th Amendment of the Constitution (which established equal rights for formerly enslaved people after the Civil War) against reluctant states.[386] Therefore, the law is directed at individuals acting under the authority of any state rather than at the federal government. Although this law was not enacted to encourage whistleblowing (akin to the case of the FCA), it has developed into one of the main sources of protection for whistleblowers.

Whilst most US statutes on whistleblowing are drafted to protect a specific activity, section 1983 is a miscellaneous civil rights provision. The cause of action it regulates is regarding violations of constitutional and legal rights, often intersecting with other branches of the law. A non-exhaustive list includes unreasonable searches and seizures and unreasonable or

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[382] *McAuliffe v Mayor of New Bedford*, 29 NE 517, 517–18 (Mass 1892).
[383] *Wieman v Updegraff*, 344 US 183 (1952). See Modesitt, Schulman and Westman (n 88) 8-13, 8-14.
[384] 42 USC § 1983. See David W Lee, *Handbook of Section 1983 Litigation* (Wolters Kluwer 2022) 1-3; Sheldon H Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (Thomson Reuters 2021) 3-5.
[385] 'Color of Law' in Bryan Garner (ed), *Black's Law Dictionary* (11th edn, West 2019).
[386] Nahmod (n 384) 6-7.

excessive force during an arrest or detention (Fourth Amendment); protection against the government taking property (Fifth Amendment); protection against excessive bail and cruel and unusual punishment (Eighth Amendment); substantive due process and equal protection claims (14th Amendment); and infringement of the freedom of speech (First Amendment).[387] Freedom of speech or the First Amendment violations are among the major areas of whistleblowing litigation in the US.

A section 1983 action is not the same as the common law action of wrongful discharge for violation of public policy. In his comparative work on freedom of expression in the US and France, Morvan seems to mix up these two causes of action. When Morvan introduces the action for infringement of the First Amendment, he links it with the employment at-will rule regarding the termination of employment.[388] All the case law he cites is based on section 1983, which is only available to employees in the public sector where the employment at-will rule does not apply.

Morvan asserts that 'the First Amendment proves to be of little help when a worker initiates an action for wrongful discharge claiming that he is a victim of reprisals and guilty only of expressing himself'. He continues by complaining that: '[f]reedom of expression offers workers a very frail shelter. In most cases, the public policy exception is not applicable because the Constitution does not provide the necessary material'.[389] Morvan does not seem to appreciate the differences between the federal action under section 1983 for infringement of the Constitution and the state action for the common law tort of wrongful discharge against public policy. This confusion is not inconsequential: it illustrates how Morvan and other legal comparatists can make wrong assumptions about how their domestic protection compares with the US law.

Further, the First Amendment restrains government action: 'Congress shall make no law . . . abridging the freedom of the speech or the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.'[390] There is no equivalent provision for the private sector. Therefore, protection against retaliation with

[387] Lee (n 384).
[388] Morvan (n 24) 1017.
[389] ibid 1018.
[390] US Constitution, 1st amendment.

respect to the exercise of the constitutional freedom of speech is only available in the public sector. Public interest in the speech is required in order to qualify as whistleblowing (protected speech). Where the retaliation is due to the political affiliation of the employee[391] (also protected by the First Amendment), there is a cause of action under section 1983, but it is not a case of whistleblowing.

In *Pickering*, the US Supreme Court addressed the criticism of the employer's workplace policies.[392] Mr Pickering was a schoolteacher who published a letter in a newspaper, opposing the Board of Education's tax campaign to raise funds and was dismissed after publishing the letter. The question before the US Supreme Court was whether the employee's opposition to an increase in taxes was protected speech. To resolve the dispute, the Court reasoned that: '… the problem is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees'.[393] Consequently, the Court held that the discussion about school funding was a matter of public concern, and the question of how to fund and spend public money is open to debate amongst citizens. Therefore, the interests of teachers, as citizens, to talk without fear of retaliation about these public issues prevailed over the interests of the Board.

*Pickering* is not a whistleblowing case, but a precedent for the whistleblowing case law built upon the First Amendment. Since *Pickering*, a two-part test has been applied to determine whether reporting wrongdoing is protected speech: the first part of the test must determine whether the speech is of public concern; the second part must evaluate whether the interest of the employee in free speech outweighs the interests of the employer in controlling workplace discipline.

The fact pattern in *Garcetti* provides a useful prototype of a whistleblowing retaliation claim for an infringement of the First Amendment. After reporting purported misconduct in prosecuting a case, Mr Ceballos suffered adverse treatment in his employment position as a Deputy District Attorney. He wrote a memo recommending the dismissal of the case after

[391] See *Rutan v Republican Party*, 497 US 62 (1990); *Branti v Finkel,* 445 US 507 (1980); *Elrod v Burns*, 427 US 347 (1976).
[392] *Pickering* (n 381).
[393] ibid 568.

visiting the crime scene and finding that the affidavit contained factual misrepresentations. Mr Ceballos made multiple attempts to convince his colleagues, but they discarded his warnings. After this episode, Mr Ceballos was transferred to a different courthouse, reassigned from his deputy to a trial deputy position and was rejected for promotion. Although the court did not find for Mr Ceballos, the case is considered a landmark whistleblowing case litigated under section 1983. In *Garcetti*, the US Supreme Court rejected the claim because the speech was made pursuant to an official capacity. Its rationale was that: '[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise the employer itself has commissioned or created.'[394] The first step of the *Pickering* test failed, and the Court did not proceed to balance the interests involved.

### 2. The Elements of a Whistleblowing Claim for Infringement of the First Amendment

According to Lee,[395] a First Amendment retaliation claim should comply with the following requirements:

> (1) the speech must have been made pursuant to an employee's official capacity;
>
> (2) the speech must have touched on a matter of public concern;
>
> (3) the government's interests, as an employer, in promoting the efficiency of the public service must have been sufficient to outweigh the employee's free speech interest;
>
> (4) the protected speech must have been a motivating factor in the adverse employment action; and

[394] *Garcetti* (n 158) 421.
[395] Lee (n 384).

> (5) the government must have reached the same employment decision in the absence of the protected conduct.[396]

Owing to the fact that the protected activity is described in statutory language, the requirement listed as number (3) is not part of the statutory protection for whistleblowers. As noted above, a judicial standard is only required when the protected activity is not described in the statute.[397]

As in other employment retaliation cases, there is a shift in the burden of proof. Experience teaches us that the employer will have better access to evidence, and it is common for the challenged decision to be covered by a pretext. Direct evidence of the 'motive' will not be available for the plaintiff employee. Indeed, the causative link between the protected speech and the adverse employment action requires lessening the burden on the plaintiff. As in direct discrimination cases, in terms of section 1983 litigation the plaintiffs should present indirect evidence to create a *prima facie* case of infringement of their constitutional rights. Thereafter, the employers should demonstrate that they would have made the same decision regardless. The last step is that the plaintiff must prove that the employer's motive is a pretext.

In *George v Walker*,[398] a First Amendment case, the Seventh Circuit accepted that the plaintiff employee could establish a *prima facie* case by showing that the protected activity was one of the contributing factors to the detrimental action:

> Once a plaintiff demonstrates that an improper purpose was a motivating factor in the decision, the burden shifts to the defendant to show that the same decision would have been made in the absence of the protected speech. . . If the defendant carries that burden, the plaintiff must then demonstrate that the defendant's proffered

[396] ibid 6-10, quoting *Helget v City of Hays*, 844 F3d 1216, 1221 (10th Cir 2017).
[397] In *Guja v Moldova*, the European Court of Human Rights delivered a six elements test to determine whether whistleblowing is protected under freedom of speech: (1) Public interest of the disclosure; (2) Authenticity of the information; (3) Alternative channels available to make the disclosure; (4) Damage caused by the disclosure; (5) Good faith; (6) Repercussions suffered by the whistleblower. See *Guja v Moldova* App No 14277/04 (ECtHR, 12 February 2008). See, Lewis and others (n 146) 55 et seq.
[398] *George v Walker*, 535 F3d 535 (7th Cir 2008).

> reasons for the decision were pretextual and that retaliatory animus was the real reason for the decision.[399]

Accordingly, a case of direct discrimination is similar to one for infringement of the First Amendment.[400] The courts have assumed that the contributing factor standard should be applied to attribute causation between the protected speech and the adverse employment action.

It is important to note the differences between these two types of whistleblowing litigation. Unlike Title VII, a whistleblower must comply with three additional steps under section 1983. These additional steps relate to the absence of statutory language describing the protected activity.

### 3. Citizen Speech Versus Duty Speech

The plaintiff must first show that the speech was made as a citizen rather than on an official capacity. In *Garcetti*, the Supreme Court found in favour of the defendant employer because the memo originated in the context of the employee carrying out the functions of a district attorney (duty speech). Conversely, in *Pickering*, the Court found for the plaintiff because he was publishing his letters as a private citizen involved in a public debate.

Drawing a distinction between citizen speech and duty speech can be tricky. The employer could insert infinite tasks in the job description to assert the 'duty speech' defence. As dicta, in *Garcetti* the Supreme Court ruled that employers may not restrict employees' free speech rights by creating excessively broad job descriptions. Thus, the expression of dissatisfaction with working conditions is not whistleblowing. Some form of public interest must be present in the disclosure or report.[401]

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[399] ibid 538. See also *Mt Healthy City School District Board of Education v Doyle*, 429 US 274 (1977), where it was held that the defendant should show by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct by the employee.

[400] See *Walton v Powell*, 821 F3d 1204, 1211 (10th Cir 2016), where it was stated that the *McDonnell Douglas* framework is of limited value beyond cases of indirect evidence and single motivation.

[401] In contrast, the French Supreme Court has stated that: '[e]xcept in the case of manifest abuse, an employee enjoys freedom of speech inside an [sic] outside the company unless the employer set up justified and

In *Connick v Myers*, the plaintiff employee would have had greater bandwidth to succeed in their claim under French law. Deckert and Sweeney explain how loose the understanding of 'whistleblowing' and 'freedom of expression' is in France: 'In principle, freedom of speech is not limited regarding topics or recipients. Therefore, an employee can blow the whistle about any topic.'[402] According to these authors, the public concern element seems to have no relevance.

The distinction between expressing dissatisfaction with working conditions and whistleblowing is a common feature of the discussions of scholars who hail from outside the Anglo-American tradition. In his comparison of free speech laws in the US and France,[403] Morvan says the following with respect to the 'public concern' element developed by the US Supreme Court and its application in US and French laws:

> Probably no supreme tribunal in Europe would ever affirm that a worker employed in the public sector could somehow ever not act as a citizen: freedom of expression is an innate prerogative of every human being regardless of whether or not a person performs work or expresses himself on a matter of public, personal, or professional concern.[404]

According to Morvan, the contrast in the underlying ideology that undergirds employment law in Continental Europe and the US is one of the factors that explains this difference in approach. In the US, Morvan explains, an ideology of a free market and the 'myth of a classless society' reign supreme, where workers do not attribute their problems to the external struggle between capital and labour. On the Continent, Marxist critiques of liberalism have generated a system that has benefited individuals to offset the employer's authority and power.[405] In this way, expressing dissent against the employer is a mode of furthering social resistance to the power of capital.[406]

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proportionate restrictions regarding the employee's position'. Cass Soc, 14 Dec 1999, No 97-41.995, cited in Deckert and Sweeney (n 73) 135–36.

[402] Deckert and Sweeney (n 73) 136.

[403] Morvan (n 24).

[404] ibid 1019.

[405] ibid 1016–17.

[406] Morvan's explanation makes sense. In 'free' America, employers make decisions to further their business interests. For free market theorists, employees are isolated from the business risks that the employer

However, this ideological dichotomy may not be as applicable to countries such as Chile. Chile has transplanted whistleblowing legislation from the US to combat corruption and other abuses beyond the employment relationship, rather than as a means of diminishing the managerial prerogative. Therefore, promoting whistleblowing as mere dissent with working conditions does not necessarily impact corruption in the way that real whistleblowing does. If whistleblowing is seen as complaining about working conditions, the Chilean Labour Code already provides protection for this activity. Therefore, defending the adoption of an incarnation of whistleblowing law that does not touch upon the public interest turns the category into something irrelevant.

### 4. The Pickering Balancing Test for Whistleblowers

Another element for a First Amendment case is the *Pickering* balancing test, which is a significant factor in whistleblowing cases. This test aims to strike a balance between the public interest in maintaining an efficient public service and the employee's interest in free expression.[407] The US Supreme Court reiterated this requirement in *Garcetti*, ruling that when a public servant speaks up 'as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences'.[408]

Following such precedent, the US courts have rejected whistleblowing claims where disclosing information risks disrupting governmental functions. For example, in *Henry v Johnson,*[409] a policeman denounced an alleged cover-up within the police department regarding the drowning of an individual under custody. The plaintiff employee spoke to the

(entrepreneur) bears. In principle, employees receive fixed contractual salaries regardless of the success or failure of the business. By taking commercial risks, employers (entrepreneurs) bear the uncertainty of benefits or losses. Applying this economic analysis to the instant case, the 'public concern' requirement works as a gatekeeper concept to prevent employees who do not suffer the risk of the decisions from exercising a kind of veto. Allocating the decision-making rights to a constituency (e.g. employees) who bear none of the risks would interfere illegitimately in the market process. As the employers' creditors, if there are negative impacts, employees have standing to sue regarding their fixed salaries and labour rights; the law considers these claims to be protected activity from retaliation. The public concern element ensures that whistleblowing is not converted into a catch-all category that enables employees to interfere with the managerial prerogative. See Friedrich A Hayek, *The Constitution of Liberty* (Chicago University Press 1978) 118–30.

[407] *Pickering* (n 381) 668.

[408] *Garcetti* (n 158) 423.

[409] *Henry v Johnson,* 950 F3d 1005 (8th Cir 2020).

press and relatives of the victim about the alleged corruption. After recognising the public concern about the speech, the Court found for the defendants, stating that Mr Henry should not speak directly to the press and relatives, spreading allegations without providing evidence of the cover-up; further, the revelations had an adverse effect on cohesion in the workplace. Therefore, notwithstanding the public concern in the speech, the Court ruled that the interest of police's work outweighed the employee's interest in free speech.

In arriving at this conclusion, the Eighth Circuit applied the *Pickering* test as developed in *Bowman v Pulaski County Special School District*,[410] which considers the following elements in the balancing test:

> (1) the need for harmony in the office or workplace;
>
> (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
>
> (3) the time, manner, and place of the speech;
>
> (4) the context in which the dispute arose;
>
> (5) the degree of public interest in the speech; and
>
> (6) whether the speech impeded the employee's ability to perform his or her duties.

However, these elements are not exhaustive to answer the question of which interest should prevail. The available evidence shows that this is an area of law is very contextual or fact specific.

To illustrate, notwithstanding that the plaintiff employee meets the section 1983 requirements for infringement of the First Amendment, the defendant employer can succeed by raising the 'disruption' defence. This defence, developed in *Connick*,[411] is as follows: '[t]he

[410] *Bowman v Pulaski County Special School District*, 723 F2d 640 (8th Cir 1983). See also *Belk v City of Eldon*, 228 F3d 872, 880 (8th Cir 2000); *Hemminghaus v Missouri*, 756 F3d 1100, 1108 (8th Cir 2014); *Henry v Johnson* 950 F3d 1005 (8th Cir 2020).
[411] *Connick v Myers*, 461 US 138 (1983).

limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships'.[412] It is interesting to note how the courts have ruled that the disruption defence is inverse to the public interest in the speech. Thus, in *Melzer v Board of Education*,[413] the Second Circuit found that '[t]he more speech touches on matters of public concern, the greater the level of disruption the government must show'.[414]

Under the same rationale, when employees work for organisations that require high standards of discipline, such as law enforcement agencies or quasi-military forces, the courts have been reluctant to find for the plaintiff employees. For example, in *Weaver v Chavez*,[415] the 10th Circuit held that the plaintiff's complaints about political patronage in recruitment to the City Attorney's Office were not protected speech, even though there was a public concern: the recurring emails, phone calls, and conversations complaining to the office and applicants impaired discipline in the workplace. The court reasoned that the employer should not tolerate that disruption as '[t]his legal doctrine is beneficial for a well-functioning public law office, where a 'wide degree of deference' is appropriate given that a 'close working relationship' between lawyers is "essential to fulfilling public responsibilities"'.[416]

Similarly, in *Belcher v City of McAlester,*[417] a firefighter raised concerns about the proposed purchase of a fire truck. The firefighter contacted three members of the City Council to warn them that the proposed truck was overpriced and would not meet the fire suppression needs of the city. According to the fire department's policy, firefighters were prohibited from contacting the City Council members outside public meetings. Consequently, the Fire Chief issued a written reprimand to the firefighter because his actions were detrimental to the Fire Department and the city. When the reprimanded worker sued the Fire Chief, the court found for the employer, regardless of the public concern involved in the purchase, stating that:

[412] ibid 154.
[413] *Melzer v Board of Education of City School of City of New York*, 336 F3d 185 (2d Cir 2003).
[414] ibid 197.
[415] *Weaver v Chavez*, 458 F3d 1096 (10th Cir 2006).
[416] ibid 1103.
[417] *Belcher v City of McAlester, Oklahoma*, 324 F3d 1203 (10th Cir 2003).

'[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.'[418]

Despite this trend, in the context of workplace environments where hierarchy plays a role in the performance of the job, several courts have held that disruption is an unavoidable part of whistleblowing. The model decision is *Porter v Califano*, where the Fifth Circuit held that: 'an employee who accurately exposes rampant corruption in her office may undoubtedly disrupt and demoralise much of the office. However, it would be absurd to hold that the First Amendment generally authorises corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.'[419] In contrast to the employees in the *Weaver* and *Belcher* cases, Mrs Porter worked as a clerk-typist at the Southeastern Programme Service Centre for the Social Security Administration. As such, respect for hierarchy was not essential for her performance.

## G. Conclusion

The variety and originality of US whistleblowing laws have attracted considerable attention from legal comparatists. However, the relationship of dependency between whistleblowing litigation and employment discrimination law has not been properly explored or understood by these comparatists. Analysing the consequences of this relationship should be a central concern for legal comparatists, particularly for scholars from countries which do not share the same litigation model for direct discrimination claims. In the US, the basic framework of an anti-retaliation case involves the causal link between a protected activity and an adverse employment action. Title VII recognises two causation standards: the 'but for' and 'contributing factor' tests.

Due to the fact that the 'protected activity' concept is interchangeable with the 'protected status' concept, direct discrimination shares the same analytical framework as anti-retaliation cases. Thus, under the FCA and the Dodd-Frank Act a 'but-for' causative link is required. In

[418] ibid 1209.
[419] *Porter v Califano*, 592 F2d 770, 773–74 (5th Cir 1979).

the case of the WPA, SOX and section 1983, the much laxer ‘contributing factor’ standard is used to attribute liability.

Some scholars and international organisations have recommended adopting the US framework for protecting whistleblowers, disregarding the significant question of whether it is even possible for other countries to replicate that framework. In countries, such as Chile, where a protected status or activity is not determinative to succeed in a discrimination case, the question of legal causation has remained irrelevant in cases of direct discrimination and employment-related retaliation. Therefore, Chilean law does not seem to fit with the US framework. As such, a thorough revision of the Chilean structure of direct discrimination should be an unavoidable step if the intention is to transplant the American whistleblower protection model.

# Chapter 4: The Protection of Whistleblowers in the Common Law in the US: The Public Interest in the Workplace

## A. Introduction

This chapter explores the US common law protection for public interest disclosures from a comparative perspective. Comparative studies in this field have focused on constitutional and statutory protection, overlooking the important role of the common law. In the US, the common law has developed an original suite of decisions, some of which have since been codified in statutes and have shaped the interpretation of US whistleblowing laws. For countries, such as Chile that have adopted statutes inspired by the law in the US, it is crucial to understand the interaction among the sources of law to determine whether the transplanted legislation can replicate the intended results.[420]

This chapter deals with two issues: the autonomy of whistleblowing as a common law mechanism in US employment law, and its role from a comparative perspective. The chapter will underscore how the existence of a public interest beyond the parties to the employment relationship is crucial for understanding the US (common) law of whistleblowing.

This chapter is organised as follows. Part I deals with the legal doctrine of public policy and how it functions as an exception to the general rule in US employment law that an employer may terminate an employee's employment at will. It explains why US employment law has a different configuration than in the rest of the world and how public interest disclosures are a central part of this difference. Part II focuses on 'passive' and Part III on 'active' whistleblowing. A comparative evaluation is undertaken, highlighting similarities and differences between US and Chilean law.

[420] Watson, *Legal Transplants* (n 17).

## B. The US Public Policy Exception

### 1. A Forgotten Source of Whistleblowing Law

Legal comparatists have dedicated little attention to the US common law of whistleblowing. In an influential paper on comparative law, Fasterling has suggested that, in the US statutes are the ultimate source of whistleblower protection when no free speech shield or claim is available. He argues that:

> [W]here freedom of expression is an insufficient basis, whistleblowers, as in the case of the United States, are dependent on statutes that explicitly authorise or encourage certain types of disclosures. For example, section 806 of the United States of the US Sarbanes-Oxley Act 2002 only protects disclosures pertaining to infringements of that statute and other US federal securities laws.[421]

Fasterling completely overlooks the role of the common law as a source of protection for whistleblowers in the US. Indeed, the principal form that whistleblowing protection takes in the US lies in the common law governing the dismissal/discharge of an employee in a manner contrary to public policy where that employee blows the whistle in the public interest and the employer retaliates by dismissing them.

Under US law, the default threshold of protection for whistleblowers is located within the tort of employee dismissal/discharge against public policy.[422] This cause of action, often referred to as 'wrongful discharge', applies to situations where the protection for free speech does not apply (e.g. for employees in the private sector) or when there is no specific whistleblower statute in place. In these cases, an employee who blows the whistle, may have the right to sue under the public policy exception. However, the dismissal of an employee is an absolute requirement for the protection to arise.

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[421] Fasterling (n 3) 335.

[422] While most states have adopted the tort theory of damages for wrongful discharge cases that violate public policy, a few states have determined that such actions are based on contractual principles. This results in the exclusion of emotional and punitive damages. See *Restatement of the Law, Employment Law* (n 247) s 5.02 comm g. From a stigma perspective on punitive damages on whistleblowing, see David Lewis, 'Stigma and Whistleblowing: Should Punitive Damages Be Available in Retaliation Cases?' (2022) 51(1) Industrial Law Journal 62.

The public policy exception is an original legal doctrine that American state law (as opposed to federal law) has developed to control the employment at-will rule governing employee dismissals. In contrast with most Western jurisdictions, in the US, there is a presumption that the employment relationship is at will: it may be terminated by either party at any time and for any reason without serving prior notice. Horace Gray Wood developed the at-will doctrine in his treatise on the law of 'Master and Servant'.[423] For Wood, when the parties agreed upon no fixed duration of employment (he called it 'general hiring'), both the master and the servant could terminate it at any moment.[424] Since the at-will rule applies to both parties, the employer can fire at will, and the employee can quit at will. Nevertheless, the main consequence of the doctrine has been the arbitrary use of the employer's managerial prerogative to dismiss.

Whilst the at-will rule of termination flourished in a jurisdiction that was suspicious of legislative intervention in employment, other industrial countries enacted legislation limiting the employer's power of dismissal, giving rise to 'just-cause' regimes. Under these, employers could only dismiss employees for one of the reasons included in a fixed list of valid reasons prescribed by law.[425] Historically, US courts rejected any legislative intervention that disapplied the free will of the parties. That was the case in *Lochner v New York*,[426] where the Supreme Court declared a regulation ordering maximum working hours for New York bakers to be unconstitutional – all in the name of the doctrine of freedom of contract. The accepted view was that, since employees and employers were equal citizens there was no need for legislative intervention.[427] Under the same rationale, in *Adkins v Children's Hospital,* the Supreme Court struck down a minimum wage mandate for female workers.[428] Employment

[423] HG Wood, *A Treatise on the Law of Master and Servant: Covering the Relation, Duties and Liabilities of Employers and Employees* (2nd edn, Bancroft-Whitney Company 1877).
[424] The adoption of the at-will termination doctrine separated the US from the old English law rule that prescribed the one-year hiring: '[w]ith us the rule is inflexible, that a general or indefinite hiring is prima facie hiring at will, and if the servant seeks to make it our yearly hiring, the burden is upon him to establish it by proof. . . [I]t is an indefinite hiring and determinable at the will of either party'. Wood (n 423) 283.
[425] There are three essential components of the just cause system: first, a substantive rule prohibiting dismissals without fair cause; second, a procedure involving a claim for wrongful discharge; and third, legal remedies for unfair dismissal. See Guy Davidov and Edo Eshet, 'Intermediate Approaches to Unfair Dismissal' (2015) 44 Indus L J 167, 170.
[426] *Lochner v New York* 198 US 45 (1905).
[427] Randy E Barnett and Howard E Katz, *Constitutional Law: Cases in Context* (Wolters Kluwer 2013) 853 et seq.
[428] *Adkins v Children's Hospital*, 261 US 525 (1923).

protection legislation enacted in the US was considered an exceptional regime that derogated the private ordering agreed upon by the parties.

As such, there is a cultural predilection for private agreements over legislative intervention in the US. There, the doctrine of freedom of contract has achieved limits not reached in other jurisdictions. For instance, whilst the rest of the world enacted legislation to control the managerial prerogative to terminate an employment contract, in the US the system of termination at-will has remained the default rule to this day.[429] The extent of statutory intervention is not as pervasive as in civil law jurisdictions. It includes areas, such as discriminatory dismissals (Title VII) or anti-union dismissals (unfair labour practice under the National Labor Relations Act of 1935).[430] The legal dogma of freedom of contract holds that the parties can reach better agreements themselves than any agreement imposed from outside by the force of legislative intervention. Therefore, in general the managerial power to fire an employee should not be restricted.

The argument posits that legislative intervention in the employment relationship is deemed appropriate and lawful only when the interests of third parties or the community are involved or adversely affected. If there is a conflict between a dismissal and the public interest, intervention in the employment relationship is justified. The crucial question becomes: when do such conflicts arise? This inquiry is addressed by the rationale underlying the tort of the public policy exception. A typical example of this exception occurs when an employee is terminated for participating in an activity mandated or encouraged by a public policy, regardless of its direct connection to their employment.[431] It supposes that nobody should do something that 'has a tendency to be injurious to the public or against the public good'.[432] An example is when an employee gives testimony at a trial against the employer and, as a result, the employer fires them. According to the at-will rule, such a dismissal would be lawful.

[429] Richard Epstein, 'In Defense of the Contract at Will: A Comment' (1989) 10 Cardozo L Rev 1625.
[430] Glynn, Sullivan and Arnow-Risman (n 233) 561. For a comparative view of the US termination system, see Joanna Howe, Esther Sánchez and Andrew Stewart, 'Job Loss' in Matthew W Finkin and Guy Mundlak (eds), *Comparative Labour Law* (Edward Elgar 2015) 268.
[431] Glynn, Sullivan and Arnow-Risman (n 233).
[432] *Safeway Stores* v *Retail Clerks Association*, 261 P2d 721, 726 (Cal App 1953).

Nevertheless, courts have barred discharges when they harm the public under the common law tort of wrongful discharge.

The landmark case expounding the public policy exception is *Petermann v International Brotherhood of Teamsters.*[433] There, the plaintiff was a union employee subpoenaed to take a deposition before the California Legislature. The union treasurer (employer) 'instructed him to make certain false and untrue statements in the testimony he was to give before the above committee'.[434] When the employee refused to lie to the authorities, his employment contract was terminated. The California Court of Appeal found that the Penal Code already contained a public policy provision forbidding perjury, reasoning: '[i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.'[435]

Under US common law, felonies and crimes are the most robust sources of public policy, but the courts have recognised broader sources of public policy to restrict the at-will rule. The public policy exception now works as a form of judicial control of the at-will termination rule. Although the public policy exception fills the gap to control ill-motivated discharges, the courts have been reluctant to expand the tort beyond the public interest. Whilst in most countries the rules of termination are designed as a general cause of action in the interests of the employee, under US law, the public policy exception is not designed to protect the private interests of the parties to the employment relationship, but third parties and the community. Thus, in *Miller v SEVAMP*,[436] the Supreme Court of Virginia stated that the public policy 'exception to the employment-at-will doctrine [is] limited to discharges which violate *public* policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general'.[437]

[433] *Petermann v International Brotherhood of Teamsters*, 344 P2d 25 (Cal App 1959).
[434] ibid 26.
[435] ibid 27.
[436] *Miller v SEVAMP*, Inc, 362 SE2d 915 (Va 1987).
[437] ibid 918.

In *Miller*, the plaintiff was fired after testifying before a panel investigating some grievances filed by a fellow employee. The court had to decide whether the breach of the internal manual, where the procedure for grievances was regulated, involved an element of public interest. The court dismissed the employee's appeal, arguing that: 'such a retaliatory act would impinge only upon private rights established by the employer's internal regulations [and it] would have no impact upon any public policy established by existing laws for the protection of the public generally'.[438] Consequently, an interest of the parties beyond the employment relationship is crucial for the operation of the public policy exception.

For comparative purposes, three key characteristics of the US common law governing whistleblowing emerge from the preceding discussion. First, the law protecting whistleblowers has developed as part of the public policy exception and as a threshold to control dismissals. Second, US rules on the regulation of employment termination operate in reverse compared to the rest of the world. In many jurisdictions, employers can terminate for one of the causes included in a list of just causes prescribed by the law; US employers can terminate at will unless the dismissal breaches public policy. Third, statutes regulating just causes for termination protect the employee's interest against abusive dismissals, whereas the public policy exception is aimed at protecting the community and third parties outside of the employment relationship.[439] The combination of these elements makes the US common law entirely unique, with no apparent functional comparative equivalent in other jurisdictions. The UK is somewhat comparable in the sense that any dismissal of an employee for making a protected disclosure in the public interest is automatically regarded as unfair dismissal.[440]

One of the most salient divergences between UK and US law on whistleblowing is the source of law. In the US, whistleblowing protection law developed as a common law cause of action to recover damages for discharge in violation of public policy (the action of wrongful discharge).[441] This common law cause of action is accompanied by several statutes that have

[438] ibid 919.
[439] *Employment Coordinator* (Thomson Reuters, Rel 25, December 2016) § 1:55.
[440] See the Employment Rights Act 1996, ss. 43A-43K, 47B, 48 and 103A.
[441] On the other hand, in UK common law whistleblowing developed from a public interest defence designed to shield employees who disclose wrongdoing from liability for breaching the implied duty of trust and confidence. See Lewis (n 171) and Cripps (n 167).

been enacted to protect whistleblowers from employment retaliation in specific areas. Irrespective of this difference, at a conceptual level common law in both the US and the UK has developed the 'public interest defence' for the action of breach of confidence and defamation (in English law, this is codified in the Defamation Act 2013).[442] The paradigmatic 'public interest defence' case arises when the defendant speaks out against their employer by making a disclosure, and the employer responds with a suit for breach of confidentiality.[443] Since the enactment of legislative protection for whistleblowers, litigation on the grounds of the public interest defence has become rare, but the public policy exception of tort law remains an important source of whistleblowing law in the US.

2. Comparative Analysis of the Public Policy Exception: Protecting the Public Interest through Employment Law

This chapter aims to fill a gap that exists in the current comparative legal studies literature on the US common law of whistleblowing. For comparatists, the sources of protection for public interest disclosures seem to be the statutes and the Constitution (the First Amendment in the case of the US). The reason for this is that comparing legislation with legislation is a natural exercise. If two countries have statutes as a source of whistleblowing law, comparing those statutes seems the natural way to proceed.

However, such comparisons are not necessarily possible when the countries belong to legal families with different sources of law. In such cases, it can be misleading to project the sources of law of the host legal system onto the foreign jurisdiction. For countries, such as Chile, where the primary source of law is legislation (rather than doctrinal precedents in case law), it can be a major challenge to transplant a legal institution, such as whistleblowing that is

[442] The Defamation Act 2013 has codified part of the common law. According to Bowers and others, the Act 'does not attempt to define what is meant by "public interest" on the basis that it is (according to the Explanatory Notes to the Act) "well established in the English common law"'. Bowers and others, *Whistleblowing. Law and Practice* (3rd edn) (n 169) 538. See also David Lewis, 'Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media, and Alleged Wrongdoers?' (2018) 47 Industrial Law Journal 339 and David Lewis, 'Whistleblowers and the Law of Defamation: Time for Statutory Privilege?' (2005) 3 Web Journal of Current Legal Issues <https://www.bailii.org/uk/other/journals/WebJCLI/2005/issue3/lewis3.html> accessed 30 September 2025. In the US, the 'public interest' defence is regulated as a conditional privilege, see *Restatement (Second) of Torts* (American Law Institute 1965) s 598.

[443] Lewis (n 161). For a common law background in the UK law, see Lewis (n 171).

rooted in the common law of torts and has no parallel in civil law jurisdictions. Understanding the interaction between the relevant statutes and the common law is, therefore, crucial for a complete picture of the whistleblowing law under examination.

In the US, the public policy exception to at-will employment constitutes the first threshold of protection for whistleblowers. Even though statutes on whistleblowing usually preclude the actions available at common law, this tort is used in a great deal of litigation before the courts.[444] In civil law countries, analysing the public interest element developed in the cause of action for wrongful discharge is crucial for avoiding confusions between whistleblowing and other domestic legal phenomena. For example, Chilean employment law shields employees who file complaints against their employer (i.e. grievances about salaries or working conditions), but a public interest is not required to confer protection. In contrast, US law also protects employees who disclose information in the interest of the community about illegal activities of their employer.

As outlined below, civil law scholars have often missed this distinction and have misclassified situations as whistleblowing even when no public interest is involved. For instance, Morvan confuses whistleblower protection with anti-retaliation discrimination protections. In his article, he quotes the anti-retaliation provision of Title VII, which provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programmes, to discriminate against any individual, or for a labor organisation to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[445]

[444] To study the preclusion of common law protection by statutory law, see *Restatement of the Law, Employment Law* (n 247) s 5.01 comm d, e, f.
[445] 42 USC s 2000e–3., quoted in Morvan (n 24), 1029.

Morvan, therefore, concludes that: [t]itle VII of the Civil Rights Act of 1964 offers extended protection to whistleblowers.[446] This Thesis disagrees with Morvan on the basis that Title VII does not regulate protection for whistleblowers, but rather constitutes a form of anti-retaliation (anti-victimisation) protection for employees who have participated in discrimination proceedings or have opposed an employer's discriminatory decisions. Such cases of retaliation, where only the employee's interests are in question, are not considered whistleblowing disclosures under Anglo-American law because they lack a public interest component.

There is similar confusion over free speech protection and whistleblowing. In civil law countries, free speech protects employees who speak out against their employer regardless of any public interest involved in the disclosure. For some civil law scholars, it is irrelevant whether the employee has made a complaint because of the employee's failure to pay wages or salaries (a private interest) or corruption (which engages the public interest). Fasterling has adopted this erroneous interpretation, since he disregards the public interest element when he observes that: '[any employee] criticism of work conditions that do not amount to a breach of legal obligations would probably not fall within the ambit of many whistleblower statutes but could still be treated as an exercise of freedom of expression'.[447] It seems that for Fasterling dissent in the workplace equates with whistleblowing. This does not seem correct. A similar approach is adopted by Deckert and Sweeney, who claim that '[i]n principle, freedom of speech is not limited regarding topics or recipients. Therefore, an employee can blow the whistle about any topic'.[448]

These interpretations are arguably misleading. The fact that employees can defend their own interests against the employer via the right to freedom of speech does not mean that they are engaging in a public interest disclosure. None of these authors provides any reasons to eliminate the public interest element from the definition of whistleblowing. In contrast, under US law, mere workplace grievances do not amount to whistleblowing. Hence, for comparative

[446] Morvan (n 24) 1030.
[447] Fasterling (n 3) 335.
[448] Deckert and Sweeney (n 73) 136.

purposes analysing how the US courts determine the presence of public policy is crucial to the success of a transplant of whistleblowing to civil law countries, such as Chile.

As a result of the public policy element, the range of activities covered by the wrongful discharge tort goes beyond the reporting of wrongdoing. The generally accepted view is that the employer cannot terminate the employment contract when the employee participates in any of the following four protected activities: (1) the employee refuses to commit unlawful acts; (2) the employee files a complaint or charge claiming certain benefits or legal rights; (3) the employee performs a public duty or obligation imposed by law; and/or (4) the employee reports an illegal activity.[449] In the US common law, there is a shared consensus that it is only the reporting of an illegal activity where public interest is involved that constitutes whistleblowing.[450]

Nevertheless, the conduct described in (1) above may be linked to whistleblowing. For instance, an employee who refuses to commit an illegal act when instructed to do so by his employer, and who is subsequently fired, could be considered a classic example of a whistleblower on the basis that the reporting of the wrongdoing is usually preceded by opposition to the act. Modesitt, Schulman and Westman call this form of dissent (when no disclosure has been made yet) passive whistleblowing.[451] Devine and Massarani have argued that whistleblowing laws should protect disclosures and also protect employees who 'refuse to violate the law' in disobedience with their employer's orders.[452] This distinction may be

[449] Mark A Rothstein and others, *Employment Law* (5th edn, West Academic 2015) 750. See also Modesitt, Schulman and Westman (n 88) 2-14. On the other hand, the *Restatement of the Law, Employment Law*, which summarises and coordinates the common law of the different states, considers six protected activities under the public policy exception: 'An employer is subject to liability in tort under section 5.01 for discharging an employee because the employee, acting in a reasonable manner:
(a) refuses to commit an act that the employee reasonably and in good faith believes violates a law or other well-established public policy, such as a professional or occupational code of conduct protective of the public interest;
(b) performs a public duty or obligation that the employee reasonably and in good faith believes the law imposes;
(c) files a charge or claims a benefit in good faith under an employment statute or law, whether or not the charge or claim is meritorious;
(d) refuses to waive a non-negotiable or nonwaivable right when the employer's insistence on the waiver as a condition of employment, or the court's enforcement of the waiver, would violate well-established public policy;
(e) reports or inquires about conduct that the employee reasonably and in good faith believes violates a law or an established principle of a professional or occupational code of conduct protective of the public interest; or
(f) engages in other activity directly furthering a well-established public policy'. *Restatement of the Law, Employment Law* (n 247) s 5.02.

[450] Modesitt, Schulman and Westman (n 88) 2-14. *Employment Coordinator* (n 439) § 1:55.

[451] ibid 7-11.

[452] Devine and Massarani (n 1) 258–59.

significant for civil law jurisdictions such as Chile, where 'active whistleblowing' is not formally recognised, but where employee opposition to unlawful orders constitutes an exception to the duty of obedience.

## C. Passive Whistleblowing or the Right to Refuse to Violate the Law under the US Common Law

### 1. Passive Whistleblowing from a Comparative Perspective

Even when there is no disclosure of any employer wrongdoing, an employee who refuses to commit an illegal act is the paradigmatic case of a passive whistleblower for two reasons: (1) the opposition to performing an illegal act is the first step in a public interest disclosure case, and (2) passive whistleblowing should be treated as whistleblowing because the 'whistleblowing dilemma' is also present at this seminal moment.[453] As the *Restatement of Law, Employment Law* provides: '[t]he employee is subject to two conflicting duties: the duty to the employer to obey the employer' instructions and the duty to the public not to commit illegal acts.'[454]

Differentiating between passive and active whistleblowing is crucial to conferring protection on employees who act in accordance with the public interest (i.e. refusing to commit an illegal act) but do not necessarily report their employers to a third party. Indeed, both types of whistleblowing have different requirements and defences. Recognising which alternative has arisen in a particular case is key for both policymakers and practitioners. Nevertheless, the social relevance of the illegal act (whether refused or reported) is decisive in shaping the public policy exception. Thus, it is not enough for an employee to refuse to perform their job when they believe that an order breaches their contract; they must demonstrate that a breach of public policy is also involved in the order.[455]

Another difference between passive and active whistleblowing is the reliability of the information about the wrongdoing. Passive whistleblowers are the most reliable sources of information. Employees who disobey orders to commit illegal acts have first-hand knowledge

[453] On the 'whistleblower dilemma', see Chapter 1.
[454] *Restatement of the Law, Employment Law* (n 247) s 5.02 comm b.
[455] ibid.

about the wrongdoing. For a factfinder in a court, it is easier to acquire a conviction for wrongdoing when the employee has first-hand knowledge. This situation is relevant when we consider that whistleblowing law should balance the level of knowledge required to gain protection versus the reputational interest of the company. There is a consensus that whistleblowing law should also protect employers against frivolous claims, since the impact of a public interest disclosure lawsuit may be fatal for the reputation and value of a company.[456] When the source of information is remote, the alleged wrongdoing may be more speculative. However, when the employee refuses to participate in the wrongdoing, the certainty of the knowledge's accuracy is higher. As a by-product, the passive whistleblower has not risked the company's reputation because there is no public reporting; the employee has only refused to participate in the alleged illegal act. Modesitt, Schulman and Westman claim that first-hand knowledge and non-disruptive behaviour make passive whistleblowers the perfect candidates for anti-retaliation protection.[457]

Passive whistleblowing has attracted little academic interest so far. That is, even though the opposition to illegal orders in the US is a protected activity that enables employees to claim wrongful termination, there is scant comparative analysis in this area for two reasons. First, there is no jurisprudence on this subject that applies to the entirety of the American Union. As such, the opinion of the highest court in one state is not a binding source of law for another state. As a result, the public policy exception is fragmented across the different states. Second, the common law concept of public policy does not to translate well to civil employment law systems. Even though it is commonplace to say that the public policy exception works as a functional equivalent to the just-cause termination regimes in the rest of the world,[458] the notion of public policy has no comparable meaning in Chilean (and civilian) employment law.

For civil lawyers accustomed to the doctrine of public order (*orden público*), the public policy exception can be challenging to understand and difficult to assimilate into the legal system. In Chile, for example, 'public order' is a specific and separate legal doctrine associated with the laws that are indispensable for the proper functioning of society. But, more confusingly,

[456] Modesitt, Schulman and Westman (n 88) 7-12.
[457] ibid.
[458] Frank J Cavico, 'Employment at Will and Public Policy' (1992) 25 Akron L Rev 1.

in Chilean employment law there is also a specific version of 'public order': this is 'labour public order' (*orden público laboral*), which is associated with the peremptory and unwaivable default rules of employment law.[459] This 'labour public order' protects the employment rules established for the employee's benefit rather than serving as a form of legal inspiration designed to protect society. Indeed, the 'labour public order' has not been invoked in court as a form of protection for third parties beyond the employment relationship. This is a remarkable difference between the conception of 'labour public order' in Chile and the notion of 'public policy' in the US.

In Chilean case law, the concept of 'labour public order' conveys the basic rule issued by the legislature that employment laws cannot be modified or negotiated away by the parties to the employment relationship. For instance, in *Cavada v CODELCO,*[460] the Chilean Supreme Court held that the parties are not entitled to establish a dismissal procedure that alters the rules governing the termination of employment in the Labour Code because those rules are 'labour public order'. In *Cavada*, the employer fired an employee for embezzlement; the employee claimed that, under the applicable collective agreement, the employer had failed to comply with the terms of an internal investigation before invoking the embezzlement regulated by the Labour Code. The Chilean Supreme Court found in favour of the employer, ruling that, by providing for a distinct bespoke internal dismissal procedure in a collective agreement, the parties had unlawfully attempted to alter the termination rules in the Labour Code which constituted mandatory 'labour public order'.[461]

The rationale behind the concept of 'labour public order' lies in the protection of the rules of employment law rather than public policy in the American sense. The *Restatement of Law, Employment Law* establishes that the sources of public policy for the tort of wrongful discharge in the US include:

> (a) federal and state constitutions;
>
> (b) federal, state, and local statutes, ordinances, and decisional law;

[459] Sergio Gamonal and César F Rosado, *Principled Labor Law* (OUP 2019) 100.
[460] Corte Suprema [CSJ] [Supreme Court], 18 June 2008, '*Cavada con Codelco'*, Rol de la causa: 1472-2008 (Chile).
[461] ibid.

> (c) federal, state, and local administrative regulations, decisions, and orders; and
>
> (d) well-established principles in a professional or occupational code of conduct protective of the public interest.[462]

Thus, the US public policy exception is broader than the Chilean concept of 'labour public order'. Whilst legislation protecting the environment, public health and criminal law is not part of the 'labour public order' in Chilean employment law, it is usually considered part of the 'public policy exception' in the US common law.

### 2. Refusal to Commit a Crime

As discussed in *Petermann,*[463] the origin of the public policy exception lies in the law governing discharges for an employee's refusal to commit a crime. Criminal law is one of the most substantive areas of public policy for many societies. When an employee faces the dilemma of obeying the employer and risking criminal sanctions or disobeying the employer and enduring discharge, the courts have incentivised a choice in favour of compliance with criminal law by awarding tort damages in cases of retaliation against the employee.

For instance, in *Sheets v Teddy,* which is a case of passive whistleblowing, the Supreme Court of Connecticut held that: 'an employee should not be put to an election whether to risk criminal sanction or to jeopardise his continued employment'.[464] In *Sheets*, the plaintiff, a quality control manager, noted that the employer was manipulating the labels of the products in violation of the Connecticut statute on food and drugs – an offense that was punishable by imprisonment. As in the *Petermann* case, in *Sheets* the plaintiff refused to participate in the criminal activity and was retaliated against by the employer.

### *3.* Refusal to Violate Civil Laws

Modesitt, Schulman and Westman refer to non-criminal rules (civil law) that also trigger the public policy exception. For instance, in *Tameny v Atlantic*,[465] the Supreme Court of California

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[462] *Restatement of the Law, Employment Law* (n 247) s 5.03.
[463] *Petermann* (n 406).
[464] *Sheets v Teddy's Frosted Foods, Inc*, 427 A2d 385 (Conn 1980).
[465] *Tameny v Atlantic Richfield Co*, 164 CalRptr 839 (Cal 1980).

had to decide whether the breach of antitrust law amounted to a violation of public policy.[466] In this case the employee was fired after refusing to participate in an illegal scheme to fix retail gasoline prices. Under US antitrust law, combinations or price-fixing cartels among suppliers are prohibited.[467] For the Court, those rules comprise public policy in the same way as perjury does in *Petermann*.[468]

Beyond criminal and antitrust law, environmental and health and safety rules have also been a source of public policy in the US common law framework. Thus, in *Bell v Ashland Petroleum,*[469] the plaintiff was a refinery employee who disobeyed his employer's orders to conceal information from a federal agency during an inspection. When the Environment Protection Agency (EPA) asked the plaintiff about the Btu [British thermal unit] levels of two heaters at the refinery, he answered that 'the heaters were operating in excess of their Btu duty rating'.[470] The court found that the plaintiff had a factual basis for a wrongful discharge claim and rejected the employer's motion for summary judgment (dismissal of the case).

The public policy exception also works as a shield for employees in a healthcare setting. The paradigmatic case is a worker who refuses to perform a procedure contrary to best practices codified in statutes. For instance, in *O'Sullivan v Mallon*,[471] the plaintiff was an X-ray technician who had been fired after refusing to perform catheterisations. Under the New Jersey Medical Practice Act 1976, only physicians and licensed nurses could perform such procedures. The Superior Court of New Jersey Appellate Division held that the at-will rule does not operate when the employee is retaliated against for his refusal to commit an illegal act: '[t]his rule is especially cogent where the subject matter is the administration of medical treatment, an area in which the public has a foremost interest and which is extensively regulated by various state agencies.'[472] *O'Sullivan* exemplifies how the source of public policy is usually law enshrined in legislation, meaning that public policy results from the legislative authority's deliberation in prioritising social goals.

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[466] ibid 178.
[467] Sherman Antitrust Act 15 USC s 1 et seq. and the Cartwright Act Bus. & Prof. Code, s 16720 et seq.
[468] *Petermann* (n 406).
[469] *Bell v Ashland Petroleum Co*, 812 F Supp 639 (SDW Va 1993).
[470] ibid 640.
[471] *O'Sullivan v Mallon*, 390 A2d 149 (NJ App Div 1978).
[472] ibid 150.

Professional employees may be subject to special ethical rules that are not codified. However, US courts have not adopted universal rules or outcomes when the employee's refusal to violate a professional code culminates in managerial retaliation. Whilst certain ethical codes can be treated as sources of public policy, others have been rejected. For example, in *Pierce v Ortho Pharmaceutical Corp*,[473] the employee filed a suit for wrongful discharge after she refused to participate in a project for a new medicine containing saccharin. The plaintiff, Dr Pierce, claimed that, under the ethical rules and Hippocratic oath she had taken, she could not participate in a project for a medicine containing a 'controversial' ingredient, such as saccharin. The Supreme Court of New Jersey found in favour of the employer, ruling that an employee has no right to remain in employment when she refuses to conduct research because of her moral outlook or views.[474] However, in the *dicta* of the opinion, the Court recognised that: '[i]In certain instances, a professional code of ethics may express public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient.'[475]

### 4. Passive Whistleblowing and the Chilean *Ius Resistendi*

The Chilean legal system has experience in protecting employees who refuse to comply with illegal orders. Under the legal doctrine of *ius resistendi,* employees are entitled to disobey the employer without risking a fair dismissal. According to the Chilean scholar William Thayer, the *ius resistendi* is an exception to the duty of obedience in four scenarios: (1) the employee is not bound to perform orders beyond the scope of the contract; (2) neither should the employee comply with orders that 'damage his dignity'; (3) nor should the employee obey orders to perform an illicit, immoral act, or against customs or public order; and (4) in general, the employer has no obligation to follow orders that go against the legal duties of the employer (i.e. the duty of security).[476] Like the public policy exception for passive

[473] *Pierce v Ortho Pharmaceutical Corp,* 84 N.J. 58 (1980).
[474] ibid 75.
[475] ibid 72.
[476] Thayer and Novoa (n 53) 120.

whistleblowers, the *ius resistendi* doctrine protects employees who have the dilemma of complying with an illegal order or risking retaliation for refusal.

However, the *ius resistendi* differs from the public policy exception in the context of passive whistleblowing under US law. In common law, the employee must rely on a 'well-established' public policy, which refers to a policy or interests that go beyond the parties' interests in the employment relationship. Thus, the refusal to perform a job because the instruction is not reflected by a term in the contract or a provision in the labour manual is not equivalent to passive whistleblowing. In the US legal system, the termination at-will doctrine will prevail when it is only the employee's private or personal interests that are at stake. The *ius resistendi* overlaps with the passive whistleblower of the common law, protecting a refusal to comply with orders against the employee's interests rather than through the engagement of a public interest.

Like the public policy exception, the *ius resistendi* doctrine works as a cause of action for wrongful dismissal and constructive discharge. Under the Chilean Labour Code, an employer can terminate the employment contract when the employee 'refuses to work without reason in compliance with the duties agreed in the contract'.[477] If the employee is fired for refusing to comply with an illegal order, they can sue for wrongful dismissal by claiming that their refusal to perform was protected under the *ius resistendi* doctrine. If there is no dismissal, the employee can sue for constructive discharge. In both scenarios, the employee bears the burden of proving that the refusal to perform was attributable to the *ius resistendi* doctrine.

Chilean legal scholars have praised the *ius resistendi* doctrine as a protection against illegal orders,[478] but it does not equate to passive whistleblowing. Although cases litigated under the *ius resistendi* doctrine can be found, none of them qualifies as whistleblowing. Employees rely upon the doctrine when job-related breaches are at stake, rather than when the public interest is involved. For instance, in *Zambrano con Servicios*,[479] two workers refused to comply with an employer's order to supply shelves on the basis that there was no extra pay involved.

[477] Labour Code, art 160 (4) (Chile).
[478] Thayer and Novoa (n 53) 120.
[479] Segundo Juzgado de Letras del Trabajo de Santiago [LT] [Labour Courts], 5 July 2016, '*Zambrano con Servicios*', Rol de la causa: T-206-2016 (Chile).

In *Quiroz con Tech*,[480] the plaintiff refused to take on an additional workload because it was not sanctioned by the contract. Finally, in *Sarmiento con Gestión*,[481] the plaintiff refused to move to a different workplace because it was against the terms of his contract.

All those cases were litigated under the *ius resistendi* doctrine, but none could conceivably be treated as involving any public interest-related whistleblowing. Cases involving an employee's refusal to comply with the employer's orders do not satisfy the requirement for a public interest in the case of passive whistleblowing. Even when the passive whistleblowing doctrine seems similar to *ius resistendi*, litigation in the latter case focuses on the resistance of the employee to employer-imposed unilateral alterations of the contract. Under the US common law, unilateral contract alterations do not comprise public policy. In these circumstances, in Chile, there is a gap in protection for public interest dissent in the workplace.

### D. Active Whistleblowing under the US Common Law

#### 1. Protection for Public Interest Disclosures in the US Common Law and Chile

Active whistleblowing occurs when all of whistleblowing requirements are met.[482] Reporting is the decisive factor to distinguish between passive and active whistleblowing in any given case. Both versions of whistleblowing involve the whistleblowing dilemma.[483] Whilst passive whistleblowing is akin to the *ius resistendi* of Chilean employment law, active whistleblowing is a concept with no equivalent. Analysing how active whistleblowing works in the US common law is helpful in proposing and formulating useful reforms to the Chilean Labour Code.

Countries that are transplanting regulations involving public interest disclosure can draw two lessons from the common law of active whistleblowing. First, the subject matter of whistleblowing differs from other forms of retaliatory discharge. As noted in the case of passive whistleblowing, the public policy exception is the legal doctrine under which

[480] Primer Juzgado de Letras del Trabajo de Santiago [LT] [Labour Courts], 9 December 2013, '*Quiroz con Tech'*, Rol de la causa: O-3473-2013 (Chile).
[481] Primer Juzgado de Letras de Ovalle [JL] [Sheriff Court], 6 July 2016, '*Sarmiento con Gestión'*, Rol de la causa: O-6-2016 (Chile).
[482] Modesitt, Schulman and Westman (n 88) 7-12.
[483] See Chapter 1.

whistleblowing evolved. The civil law notion of 'public order' (*orden público*) does not equate with the public policy doctrine.

Instead, under a different legal doctrine, the Chilean Labour Code regulates retaliatory discharges concerning job-related reporting. The Labour Code provides that: '[it is a breach of fundamental rights] to retaliate against employees who file a lawsuit for participating in such a suit as a witness, having been offered as a witness, or because of Labour Inspectorate examinations.'[484] The anti-retaliation protection applies when the employee who raises the legal action has legal standing. As a consequence (similar to the *ius resistendi*), this cause of action for retaliation falls short of protecting the public interest in the workplace. Indeed, anti-retaliation protection is regulated by article 485 of the Labour Code and applies to cases where the statutory or contractual rights of the employee are at stake.

This hypothesis is partially covered by the public policy exception under the *Restatement of Law, Employment Law*, which provides that an employee cannot be retaliated against for 'fil[ing] a charge or claim[ing] a benefit in good faith under an employment statute or law, whether or not the charge or claim is meritorious'.[485] However, Modesitt, Schulman and Westman dismiss the argument that making internal private claims qualifies as a form of whistleblowing.[486] Filing a suit as a protected activity where it only engages labour-related interests does not qualify as a public interest disclosure.

The same reasoning applies to claims submitted to the Labour Inspectorate, which has jurisdiction over employment grievances. For example, in the hypothetical situation where an employee in the private sector is fired after filing a complaint with the Environmental Agency, a Chilean employee has no anti-retaliation protection. Understanding the difference between workplace grievances and public interest disclosures is crucial when considering the possibility of transplanting whistleblowing laws.

[484] Labour Code, art 485 (Chile).
[485] *Restatement of the Law, Employment Law* (n 247) s5.01(c).
[486] Modesitt, Schulman and Westman (n 88) 7-47.

Second, when an employee reports non-labour-related wrongdoings, the Labour Code's rules offer weaker protection than the US common law governing active whistleblowing.[487] The Chilean termination rules do not treat the filing of non-labour charges with an agency or the employer as a just cause for termination. Therefore, if the employer fires the employee for this reason, it constitutes a wrongful discharge.

However, under the Chilean Labour Code, the analysis centres on whether there was a statutory cause for dismissal rather than the public relevance of the reported wrongdoing. In the Chilean dismissal protection regime, the subject matter of the reporting is not part of the legal reasoning. It does not matter if the employee saved the lives or resources of the public through his reporting. This irrelevance of the public interest constitutes a remarkable difference from the US common law, where the employee must demonstrate that the reporting was beyond private interest.[488]

### 2. Reporting Breaches of Criminal Law

Criminal law is one of the most robust instances of public policy application. Employees who report a breach of its content have the highest chances of securing protection.[489] *Harless v First National Bank* was one of the first cases on blowing the whistle on criminal wrongdoing.[490] There, the Court of Appeal of Virginia held that reporting breaches of criminal law is a valid cause of action under the public policy exception. In *Harless*, the plaintiff alleged that he was discharged owing to his warnings about the defendant, namely that it 'had intentionally and illegally overcharged customers on prepayment of their instalment loans and intentionally did not make proper rebates.'[491] The court held that the disclosure of such a criminal act was a protected activity:

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[487] However, the monetary remedies at common law are more generous because they include emotional and punitive damages. The Chilean Labour Code regulates a fixed tariff as compensation for wrongful discharge: one month of salary for every year of employment with a limit of 11 salaries. See Glynn, Sullivan and Arnow-Risman (233) 205.

[488] 'Employees who blow the whistle on matters that affect only private interests will be unsuccessful in maintaining a cause of action for discharge in violation of public policy'. *Employment Coordinator* (n 439) § 1:55.

[489] ibid.

[490] *Harless v First National Bank*, 246 SE2d 270 (W Va 1978).

[491] ibid 118.

> We have no hesitation in stating that the Legislature intended to establish a clear and unequivocal public policy that consumers of credit covered by the Act would be given protection. Such manifest public policy should not be frustrated by a holding that an employer of a lending institution governed by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge.[492]

Thus, the employee who alerted his superiors about this criminal wrongdoing was protected under the public policy exception.

For comparative purposes, *Harless* covers the public policy element of the action for wrongful discharge. Under US common law, the legal analysis concerns the relevance of the subject matter of the disclosure. Under the Chilean action for wrongful discharge, where an employee reports wrongdoing, the subject matter of the reporting would be irrelevant because the action focuses on the existence of just cause for the dismissal. In this way, whistleblowing entails a different paradigm: from analysing the breaches of employment law to violations of other branches of the law and considering the interests of parties operating beyond the employment relationship.

### 3. Reporting Breaches of Non-Criminal Law

When considering breaches of non-criminal law under the public policy exception, the distinction between passive and active whistleblowing becomes less significant. If a court protects an employee who expresses opposition following an employer's order to breach a statute, the court will arrive at the same conclusion regarding the reporting.[493] Cases of reporting in areas where no criminal sanctions are involved, such as public safety, health care and product safety, are usual in the US common law.

For instance, in *Kempfer v Automated Finishing*,[494] the Supreme Court of Wisconsin found in favour of the employee when he refused to drive a truck without the required commercial

[492] ibid 126.
[493] Modesitt, Schulman and Westman (n 88) 7-1.
[494] *Kempfer v Automated Finishing*, 564 NW2d 692 (Wis Ct App 1997).

license. The plaintiff was a delivery driver with a 22-foot International Harvester flatbed truck. Whilst on route during a delivery, a police officer checked the truck and warned the driver about the requirement to hold a commercial licence to drive the vehicle. The employee notified his manager about the breach of the traffic safety rules and refused to continue driving the truck without a licence. As a result, he was fired. Under this factual scenario, the court stated that highway safety rules constitute a 'fundamental and well-defined public policy'.[495]

Courts have rejected disclosures about workplace safety, ruling that it is vital to identify a source of public policy beyond the mere interests of the complainant. For instance, in *Braxton v Domino's Pizza*,[496] the District Court of Maryland found in favour of the employer when an employee reported workplace neglect of job safety. There, the plaintiff complained to her supervisor that another employee had made sexual advances towards her and threatened her with bodily harm. The Court rejected the case as a matter of law because she failed to identify a source of public policy in her safety concerns.

### 4. Wrongdoing Not Committed by the Employer

When analysing the scope of what constitutes the public interest, a distinct issue arises as to whether employees who report wrongdoing not committed by their employer are protected. The Supreme Court of Illinois addressed this question in *Palmateer v International Harvester*.[497] There, the plaintiff informed the local authorities that another employee might be selling stolen merchandise. The employer was neither the wrongdoer nor had it instructed the other employee to commit theft. The employer gained no actual benefit from concealing the violation. After reporting to the police and gathering information about it, the plaintiff contacted the suspected wrongdoer to purchase the stolen merchandise. As a result, the employer discharged the plaintiff, claiming poor performance. When addressing the disclosure of this criminal conduct, the Supreme Court of Illinois emphasised the requirement to establish a valid public interest in order to extend the public policy exception in a situation where the employer had not committed the wrongdoing. The court observed that: '[a]lthough

[495] ibid 114.
[496] *Braxton v Domino's Pizza*, 2006 US Dist LEXIS 92902 (D Md Dec 21, 2006).
[497] *Palmateer v Int'l Harvester Co*, 421 NE2d 876 (Ill 1981).

there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed'.[498] Moreover, the employee's involvement in a legal procedure was crucial in granting protection to him:

> It is clear that [the plaintiff] has here alleged that he was fired in violation of an established public policy. The claim is that he was discharged for supplying information to a local law-enforcement agency that an IH employee might be violating the Criminal Code, for agreeing to gather further evidence implicating the employee, and for intending to testify at the employee's trial, if it came to that.[499]

*Palmateer* demonstrates that whistleblowing is a category independent of workplace grievances. It protects an employee regardless of the employer's participation in the reported wrongdoing. Two observations support this conclusion: first, whistleblowing is considered a form of collaboration with law enforcement, and second, the subject matter of whistleblowing extends beyond mere personal grievances.

The ruling in *Palmateer* is reinforced by the decision of the Supreme Court of California in *Foley v Interactive Data Corp*,[500] where the deception against the employer was not considered a matter of public policy. There, the plaintiff was fired after informing his employer that one of his co-workers was suspected of embezzling from another company. The plaintiff claimed the employer 'discharged him in "sharp derogation" of a substantial public policy that imposes a legal duty on employees to report relevant business information to management'.[501] Thus, the court had to consider whether the information disclosed to the employer was sufficient to engage the public interest element required for applying the public policy tort. In its decision, the court held that the defendant could not show a statutory basis for the duty to disclose information associated with other employees. It also found that there

[498] ibid 131.
[499] ibid 132.
[500] *Foley v Interactive Data Corp*, 765 P2d 37 (Cal 1988).
[501] ibid 669.

can be no public policy involved '[w]hen the duty of an employee to disclose information to his employer serves only the private interest of the employer'.[502]

Nevertheless, there are other cases similar to *Palmateer* in which the courts have granted protection when the wrongdoing was committed by a co-worker rather than the employer. For example, in *Knight v American Guard & Alert*,[503] the plaintiff was a guard in a pipeline facility and was fired after reporting his colleagues for drinking and drug use whilst on duty. The court found in favour of the plaintiff. Similarly, in *Thomas v Medical Center Physicians*,[504] the plaintiff was a physician who reported another physician for bartering with patients for personal gifts in exchange for medical services, the unnecessary performance of treatment and other instances of misconduct. The Supreme Court of Idaho stated that the 'falsification of medical records and the performance of unnecessary operations'[505] to increase the physician's income was against public policy.

Cases, such as *Palmateer*, *Knight* and *Thomas*, where the employer is not the wrongdoer, highlight the key structural difference between passive and active whistleblowing. In active whistleblowing, the wrongdoer can be someone other than the employer. In passive whistleblowing, the illegal act always emanates from the employer. The resistance to perform an unlawful act (passive whistleblowing) limits the scope of the employee's legal duty of obedience owed to the employer.[506] However, when an employee reports wrongdoing (active whistleblowing), the perpetrator of the misconduct does not necessarily have to be the employer.

### 5. The Employer as the Victim of the Disclosed Wrongdoing

There is no consensus in the US common law about the content and scope of the rules governing active whistleblowing when the employer is the victim of the reported wrongdoing. This scenario has not been studied in sufficient depth by scholars, as they have tended to focus on organisational wrongdoing.[507] These cases are rare but do show how the interests of the community (rather than the interests of the employee) shape the law of

[502] ibid 670–71.
[503] *Knight v American Guard & Alert*, 714 P2d 788 (Alaska 1986).
[504] *Thomas v Medical Center Physicians*, 61 P3d 557 (Idaho 2002).
[505] ibid 565.
[506] Adams and others (n 145) 331–32.
[507] See Jubb (n 132), 78 and Near and Miceli (n 132).

whistleblowing. Two scenarios can arise when the employer is the victim: (1) the employee reports the wrongdoing committed against the employer when there is no duty to do so; or (2) where alerting the employer to the wrongdoing forms a part of the employee's occupational obligations.

The case of *Vonch v Carlson Cos* is an example of the first scenario.[508] Here, the Minnesota Court of Appeals held that a worker who reported theft and fraud against the employer was not protected under the public policy doctrine. The plaintiff had reported to the vice-president of the personnel department that his supervisor was committing theft and fraud in his claims for travel expenses. The internal investigation substantiated the charges but found that the employer had not sustained a 'significant loss'. After the investigation, the employee was fired; he claimed that his discharge was retaliatory and against public policy. The Court addressed whether this kind of corporate conduct involved a breach of public policy or merely invoked the employer's private interests. It found that the public policy exception 'was carved out to protect the general public from injury due to the company's neglect or affirmative bad act,'[509] and thus concluded that the public did not have any interest in the alleged mismanagement that the employer may have suffered.

The decision in *Vonch* can be contrasted with that of *DeCarlo v Bonus Stores*,[510] where the Supreme Court of Mississippi held that an employee had a cause of action where he had reported wrongdoing involving the employer as the victim. There, the plaintiff was the vice-president of store operations when he started an investigation into the rather disappointing profits of the company. During his investigation, he discovered that another employee was a partner in a company that billed for services that were never delivered to the employer. The illegal activity discovered was clearly contrary to the employer's interests and reporting it seemed to be in its best interests. Nevertheless, the plaintiff was fired after he alerted his superiors about the misconduct. The court observed that under the common law of Mississippi: '[d]ischarge in retaliation for an employee's good faith effort to protect the employer from wrongdoing constitutes an independent tort and may support punitive

[508] *Vonch v Carlson Cos*, 439 NW2d 406 (Minn Ct App 1989).
[509] ibid 408.
[510] *DeCarlo v Bonus Stores, Inc*, 999 So 2d 351 (Miss 2008).

damages.'[511] Therefore, the court permitted the plaintiff's claim for retaliatory discharge under the public policy exception 'for reporting a co-employee's illegal acts that relate to the employer's business.'[512]

However, in a more recent decision, the Supreme Court of North Carolina held that the public policy exception does not apply when disclosing wrongdoing against the employer is part of the employee's contractual duties, but no legislation confirms that obligation. In *Taghivand v Rite Aid Corp*,[513] the plaintiff was a shop manager who noticed a patron acting strangely and walking around suspiciously. After the client checked out, the cashier told the manager that the patron was carrying a bag with items in it, but that it was empty when the patron entered the shop. The plaintiff instructed the cashier to call the police. When the police searched the client's bag, they found only clothes for his laundry. The very same day, the plaintiff's employment was terminated, and he was informed that his misreporting was the reason. The Supreme Court of South Carolina found for the employer, holding that: 'no one can reasonably dispute that reporting the commission of a crime is a commendable act,'[514] but that the legislature had not created any obligation to report a crime in South Carolina. Consequently, there was no legal source for an exception to the at-will rule.[515]

It is interesting that in *Taghivand* the court did not address whether employees with contractual reporting duties, such as supervisors, controllers, quality managers or auditors, can be treated as whistleblowers. For example, some scholars reserve the term whistleblowing for cases of voluntary reporting of wrongdoing.[516] Jos Leys and Wim Vandekerckhove claim that employees with reporting duties do not blow the whistle whilst performing their jobs.[517] Nevertheless, they can be considered whistleblowers when reporting wrongdoing outside the scope of their duties.[518] Therefore, when Mr Taghivand

[511] *Willard v Paracelsus Health Care Corp*, 681 So 2d 539, 543 (Miss 1996).
[512] *DeCarlo* (n 510) 358.
[513] *Taghivand v Rite Aid Corp*, 768 SE2d 385 (SC 2015).
[514] ibid 248.
[515] This counterintuitive decision is linked to the at-will rule of employment in the US. Accordingly, employment contract is not a source of 'public policy'. In the UK, where just cause rules, may be an implied duty to report. See, Bowers and others *Whistleblowing: Law and Practice* (3rd edn) (n 169) 718 et seq.
[516] Jubb (n 132) 82.
[517] Leys and Vandekerckhove (n 157) 123. Terance Miethe, *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job* (Routledge 2019) 79.
[518] Leys and Vandekerckhove (n 157) 123.

reported the alleged shoplifting, he could not be considered a whistleblower because reporting was a part of his regular contractual duties.[519]

## E. Conclusion

Our examination of the 'public policy' exception reveals significant disparities between whistleblowing practices in civil law jurisdictions and those in the US. Comparative legal scholars often project their own legal frameworks onto foreign systems, characterising instances of whistleblowing as forms of dissidence that, under US law, would be deemed mere grievances. This inclination is particularly evident in the context of the protected activity of engaging in legal proceedings against employers for employment-related complaints.

In common law jurisdictions, the protection afforded to whistleblowers encompasses the right to resist illegal orders (passive whistleblowing) as well as protection for employees who disclose information of public concern (active whistleblowing). Both categories of protected activity necessitate an element of public interest that transcends the immediate employment relationship in order to be considered whistleblowing. Chilean employment law recognises the right to resist illegal orders through the principle of *ius resistendi*, which aims to safeguard employees confronted with unlawful directives. However, this principle has primarily been litigated in contexts solely concerning the interests of the employees and is not treated as an example of whistleblowing. To align Chilean law with the US standards, it is imperative to implement reforms that delineate between matters of public interest and personal or private employment grievances.

With respect to active whistleblowing, protection under the US common law is granted for actual disclosures under the public policy doctrine; however, Chilean employment law lacks a corresponding doctrine. Although superficially analogous, the Chilean doctrine of 'labour public order' does not equate with the public policy exception. Both the public policy exception and the 'labour public order' protect the inderogable and non-waivable principles of employment law, but the scope of the public policy exception is more expansive, encompassing criminal law, public health statutes, antitrust regulations and other legal

[519] In Chapter 3, we discussed the problem of 'duty speech' in cases of First Amendment infringement.

frameworks where communal interests are prevalent. Thus, instances that do not involve breaches of employment law may still be adjudicated under the public policy exception.

The comparative analysis between common law whistleblowing protection and Chilean employment law presents a formidable challenge. Bridging this gap would necessitate a doctrinal transition from a framework primarily focused on safeguarding the interests of the parties to the employment relationship to one that equally prioritises the interests of the wider community in protecting the public.

# Chapter 5: Enforcing Anti-Retaliation Protection for Whistleblowers in the Chilean Legal System

## A. Introduction

The enforcement of anti-retaliation protection for whistleblowers is a central problem for scholars and policymakers worldwide. Over the past two decades, a burgeoning field of study known as 'international best practices' on whistleblowing has emerged to guide countries in adopting or reforming their whistleblower laws. A notable drawback of this scholarship lies in its focus on the substantive aspects of whistleblowing legislation, thereby deferring to domestic lawmakers the intricate details of the interplay between the newly introduced substantive regulations and existing rules of procedure and enforcement bodies. In law, the efficacy of enforcement depends on the mechanisms of adjudication, such as the judiciary or administrative dispute resolution bodies, as well as the procedural rules that are in place in a particular jurisdiction.

This chapter addresses the problem of how Chilean law ought to connect substantive anti-retaliation protection for whistleblowers with the current Chilean rules of procedure and the existing dispute resolution bodies involved in adjudication. In the first part, the role of domestic bodies and procedures in integrating anti-retaliation protection for whistleblowers is analysed. Particular emphasis is placed on US litigation proceedings and how they can inform and illustrate the kind of approach and principles that should be adopted in Chile. The proper branch of the Chilean legal system that should incorporate anti-retaliation whistleblowing protection has already been explored in this Thesis. It is proposed that these protections be integrated within the current framework of Chilean employment discrimination law, thereby establishing them as default rules applicable in whistleblowing cases. In the second part, the nexus between anti-retaliation protection and procedural access to evidence will be explored. Recognising the pivotal importance of the need to establish a causal link between an adverse employment action and a protected disclosure in the context of a whistleblowing claim, it is strongly recommended that Chilean lawmakers should broaden the scope of disclosure and discovery of evidence in the rules of employment procedure, thus enhancing the plaintiff employees' access to such evidence.

### B. Beyond Rights on Paper

Whistleblower legislation should avoid the trap of 'paper rights'.[520] This refers to the situation where the law confers rights but lacks enforcement tools, rendering them paper tigers without effective 'teeth'. In general, the success of transplanted whistleblower laws depends on the current enforcement bodies and the rules of procedure enshrined in domestic law. Notably, in the US, which has been a historical bastion of whistleblowing protection dating back to colonial times, whistleblower laws are intricately woven into the legal system.[521] In comparison, whistleblowing is a foreign legal category in civil law countries, such as Chile. Under this scenario, the key question is whether enforcing newly introduced whistleblower laws in civil jurisdictions should keep or amend established domestic enforcement bodies and procedural rules. Whether the reform and implementation of these laws should use existing mechanisms in Chile or require the establishment of dedicated enforcement bodies and procedures remains a topic of debate. The discussion centres on whether the adoption of whistleblower laws should include not only the substantive provisions recommended under 'international best practices' on whistleblowing but also the institutional structures and procedures found in jurisdictions where whistleblowing is well-established, such as the US.

Scholars and NGOs have addressed the operation of whistleblower laws under the topic of 'international best practices' on whistleblowing.[522] Victoria Luxford defines 'best practices' as

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[520] Devine and Massarani (n 1) 128.

[521] There is consensus in the US that whistleblowing itself is an enforcement mechanism. Modesitt, Schulman and Westman (n 88).

[522] In her study of 2022, Luxford listed the following sources of good practices:

a. David Banisar, 'Whistleblowing: International Standards and Developments' in Irma E Sandoval (ed), *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (World Bank, Institute for Social Research 2011) <http://ssrn.com/abstract_id=1753180> accessed 30 September 2025.

b. Tom Devine, *International Best Practices for Whistleblower Policies* (Government Accountability Project 2015) <www.ourcommons.ca/content/Committee/421/OGGO/WebDoc/WD8991016/421_OGGO_reldoc_PDF/DevineTom-e.pdf> accessed 30 September 2025.

c. Paul Latimer and AJ Brown, 'Whistleblowers Laws: International Best Practices' (2008) 31(3) UNSW L J 769.

d. Transparency International, 'Recommended Draft Principles for Whistleblowing Legislation' (2009) <www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf> accessed 30 September 2025.

e. Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation* (Transparency International 2018) <https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf> accessed 30 September 2025.

'suggestions as to how to most effectively draft whistleblower legislation and the [provision of] ideas for countries attempting to develop or improve whistleblower legislation.'[523] However, the adoption of these best practices is not always feasible. Luxford has warned of the institutional and economic barriers of transplanting whistleblowing laws: 'It is also important to recognize that it is seldom, if ever, effective to simply transplant successful legislative regimes from one cultural setting to another or from developed countries to developing countries'.[524] Similarly, Paul Latimer and Alexander Brown[525] claim that: 'whistleblower laws must be seen in the context of culture,'[526] and '[t]hey cannot be exported to hostile environments'.[527]

It is imperative to acknowledge that prevailing best practices and ideal legislative frameworks consist primarily of principles derived from common law jurisdictions, with the US used predominantly as the main benchmark. As discussed in detail in Chapter 1, this is attributed to the historical evolution of whistleblowing as an integral facet of law enforcement in the Anglo-American law.[528] Remarkably, the nuances involved in the two distinctive common law and civil legal traditions – commonly referred to as legal families – remains conspicuously absent from the explicit considerations made by proponents of 'best practices' in the realm of whistleblowing legislation.[529]

Given these differences among legal systems, 'international best practices' provide limited guidance. Only five aspects of whistleblowing protection are covered by them: (1) what

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f. Simon Wolfe and others, *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (BluePrint for Free Speech October 2015) 1 <https://www.blueprintforfreespeech.net/s/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf> accessed 30 September 2025.
g. UNODC (n 12).
h. Canadian Standards Association, *Whistleblowing Systems — A Guide, EXP01-16* (CSA Group 2016) <https://community.icann.org/download/attachments/59643288/CSA%20Whistleblower%20Guideline.pdf?version=1&modificationDate=1470853787000&api=v2> accessed 30 September 2025.
For a complete overview of good practices, see Victoria Luxford, 'Whistleblower Protections' in Gerry Ferguson (ed), *Global Corruption its Regulation under International Conventions, US, UK, and Canadian Law and Practice* (University of Victoria Press 2022).

[523] Luxford (n 522) 1099.
[524] ibid 2022.
[525] Latimer and Brown (n 522).
[526] ibid.
[527] ibid. See also Vandekerckhove and Lewis (n 154).
[528] See Chapter 3.
[529] For Damaška, law enforcement is one of the radical differences between common and civil law legal systems. See Damaška (n 88).

information is disclosable; (2) the channels of disclosure; (3) confidentiality, (4) anti-retaliation protection' and (5) remedies.[530] None of these standards addresses the issue of how best to embed whistleblowing laws within the existing rules of the legal system, leaving the flesh out of whistleblowing legislation to domestic policymakers. In particular, 'international best practices' do not provide guidance on how to integrate anti-retaliation protection for whistleblowers within the existing rules of enforcement. As noted in Chapter 2, the manner in which anti-retaliation protection is litigated in the US is not necessarily feasible in other legal systems. Thus, domestic policymakers must determine whether new enforcement bodies should be created to deal with whistleblowers' claims and whether the rules of procedures must be amended.

In the US, where several antiretaliation 'best practices' takes inspiration from, all whistleblowing retaliation cases exhibit a similar structure. The American legal author Stephen Kohn articulates the issue, noting that: '[r]egardless of whether their claims are based on state law, the First Amendment, or federal protection statutes, whistleblowers must demonstrate that they experienced adverse action as a result of their whistleblowing. In other words, they must establish that the employer acted with discriminatory intent or had a retaliatory policy.'[531] Therefore, when an employee faces retaliation in the workplace for reporting their employer's malpractice, fraud or corruption, the legal proceedings typically involve similar elements.[532] Notably, whistleblower laws in the US have few regulations that specify how they are to be litigated in courts. Consequently, the default rules of civil procedure and evidence apply to these cases.

However, there are a few differences in litigating whistleblowing and other civil cases. The primary exceptions pertain to the shifting of the burden of proof, the standards of evidence and the administrative forum. The shifting of the burden of proof and standards of evidence of US whistleblowing law has been adopted in 'international best practices', but there is no consensus on whether an administrative forum similar to those applicable in the US is necessary. Hence, it is not an exaggeration to say that the substantive protections against

[530] Luxford (n 522) 1012.
[531] Stephen Kohn, 'Proving Motive in Whistleblower Cases' [2002] Trial <https://go-gale-com.ezproxy.is.ed.ac.uk/ps/i.do?p=ITOF&u=ed_itw&id=GALE|A84549979&v=2.1&it=r> accessed 30 September 2025.
[532] See Chapter 3

retaliation for whistleblowers in the US fundamentally rely on the Federal Rules of Civil Procedure and Federal Rules of Evidence.[533] These rules of civil procedure and evidence should be studied to compare whistleblowing laws properly.

Countries instituting whistleblower laws that wish to adhere to 'international best practices' must meticulously assess the feasibility of replicating the enforcement mechanisms inherent in the US within their domestic legislative frameworks. A critical consideration is identifying the procedural and evidentiary rules, if any, that should accompany substantive whistleblower laws during transplantation. In essence, these jurisdictions are confronted with the task of delineating the connection between whistleblower laws and their domestic legal systems, necessitating a comprehensive examination of the extent to which procedural reforms are necessitated. As noted in Chapter 3, in the US, this conundrum has been addressed by assimilating whistleblower laws within the purview of employment discrimination laws.

The following sections will examine two often-overlooked aspects advocated by proponents of 'international best practices'. First, the appropriate positioning of whistleblower laws within the domestic legal framework will be analysed. Second, the essential rules of evidence – beyond merely burden-shifting and standards of proof – necessary to effectively integrate whistleblowing provisions will be explored. Both dilemmas assume that the law functions within an established legal context, highlighting the critical importance of assessing how and whether whistleblower protections can and should align with existing enforcement laws. The central argument is that whistleblower legislation embodying 'international best practices' should be deeply entrenched within the rules that govern enforcement bodies and the procedural norms already found within the domestic legal system of the host state, with a particular focus on their integration with the laws related to employment discrimination laws.

[533] Stephen Kohn*, Rules for Whistleblowers* (Lyons Press 2023) 256; Joseph Sibak, 'Procedure of Litigating SOX Whistleblower Complaints' in Nick M Beerman and others (eds), *Understanding SOX Whistleblower Protection* (Aspatore 2016) 7, 16.

## C. Procedural Considerations for the Transplant of Whistleblowing Laws in Chile

### 1. Anti-retaliation Protection for Whistleblowers: Between Rules of Termination and Discrimination

It was hypothesised that whistleblower protection in countries other than the US can be found in the rules of employment termination. Non-US researchers tend to associate anti-retaliation whistleblower protection with the protection against unfair dismissal.[534] Following this trend, Fasterling has argued that a country with strong protection against dismissal, but few whistleblower laws (e.g. France or Germany), can protect whistleblowers just as effectively as a jurisdiction that recognises specific protection for whistleblowers but without just cause termination (the US).[535] In other words, with some modifications, the unfair dismissal rules of the host state could function in the same way as whistleblower laws in the US.

It is plausible to add that the dynamics of litigation of just-cause unfair dismissal work similarly to anti-retaliation rules.[536] The reasoning is that a legal system with a just-cause termination regime already contains rules of burden shifting in favour of the plaintiff employee. Indeed, when an employee files a claim of wrongful discharge, the law of termination provides a rebuttable presumption in favour of the employee by shifting the burden of proof over to the employer; accordingly, the employer must prove one of the fair dismissal causes to prevail (and reporting misconduct is not a good cause).[537] At first glance, the challenges of evidence in a whistleblowing case can be embedded within the broader problem of regulating wrongful termination of the employment relationship.

Nonetheless, several compelling reasons exist to advocate for separating the rules governing dismissal and termination from the anti-retaliation protections afforded to whistleblowers. First, whistleblowing legislation and termination rules serve distinct purposes. Termination rules are framed as an employee's right to 'job security' and do not involve the broader community's interests. In contrast, it is essential to recognise that the employee's interests do not play a decisive role in invoking anti-retaliation protections for whistleblowers.[538] For

[534] Fasterling (n 3) 336.
[535] ibid.
[536] See Davidov and Eshet (n 425) 170.
[537] ibid.
[538] See Chapter 2 and 4.

instance, under the just-cause unfair dismissal framework established by the Chilean Labour Code, the public interest associated with whistleblowing cannot be adequately addressed. Further, it is improbable that a legal system focused solely on workplace grievances can effectively comprehend the public interest inherent in whistleblowing by conflating it with the termination system designed to resolve workplace disputes.

Second, whistleblowing protection ought to be aligned with the framework of employment discrimination rather than the traditional rules governing the termination of employment. At the same time, whistleblowers can indeed utilise standard unfair dismissal regulations. Where the burden of proof shifts towards the employer, the framework of direct discrimination offers a more suitable analytical approach for addressing cases of retaliation against whistleblowers.

Examining the distinct frameworks highlights that the nuances associated with indirect evidence, typical in whistleblowing retaliation cases, are more compatible with the structure underpinning direct discrimination claims. In a wrongful discharge scenario, for instance, the employee (plaintiff) is tasked with presenting evidence of the dismissal itself, subsequently prompting the employer to demonstrate that the dismissal resulted from one of the three recognised justifications: economic reasons (e.g. redundancy), disciplinary actions or instances of poor performance. Conversely, within direct discrimination claims, the evidentiary dynamics divert significantly. Here, the plaintiff must show a causal linkage between the protected characteristic or activity and the adverse employment decision and establish that the employer’s actions were influenced by the employee's protected status or activity.

The evidentiary framework in a discrimination case aligns more closely with a whistleblower retaliation claim. In both instances, an underlying motivation typically leads to adverse actions against the employee, necessitating reliance on indirect evidence to infer discriminatory intent. To successfully defend against such claims, the employer must refute the discriminatory intent, providing an independent reason for the employment decision in question.

Consequently, it is generally less burdensome for an employee to initiate a wrongful discharge claim than a discrimination case. In the former, proving the fact of dismissal alone suffices to shift the burden of proof. In contrast, in a discrimination case, the employee must establish an adverse action, detriment or dismissal whilst concurrently demonstrating a connection between the protected status or disclosure and the negative outcome. However, the scope of adverse conduct in discrimination or retaliation cases is broader than a mere dismissal, covering detriments short of a discharge. For example, whistleblower protection laws extend to cover harassment, transfers, demotions, and any form of adverse treatment or discrimination stemming from the protected disclosure, thereby reinforcing the case for aligning whistleblowing protections with the discrimination framework.

2. The Judicial and Administrative Litigation Involved in Whistleblowing Claims in the US

As with discrimination claims, US whistleblowing litigation involves an administrative phase. All the discrimination statutes adopt a mixture of administrative and judicial enforcement for their substantive provisions. Thus, an employee victim of discrimination under any of the protected characteristics/activities listed in Title VII,[539] the Age Discrimination in Employment Act[540] or the Americans with Disabilities Act[541] must file administrative charges with the Equality Employment Opportunity Commission (EEOC) before filing a suit in court. The US Congress created the EEOC to enforce Title VII. Under Title VII, the aggrieved employee should file charges with the EEOC within 300 days of the alleged discrimination. Once the charges have been filed, the EEOC should serve the charges to the employer and investigate them. If the agency finds merit in the charges, it should attempt conciliation between the parties. If the conciliation fails, the EEOC will file a suit in federal court against the employer or issue a 'letter to sue' which enables a private claim to be brought by the employee against the employer. If the EEOC finds no merit in the charges, this does not bar the employee from filing a suit in court on their own.[542]

[539] 42 USC s 2000e et seq.
[540] 29 USC s 621 et seq.
[541] 42 USC s 12101 et seq.
[542] Sullivan and Zimmer (n 313) 523–24.

This administrative phase has influenced the enforcement of US whistleblowing statutes. The agencies involved and administrative proceedings will differ depending on whether the disclosure occurs in the federal or private sector. OSHA oversees anti-retaliation provisions regulated by 25 different statutes in the private sector. On the other hand, whistleblowers in the federal sector must file charges with the OSC, which investigates the claim.[543] The decision may be appealed to the MSPB within 60 days.

After the administrative charges, the level of judicial review granted to the administrative decision varies by statute. A more heightened intensity of judicial review is adopted in cases where the public interest is superior. For example, under SOX, the OSHA administrative procedure grants the whistleblower a de novo trial in a district court if the administrative procedure has not been completed within 180 days.[544] However, a much more limited review is applied under the WPA in the case of federal employees, where under no circumstances does a district court have jurisdiction to decide a case. Instead, only the Court of Appeals of the Federal Circuit has jurisdiction. The grounds to overrule the MSPB's decision are quite limited: (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence.[545] As a consequence, the issues of fact are rarely decided by a full jury trial in a court under most whistleblower statutes.

Consequently, comparatists should be especially cautious when adopting whistleblowing practices from the US. The reason is that the adjudicative bodies cannot necessarily be replicated in a foreign legal system. There are cases litigated under full due process, meaning a complete jury or bench trial (when applicable). Examples of these include civil rights cases for infringement of the First Amendment (also known as section 1983), retaliation cases under the FCA and the common law cases for wrongful discharge (public policy exception). Because these cases are litigated in courts of law under full due process, they can be more easily compared with foreign legal systems. However, a second type of whistleblowing case is

[543] Richey (n 313) 10-5, 10-6.
[544] 18 USC s1514A(b)(1)(B). See Delikat and Phillips (n 76).
[545] 5 USC s 7703(c).

litigated through administrative quasi-jurisdictional bodies, such as the OSHA, OSC and MSPB, whose decisions can be reviewed by the courts.

The US mixed enforcement model has no equivalent in Chile for discrimination/retaliation cases. For example, in the US, the OSHA investigates most whistleblowing retaliation cases in the private sector, including those presented under the SOX and the Dodd-Frank Act. In contrast, in the federal sector, under the WPA, the OSC and the MSPB investigate any administrative charges filed by an employee, carry out the fact-finding exercise and adjudicate the cases – all of which are to be reviewed by the court of appeals.[546] As such, the US enforcement model is very different from the investigation and adjudication process in Chile, where employment tribunals adjudicate retaliation cases. The involvement of administrative quasi-judicial agencies in Chile in the context of whistleblowing claims would raise the question of constitutionality.

There are various explanations for the administrative form of adjudication in whistleblowing cases in the US. First, statutes banning retaliation against whistleblowers have the same structure as anti-discrimination statutes. Therefore, it is not surprising that the whistleblower statutes have followed the same pattern of enforcement as Title VII, which involves the EEOC as an administrative adjudicator. As noted in Chapter 3, employees who file a complaint against discrimination are engaged in something similar to the whistleblowing process, even when there is no public interest in their complaints.[547] However, the literature discussing 'international best practices' has not addressed this link between discrimination and whistleblower statutes in US law.

Second, the preference for investigations and adjudication via administrative agencies facilitates smoother access to justice for employees. In the US, litigation in the courts or tribunals is extremely expensive. For an employee who is fired after blowing the whistle, there are very few opportunities to succeed against the employer because of the latter's 'big pockets'. Therefore, investigations through governmental agencies facilitate fact-finding for employees at much less expense.[548] Both the OSHA and the OSC facilitate whistleblowers in

[546] 5 USC § 1214 (Whistleblower Protection Act 1989, as amended).
[547] Modesitt, Schulman and Westman (n 88) 3-7.
[548] In addition, these agencies can anticipate relief for the whistleblower through interim orders for reinstatement. Then, the whistleblower's salary will be paid whilst the final decision is pending.

the private and federal sectors in making their cases. The administrative investigation record is one of the main pieces of evidence for the judiciary. For countries like Chile, where access to specialised courts is guaranteed and a public defence is provided for free to poor employees, introducing quasi-judicial agencies for whistleblowers does not seem necessary.

### 3. Who Should Deal with Whistleblower Claims and How?

There is no consensus in 'international best practices' on whether countries should adopt enforcement agencies similar to those in the US or adjudicate retaliation cases through domestic bodies (judicial or administrative). For example, article 12 of the OAS (Organization of American States) Model Law on Whistleblowing[549] follows the US framework, suggesting that different administrative agencies should deal with the reception of reports and handle the retaliation cases, whilst the United Nations Office on Drugs and Crime, in its guide on good practices on whistleblowing,[550] suggests a mixed approach emphasising the need for judicial review of retaliation cases against whistleblowers.

To address this challenge, David Banisar has delineated four distinct models of 'oversight and enforcement' that apply to whistleblower laws.[551] The classification is contingent upon the reception of reports and handling of retaliation cases, manifesting in the following paradigms. The initial model, referred to as 'Independent Bodies', comprises single, autonomous administrative agencies tasked with addressing reports of wrongdoing and investigating retaliation claims. A paradigmatic exemplar is the OSC in the US system, which is responsible for receiving reports of malfeasance and presenting retaliation cases before the MSPB. It is noteworthy, however, that despite Banisar's categorisation of the OSC as a 'single independent body', its jurisdiction is confined to enforcing whistleblower laws solely within the federal sector (i.e. specifically the WPA). In contrast, OSHA oversees the enforcement of various anti-retaliation statutes in the private sector, including under the SOX and the Dodd-Frank Act.

[549] Devine, Vaughn and Henderson (n 1).
[550] UNODC (n 12) 73.
[551] Banisar (n 522).

The second oversight model introduced by Banisar involves an 'ombudsman' role dedicated to whistleblowing. The paradigmatic case is the Dutch Whistleblower Authority. Functioning as a body specifically engaged in whistleblower enforcement, an ombudsman receives reports of wrongdoing, advises whistleblowers and investigates reprisals. Despite the potential for investigating and rendering decisions in retaliation cases, Banisar contends that the ombudsman's efficacy is hampered by its limited authority to enforce decisions directly.[552]

A third alternative takes the form of 'sectorial bodies,' whereby quasi-jurisdictional agencies are endowed with the authority to investigate potential illegalities and, in certain instances, shield whistleblowers from retaliation. In the US, a pertinent example is the SEC, which can investigate misconduct and safeguard whistleblowers in the corporate sector.[553]

Fourth, Banisar notes the enforcement of whistleblower laws through existing court systems.[554] The US and the UK exemplify instances of this model.[555] For instance, the UK PIDA constitutes a comprehensive whistleblowing statute adjudicated through specialist employment tribunals.[556] Whilst Banisar groups the US and the UK together, it is crucial to note that there are significant differences between the two jurisdictions. Banisar states that in the US, employees can appeal to the MSPB and subsequently to the federal Court of Appeals.[557] However, it is important to recognise that interventions by the OSC and the MSPB under the WPA incorporate elements of administrative agencies alongside jurisdictional review by a court of law. In contrast, cases under PIDA in the UK are exclusively adjudicated by tribunals or courts, with no administrative agency intervention. Notably, in the US, only whistleblower cases falling under section 1983 (First Amendment infringement), the FCA and

[552] ibid.
[553] 17 CFR s 240.21F-17. Through orders of 'cease and desist' against the wrongdoer, the SEC may fine companies that retaliate against whistleblowers.
[554] Banisar (n 522).
[555] ibid.
[556] From a practical perspective on employment adjudication in the UK, David Lewis discusses the challenges and limitations of employment tribunals in resolving whistleblowing disputes in his article: David Lewis, 'Resolving Whistleblowing Disputes in the Public Interest: Is Tribunal Adjudication the Best That Can Be Offered?' (2013) 42(1) Industrial Law Journal 35. Claiming for a reform of adjudication in whistleblowing cases, David Lewis critically examines the evolution of UK whistleblowing legislation and advocates for a more comprehensive approach in his article: David Lewis, 'Nineteen Years of Whistleblowing Legislation in the UK: Is It Time for a More Comprehensive Approach?' (2017) 59(6) International Journal of Law and Management 1126.
[557] ibid.

the public policy exception for wrongful termination are entirely litigated by courts of law, excluding quasi-jurisdictional agency participation.[558]

In the case of Chile, as suggested above, anti-retaliation protection for whistleblowers should be embedded within the existing Chilean employment discrimination framework. First, as discussed, whistleblowing did not develop within the legal systems of the civil law tradition, such as in Chile. Nevertheless, most countries in the civil law tradition have adopted legal protection mechanisms against discrimination. As such, it is recommended that in Chile the existing whistleblowing laws be integrated through the reform of the Labour Code, following the procedures designed for workplace discrimination cases. Legal reforms should introduce a requirement for a 'public interest' concern for whistleblowers to gain protection in order to avoid any confusion between claims involving the resolution of personal grievances and whistleblowing claims. Consequently, the employment legislation must consider two kinds of protected activities: the traditional protection system related to the employee's involvement in labour-related grievances and a new system for public interest grievances. Both must operate according to the procedural rules regarding discrimination/retaliation cases.

This recommendation for reform is sensitive to current developments in Chilean law. Indeed, Chile already has a system of protection for workers participating in employment-related grievances. Article 485 of the Labour Code grants protection, providing that: '[It is a breach of fundamental rights] to retaliate against employees who file a lawsuit, for participating in such a suit as a witness or being offered as witnesses, or because of Labour Inspectorate examinations.'[559] These employment grievances are subject to the jurisdiction of the employment tribunals. To decide these retaliation cases, specific procedural rules were established in the Labour Code. Under the cause of action called 'labour protection' (*acción de tutela laboral*), the employee who participates in the protected activity should prove the *indicia* (indirect evidence) of unlawful retaliation. It is recommended that the burden of proof of the WPA be adopted; thus, in order to avoid liability, the employer should have to discharge the burden of proof by establishing a legitimate independent reason.

[558] Modesitt, Schulman and Westman (n 88).
[559] Labour Code (Cod. Trab.), art 485.

Second, it is suggested that the existing employment tribunals in Chile should adjudicate whistleblowing claims. These tribunals currently deal with cases of employment discrimination.[560] Because of their similar structure, whistleblower cases should be litigated under the same procedural rules and tribunals as equality cases. Admittedly, this argument clashes with some 'international best practices' that recommend the introduction of an 'ombudsman' to neutralise the employer's retaliatory attempts against the whistleblower.[561] In the case of Chile, the introduction of an administrative agency as an ombudsman with the power to investigate whistleblowing cases and retaliation cases may lead to political capture. When politicians appoint members of the agencies, there is a high risk that cases with political repercussions may be dismissed. In Chile, employment tribunals are independent from political parties. Moreover, access to courts is not as expensive as in the US. In this way, employment tribunals seem like the natural forum to hardwire whistleblowing into the existing legal system. This also guarantees that the whistleblower gets their 'day in court', which is a growing concern under the quasi-jurisdictional form of adjudication in US law.[562]

In Chile, the anti-retaliation relief available to civil servants who blow the whistle has evolved closer to the US model, with the adoption of a mixture of administrative bodies and judicial review. From 2024, the whistleblower laws in the public sector were reformed by vesting the Office of the Comptroller General with the authority to receive formal disclosures. Civil servants can report administrative and disciplinary defaults, corruption and misuse of public resources to the Office of the Comptroller General.[563] Accordingly, the Office of the Comptroller General maintains a channel for formal complaints open to all public sector employees. The Office can order interim relief (*medidas preventivas*) in favour of the reporting civil servants. As for retaliation, the civil servant can ask the Office of the Comptroller General for protection when they file their formal report. In such a case, the Office of the Comptroller General may: (1) shield the whistleblower against any disciplinary action from their supervisors, including termination, suspension, and transfer; and (2) exempt the whistleblower from the employer's annual performance appraisal process.

[560] Nevertheless, in Chapter 2, we explain how some misunderstandings in the interpretation of the sources have misaligned Chilean and Anglo-American law in cases of employment discrimination.
[561] Devine and Massarani (n 1) 263–64.
[562] ibid 263.
[563] Law No 21.592 art 3º, 21 August 2023, Diario Oficial [DO] (Chile).

Notwithstanding this new reform in Chilean law, whistleblowers in the public sector also retain their right to file a suit for retaliation in the employment tribunal. Unlike the US WPA, where the public servant is expected to 'exhaust the administrative remedies', in public sector whistleblowing claims in Chile, the employee decides whether to file an administrative or judicial claim to investigate and preclude retaliation. The intervention of the Office of the Comptroller General is limited to cases arising in the public sector, and it only shields against the misuse of the disciplinary prerogative in the workplace. Therefore, when a whistleblower seeks damages or reinstatement, the employment tribunal is the natural forum for resolving the dispute.

## D. The Importance of Discovery and Access to Evidence in Whistleblowing Claims

### 1. The Fundamental Role of Disclosure in Succeeding in a Whistleblower Claim

Beyond enforcement bodies, access to evidence in retaliation cases deserves considerable attention. In litigation, it is important to distinguish between the problem of access to evidence and the problem of the burden of proof. The former involves the issue of how much collaboration one party owes to the other on the elements of the former's legal claim; the latter, however, engages the issue of who should bear the responsibility of establishing the factual elements of the claim (and as a corollary, who benefits in the case the burden is not met). Thus, it is not enough to shift the burden of proof since the whistleblower also needs access to evidence to make his *prima facie* case. As pointed out above,[564] gathering indirect evidence of the causal link between the detrimental employment decision and the protected activity is the main challenge confronting the employee in a whistleblowing case.

US whistleblowing statutes do not cover rules about access to evidence. As such, the standard rules of discovery apply to whistleblowing litigation. Discovery is a pretrial stage where 'every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged'.[565] The implications of discovery in litigation have not been appropriately considered by 'international best practices' on whistleblowing. Nevertheless, US practitioners involved in whistleblowing litigation agree

[564] See Chapter 3.
[565] Charles A Wright and others, *Federal Practice and Procedure* (3rd edn, Thomson Reuters 2023) s 2001.

with the importance of discovery. Kohn has stated that: '[w]histleblowers do not win their employment cases because justice is on their side… [r]etaliation cases are won and lost on hard evidence, usually obtained through the extraordinary efforts of whistleblowers before they are fired or through their attorneys during the pretrial discovery process'.[566] Thus, after the retaliation against the whistleblower, the efficacy of substantive protection laws depends on successful discovery.

In his treatise on *Defense of Equal Employment Claims*, the American author John Buckley remarks on the significance of discovery in discrimination/retaliation cases.[567] In light of the fact that the employer controls the workplace, it will commonly be the case that the plaintiff employee and his counsel will have limited access to the relevant documentation and evidence to establish the true facts. To illustrate the point, the employer controls the information regarding the circumstances surrounding the wrongdoing that has been reported by the whistleblower, which may be crucial to create the inference of any 'reasonable belief' in the merits of reporting the alleged wrongdoing. Further, the plaintiff employee must contest the independent and non-retaliatory reason asserted by the defendant employer, usually under the guise of no discrimination because 'other employees were treated the same'. However, only the employer can access information about similarly situated employees.

On the side of the plaintiff, to make his *prima facie* case, the whistleblower's counsel needs to know whether other employees (comparators) who have not blown the whistle also received the same treatment as the plaintiff whistleblower. Further, in practice, prior trials, settlements and internal investigations are only available to the employer's counsel. In the absence of disclosure, it is only 'the employer's lawyer [who] may review and analyse relevant documents, including electronically stored information, obtain witness statements from the other employees and supervisors involved in the case'.[568] Finally, the policies encouraging internal whistleblowing and consequent investigations are easily accessible to the employer's lawyers but not to the whistleblower. Owing to these dynamics, in a retaliation case,

[566] Kohn (n 533) 255.
[567] Buckley (n 13) 14-5.
[568] ibid 16-3.

discovery – even when it is available to both parties – is a crucial tool for the whistleblower in comparison with the employer.[569]

For these reasons, the whistleblower's counsel will spend more time and resources on the discovery phase than in any other aspect of the litigation. Duties of disclosure between the parties are a key component of these kinds of proceedings. The underlying logic is that there will usually be no direct evidence of the causal link between the adverse action and the protected activity in retaliation cases. Without disclosure duties, the plaintiff's claim would be easily dismissed for a failure to make a *prima facie* case. Under the US Federal Rules of Civil Procedure,[570] a generous discovery procedure enables the whistleblower-employee-plaintiff to complement the pleadings and survive any motions for summary judgment (dismissal of the case).

In US practice, the approach to discovery in whistleblowing cases is more strategic than the standard civil litigation. To illustrate, the plaintiff employee must take the initiative. The employee's counsel must be proactive in devising a discovery plan and pushing the employer to comply with the formal requests for evidence. On the other hand, the incentives are the opposite for the defendant employer. In most cases, the employer's strategy is to resist the employee's formal requests for disclosure by claiming that they are burdensome and/or interfere with the expectations of privacy of other employees or third parties.[571] As Buckley argues: '[m]ost employment discrimination discovery proceeds on the premise that the relevant information, or most of it, is in the defendant's electronic and paper files'.[572] From the employer's standpoint, discovery is usually time-consuming, wasteful, and disruptive to the progress of the business.

However, it is not necessarily the case that the employer will always be reactive to the employee's requests. Indeed, the difference in resources between the plaintiff employee and employer can incentivise the employer to seize the offensive. Employers have the means to hire lawyers, and aggressive litigation can result in an 'early and low-cost settlement'.[573] In

[569] Kohn (n 533) 257.
[570] Fed R Civ P 26–37 (2023).
[571] Buckley (n 13) 16-10.
[572] ibid.
[573] Rossein (n 13) 14-8 – 14-9.

high-impact whistleblowing cases, counterclaims against the whistleblower or their aids may lead to Strategic Lawsuits Against Public Participation (SLAPPs). But normally, on the employer's side, the approach to discovery is a mixture of offensive action against the employee's claim and resisting the employee's requests for disclosure.[574]

### 2. Practical Aspects of Discovery

As described in Chapter 3, the role of the parties in a direct discrimination/retaliation claim is: (1) the plaintiff should prove a *prima facie* case; (2) the employer should defend itself against the *prima facie* case by establishing a legitimate non-discriminatory reason; and (3) the plaintiff must prove the employer's reason was a mere pretext to defend the claim. Considering these elements, Merrick Rossein describes a typical discovery plan in his treatise on employment discrimination. According to Rossein, the sources of proof for the *prima facie* case are the plaintiff, the employer, the employee's line manager or supervisor, personal files and employment records. Meanwhile, the sources of discovery for the employer's legitimate reason are the plaintiff, employment records, supervisors, co-workers and past employees. The discovery tools to uncover these sources are: (1) written interrogatories of witnesses, such as line managers or supervisors, co-workers, past employees and expert witnesses; (2) formal requests for the production of communications, available in hard copies or electronically stored information; and (3) oral depositions of the parties, witnesses and experts.

Discovery provides the parties with the largest possible range of evidence and documents to establish the facts. According to Kohn, it enables the employee to identify the weaknesses and strengths of his claim by: (1) determining what is the employer's case against him; (2) determining whether the evidence of the alleged misconduct is true; (3) enabling him/her to obtain emails and other computer-generated files; and (4) enabling him/her to obtain evidence of pretext.[575]

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[574] Stephen Stern, 'Strategies for Analyzing and Responding to Sarbanes-Oxley Whistleblower Claims' in Stephen Stern and others (eds), *Complying with Sarbanes-Oxley's Whistleblower Provisions* (Thomson Reuters/Aspatore 2009) 7-33.

[575] Kohn (n 533) 257–58; Sibak (n 533) 16.

From the employer's perspective, the best discovery tool is the plaintiff's deposition. The employer will attempt to find inconsistencies in the employee's story and/or impeach their credibility. If the employer anticipates losing the claim on its merits, the employer will offer the employee a settlement; however, if the employee's case remains weak after the discovery stage, the employer will file a motion for summary judgment to dismiss the case. The employer defendant's discovery plan aims to impede the employee plaintiff from making a *prima facie* case and prevailing in the summary judgment. In whistleblowing cases, this is crucial because any direct evidence of the causal link between the employee's disclosure and the adverse employment action is vanishingly rare.

Comparatists and policymakers have dedicated little attention to discovery's influence in whistleblowing cases. Under the US Federal Rules of Civil Procedure, discovery tools provide the parties with a broad amount of information to establish their claims and defences. The central role of discovery was highlighted in *Swierkiewicz v Sorema,* where the US Supreme Court held that: the 'simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues to dispose [of] unmeritorious claims'.[576] In combination with the shift in the burden of proof, discovery is a determinative element to make the whistleblower's *prima facie* case.

As with equal opportunity claims, in whistleblowing cases the causal link between the protected activity/status is the determinative element of the litigation. As Modesitt, Schulman and Westman have argued: '[t]he most important evidence from an employee's standpoint is proof of retaliatory motive'.[577] However, for the employee, there are scarce opportunities for admission or direct evidence of the employer's retaliatory intent since the employer controls the workplace. The employer drafts the handbooks, procedures and employment records, and the employee's line managers, supervisors and co-workers are subordinated to the employer; it is easier for the employer to concoct evidence of a legitimate non-discriminatory/retaliatory reason. Without discovery, the whistleblower would go to an 'ambush trial'.

[576] *Swierkiewicz v Sorema NA,* 534 US 506, 512 (2002).
[577] Modesitt, Schulman and Westman (n 88) 10-14.

Ultimately, the question regarding access to evidence is what indirect facts the whistleblower should seek to prove the employer's motive for the retaliatory conduct. Modesitt, Schulman and Westman provide a non-exhaustive list of seven types of indirect evidence whistleblowers should seek:

(1) The reported wrongdoing actually occurred;
(2) The employer did not address the concern reported;
(3) Whether the circumstances of the termination show that the employer overreacted;
(4) The supervisor or line manager who disciplined the whistleblower was not receptive to employees raising concerns;
(5) There have been prior cases of employer retaliation;
(6) The whistleblower had a good performance record; and
(7) The employer has a record of prior violations of the same regulations.[578]

### 3. The Limited Scope of Discovery in the Chilean Labour Procedure

None of the 'international best practices' on whistleblowing law have considered the importance of a whistleblower's access to evidence. For example, in their *International Best Practices for Whistleblower Policies*,[579] Devine and Massarani have classified the evidentiary rules under the title 'Rules to Prevail', but they only consider the 'realistic standards to prove a violation of the rights.'[580] This is a reference to the shifting of the burden of proof as developed in the WPA in the US. As such, the significance of employee access to evidence and the disclosure duty are overlooked in their list. Likewise, the *International Principles for Whistleblower Legislation* developed by Transparency International[581] only considers the shifting burden of proof as an evidentiary recommendation for countries seeking to adopt or reform their whistleblowing legislation.[582] Beyond considering the shifting burden of proof,

[578] ibid 10-14, 10-15.
[579] Devine and Massarani (n 1) 256–69.
[580] ibid. See also Chapter 3.
[581] Transparency International, *International Principles for Whistleblower Legislation* (n 12).
[582] In its principle number 8, Transparency International has included: '8. Burden of proof on the employer – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures

in the section 'Relief and participation', Transparency International recommends that 'rules of procedure must be balanced and objective' for whistleblowers seeking redress. It is surprising that both sets of best practices set out in *International Best Practices for Whistleblower Policies* and those promulgated by Transparency International are based on the notion of a *prima facie* case for the whistleblower (the shifting of the burden of proof). However, neither set of guidelines consider access to information or duties of disclosure as part of the rules of procedure.

In Chile, the rules of disclosure in relation to employment tribunal claims are quite limited. The Labour Code considers shifting the burden of proof in employment discrimination cases; however, access to evidence held and controlled by the employer is difficult. The limited disclosure rules make it challenging for employee plaintiffs to collect *indicia* (indirect evidence) to prove causation between the protected status/activity of the employee plaintiff and the detrimental conduct.

Compared with the US Federal Rules of Civil Procedure, the Chilean Labour Code provides minimum discovery tools after pleadings. Access to evidence, in a typical employment case, is regulated by the Labour Code as follows:

> Art. 453(5) During the trial hearing, parties should produce the documents ordered by the tribunal. When, without reason, a party does not produce the documents that the law requires for record-keeping, the judge can take the facts claimed in these documents as proven.[583]

From this provision, we can identify at least three differences between the duty of disclosure in Chile and the US. First, the duty of disclosure in Chile is limited to the production of documents at the trial. In contrast with the US Federal Rules of Civil Procedure, there are no written questionnaires or oral deposition of witnesses before the trial in Chile. In typical litigation in Chile, the first interaction with the witnesses and the other party's testimony will be at the trial in court.

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taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure'. Transparency International, *International Principles for Whistleblower Legislation* (n 12).

[583] Código del Trabajo, art 453(5) (Chile).

Second, the disclosure of documents to the other side involved in the litigation is not a necessary step prior to the trial. Usually, in Chile, to make their *prima facie* case and defences, parties rely in their pleadings on evidence that they have ingathered privately.[584] The extent of the information that may be disclosed under article 453(5) of the Labour Code is rarely useful to establish an inference of discriminatory or retaliatory intent.

Third, the parties should disclose documents only when Chilean law mandates that they must be recorded. For example, the law mandates that the employer draft a handbook about workplace security and keep working time records, letters of dismissal, salary slips, etc; all of these documents may be disclosed. However, the employer has no duty of disclosure regarding other documents not listed by law. As such, this scenario of limited discovery and reduced information is a disadvantage for the whistleblower seeking indirect evidence to make his *prima facie* case in Chile.

Chilean law does not provide for a general obligation to record and disclose information in the context of an employment relationship.[585] Chilean authors and case law agree on this restrictive view. To illustrate, in his book on evidence in employment procedures, Raul Fernández claims that the employer should only disclose documents when record-keeping is mandatory by law; when there is no statutory obligation to keep the records, the employer cannot be penalised for not disclosing.[586] Likewise, the San Miguel Court of Appeals[587] has held that there is no obligation to disclose documents when there is no law obliging that the employer to keep the document on record.

The question is why authors on 'international best practices' have ignored the problem of disclosure of evidence in whistleblowing litigation. One possible answer lies in the irreducible differences in legal procedures in jurisdictions. Whilst the usual recommendations for whistleblower laws, such as the accessibility of indirect evidence, the shifting burden of proof

[584] In his treatise on the *Defense of Equal Employment Claims*, Buckley elaborates on pleadings and evidence as follows: 'The Supreme Court in *Swierkiewicz v Sorema NA*, held that an employment discrimination complaint need not contain specific facts establishing a prima facie case under *McDonnell Douglas Corp v Green*. Instead, the complaint may contain only a "short and plain statement of the claim showing that the pleader is entitled to relief". . .' Buckley (n 13) 12:5.

[585] However, regarding the few documents that the law mandates be recorded, the record-keeping should last five years, which is the statute of limitations for employment rights.

[586] Raul Fernández, *La Prueba en el Procedimiento Laboral* (Tirant 2020) 716.

[587] Corte de Apelaciones de San Miguel [C Apel] [Courts of Appeals], Rol de la causa: 14-2014 (Chile).

and standards of evidence, can be transposed into most procedural systems, discovery is a procedural tool that belongs specifically to common law systems such as the US's adversarial system. In US law, discovery is a significant tool: 'to narrow issues in order that at the trial it may be necessary to produce evidence only in residue of matters that are found to be actually disputed and controversial'.[588] Thus, under the US Federal Rules of Evidence, discovery plays the role that is usually reserved for pleadings in civil law systems.

In Chile, the reality is different. Within the purview of the Employment Procedure governed by the Chilean Labour Code, the factual substratum to be adjudicated upon by the tribunal or court is typically gleaned from the pleadings.[589] After the pleadings have been lodged with the court or tribunal, encompassing the filing of both the complaint and the answer, a preliminary hearing is held. At this stage, the employment judge delineates the contentious facts slated for adjudication in the trial.[590] The preliminary hearing also serves as a forum for both litigants to declare the nature of the evidence they intend to present at trial. This procedural juncture affords each party the opportunity to move for the exclusion of yet-to-be-produced evidence on the grounds of irrelevance, redundancy or an infringement of fundamental rights. The underlying rationale for the preliminary hearing hinges on optimising the exclusion of extraneous evidence from the claim.

Within this legal framework, the preliminary hearing is the sole avenue to request disclosure by the parties.[591] Consequently, the bulk of evidentiary material presented during the trial emanates from the informal investigations conducted by the litigating parties. This procedural schema accentuates the significance of discovery – or, more accurately, the absence of discovery and disclosure – in the Chilean rules of employment procedure.

In contrast, in the US, the process of discovery entails legal practitioners requesting the production of documents, issuing subpoenas to witnesses, subjecting them to cross-

[588] Wright and others (n 565) s 2001.
[589] This is common to all civil law systems. 'While in common law systems, the parties and the court first investigate the facts in order to establish the truth, in civil law systems, the court is mainly concerned with the claims of the parties as they are expressed in the pleadings. In common law systems, a complaint is merely a formality which starts a procedure of investigation aimed at establishing the truth'. See Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 32(3) Victoria U Well L Rev 831.
[590] Labour Code, art 453 (Chile).
[591] Ibid.

examination, and compelling truthful testimony under oath, all within the ambit of the legal proceedings and notably with the minimum formal imprimatur of judicial authority. The conceptual incongruity arising from the substitution of the adjudicative function to private legal practitioners in the US has no corollary within the legal milieu of Chile. This empirical observation coheres with theoretical paradigms delineating legal procedures, particularly expounded upon by Damaška. His scholarship underscores the incompatibility of discovery within civil law jurisdictions, attributing such discordance to inherent distinctions in legal cultures.[592] More precisely, procedural norms in civil law countries are intricately enmeshed within a hierarchical framework, culminating in a heightened intervention of governmental bureaucracies in the adjudicative process. In contrast, the procedural landscape of common law systems operates on the foundational tenet of coordination, affording latitude for private legal practitioners to assume quasi-public roles.[593] This dichotomy in procedural philosophy emphasises the nuanced complexities inherent in the transplantation of legal institutions across divergent legal traditions. Notably, despite the profound impact of legal origins on the transformative process of transplanting whistleblower laws, this facet remains noticeably unaddressed in the literature espousing international best practices in the domain of whistleblowing law.

## E. Conclusion

This chapter underscores the importance of effectively integrating anti-retaliation protections for whistleblowers within the Chilean legal context whilst respecting the country's legal tradition and existing employment discrimination frameworks. The challenges identified for the enforcement of whistleblower laws – particularly those related to the administrative and jurisdictional bodies, legal procedures and the ability of whistleblowers to obtain evidence through discovery – reveal the complexities of transplanting whistleblower laws and practices into Chilean law from a common law jurisdiction such as the US. Given the critical risk of adopting nominal rights on paper, a balanced approach that aligns with Chile’s legal system is essential.

[592] Damaška (n 88) 67–68.
[593] ibid.

The chapter also demonstrates that when drawing upon 'international best practices', there is a critical need for policymakers to shape and incorporate these intelligently, sensitively and carefully within the Chilean context, ensuring that whistleblower protections are not only rights on paper but also practically enforceable. Comparative legal analysis in informing such domestic legal reforms is important, and this chapter provides recommendations for careful consideration of both the procedural aspects and effective access to documents and evidence to support retaliation claims. Finally, this chapter calls for consideration of legal origins and the context-specific crafting of whistleblower laws in Chile, fostering the identification of procedural amendments to enhance adequate whistleblower protection.

# Chapter 6: The Just-Cause System as a Form of Whistleblower Protection: Comparative Analysis

## A. Introduction

This chapter explores the legal frameworks that either promote or obstruct the protection of individuals who report misconduct in the public interest. It offers a comparative analysis of Chile's unfair dismissal system, which functions as a default protection mechanism for whistleblowers in the absence of comprehensive legislation. The comparison highlights the legal approaches employed in the US and the UK.

Historically, the legal framework for whistleblower protection has been markedly underdeveloped in Chile compared to the US, where such protection is deeply entrenched in the legal system. This chapter critically assesses the ramifications of this legal deficiency within the Chilean legal context and explores how the just-cause termination system, which is a fundamental element of Chilean employment law, can function as a suitable surrogate for whistleblower protection.

The analysis commences by tracing the historical evolution of whistleblower protections in Chile, wherein explicit legal provisions have been absent until the recent past. This examination is juxtaposed with the frameworks of the US and the UK, where whistleblowing is formally recognised as a protected activity, typically through specific legislation that goes beyond merely addressing unfair dismissal claims, albeit closely connected to their existing anti-discrimination protection frameworks. To elucidate the cultural and legal barriers inherent in this comparative analysis, we dedicate a section to 'Karin Law', a contemporary Chilean statute intended to combat workplace bullying and harassment yet notably lacking in its acknowledgement of the public interest imperative associated with whistleblowing. This case study exemplifies the challenges faced in adapting the Anglo-American model of whistleblower protection to the Chilean legal landscape.

Thereafter, the chapter turns to the just-cause termination of employment contracts as a potential collateral mechanism for safeguarding whistleblowers. It also examines the legal

principle of *ius resistendi* within Chilean law, which empowers employees to resist unlawful directives, and assesses its functional equivalence as a form of passive whistleblowing. Nonetheless, we underscore the practical limitations of this concept, as it is predominantly invoked in personal employment conflicts rather than in scenarios that pertain to public interest disclosures.

In its third section, the chapter scrutinises the UK's framework for public interest disclosure, ultimately advocating the establishment of a legal structure that distinctly recognises and protects whistleblowing as a distinctive activity separate from unfair dismissal and protection for workplace grievances. This calls for a thorough examination of the prospects for legal transplantation of whistleblower statutes, particularly in jurisdictions such as Chile, where the pre-existing legal system may not adequately accommodate the Anglo-American model of whistleblower protection, especially in cases involving direct discrimination.

## B. Protection for Whistleblowers in Chile: A Missing Legal Category

### 1. Whistleblower Protection in Chilean Law: Between Vagueness and Non-existence

Historically, whistleblower laws have not been a part of the Chilean legal system. Like other civil law jurisdictions, traditional forms of whistleblower legislation, such as *qui tam* actions and obligations to cooperate with law enforcement, did not emerge in Chile.[594] Modern approaches to whistleblower protection, particularly concerning public interest disclosures in the workplace, have only recently been added to Chilean law. Indeed, if we define a whistleblower as an employee who reports their employer's misconduct to safeguard the public interest, the legislation introduced in Chile has been limited to the public sector and only dates back to 2007.[595] In the private sector, neither the old Labour Code of 1931 nor the current Labour Code of 1994 include any specific provisions covering whistleblowing. Consequently, in Chilean law, protection against retaliation for public interest disclosures in the workplace is primarily indirect and significantly overshadowed by the protection related to labour grievances.

[594] See Chapter 1.
[595] Law 20.205 of 2007 (Chile).

As discussed in Chapters 3 and 4, to conduct their analysis some civil law comparatists have examined whistleblowing alongside other related categories. The rationale behind this approach is that all societies face similar challenges; thus, the issues arising from employer misconduct and the necessity for a whistleblowing framework should be present across all jurisdictions, albeit manifesting in different forms.[596] In essence, the protection of employees who report wrongdoing to prevent societal harm caused by their employers is an issue of universal concern.

Drawing on the US experience as a comparative point of reference, some legal scholars have argued that the rules governing just-cause terminations may be analogous to whistleblowing laws in civil law countries.[597] Specifically, whistleblower protections are established in jurisdictions that do not recognise just-cause termination rules. Therefore, the development of whistleblower laws is considered more significant in jurisdictions recognising the at-will employment rule, such as the US, than in jurisdictions where just-cause schemes dominate.

Other scholars have contended that the broader protections for freedom of speech found in civil law countries, such as those in European jurisdictions, may surpass the whistleblower protections offered under the First Amendment of the US Constitution.[598] For instance, in his comparative study on freedom of expression between the US and France, Morvan argues that:

> [Under the US Constitution], freedom of speech should be firmly guaranteed, if not revered as an absolute principle. However, the reality is far removed from this idealistic perspective. From the viewpoint of American businesses and investors, European laws afford employees an excessively generous level of protection against employer authority and control. By contrast, viewed from the Old Continent (except for this insular monarchy drifting off our shores, called United Kingdom) America resembles hell for workers.[599]

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[596] For Zweigert and Kötz, if we do not find an equivalent legal institution in a different jurisdiction, this can be attributed to insufficient focus on the legal institution's function. Zweigert and Kötz (n 38) 34. J Gordley, 'The Functional Method' in P Monateri (ed), *Methods of Comparative Law* (Elgar 2012) 107-119; Michaels (n 44) 347.
[597] Fasterling (n 3) 336.
[598] Deckert and Sweeney (n 73) 136; Morvan (n 24) 1030.
[599] Morvan (n 24).

This observation raises questions about to whether the perceived advantages of employee protection in Europe translate into better outcomes for whistleblowers compared to the US system.

The optimistic perspective regarding the French approach to free speech, compared to that of the US, may not be entirely justified. We can examine two decisions made in 2005 by the French data protection agency (*Commission Nationale de l'Informatique et des Libertés*, CNIL) regarding anonymous whistleblower hotlines established by American companies operating in France.[600] The French agency prohibited these anonymous hotlines, deeming them to be forms of snitching. In contrast, anonymous hotlines are widely accepted in the US. According to Delikat and Phillips, it is common for many US employers to implement whistleblowing systems, including telephone and internet hotlines, which enable employees to anonymously disclose potential violations.[601] In this way, it becomes clear that an employee filing an anonymous report enjoys a more favourable environment in the US than in France.

Legal comparatists have examined the concepts of free speech and the just cause termination rules as potential functional equivalents to whistleblowing in civil law jurisdictions. The proposed parallels between whistleblowing laws and similar civil law categories raise significant concerns about over-projection.[602] Evidence indicates that whistleblowing in the Anglo-American context is a distinct phenomenon not readily recognised by lawyers operating within civil law jurisdictions. Labour lawyers in civil law systems are accustomed to a framework where the labour system mediates conflicts between employers and employees. In these contexts, the role of employees in acting in the public interest, especially when their employers threaten it, is often overlooked. This tendency to prioritise the resolution of employer-employee disputes within a labour context is encapsulated in Morvan's observation:

[600] CNIL decision 2005/110 of May 26, 2005 (Group McDonald's France) and CNIL decision 2005/111 (Exide Technologies). See Chapter 3 for more details on the cases.
[601] Delikat and Phillips (n 76) s 7:2.
[602] In comparative law, 'over projection' or 'analocalism' refers to the inappropriate application of ideas from the comparatist's own culture and education to a different legal system where they may not be applicable. See Masferrer, Modéer and Moréteau (n 21). See also Olivier Moréteau, 'The Words of Comparative Law' (2019) 6 J Int'l & Comp L 183.

> [T]his culture [in the US] implicitly turns workers against each other… Continental Europe, however, is a completely different scenario. There, the Marxist critique of liberalism has firmly established a confrontational structure in work relations, prompting unions to advocate for new rights and liberties for individuals to counterbalance the authority and power of employers.[603]

This focus on the employee's struggles appears to be comparatively less pronounced in the Anglo-American culture. In this milieu, a specific legal framework has emerged to protect employees who disclose information in the public interest, extending beyond mere workplace grievances. This distinction between a labour grievance and a public interest disclosure (whistleblowing) is crucial in the sphere of Anglo-American employment law.

Despite the lack of systematic recognition of public interest disclosures in Chilean law, it is worth investigating whether any functional equivalents have been developed. In the following sections of this chapter, we analyse potential substitutes for whistleblower protection. Three main categories of whistleblower laws exist in Chile: (1) anti-retaliation provisions, (2) reporting channels for misconduct and (3) reward schemes. Over the past two decades, Chile has not been very active in enacting legislation corresponding to each of these types. However, legal provisions have emerged through a process of legal transplantation that is often fragmented, and the relevant case law remains in its early stages. Given this context, it is logical to classify Chile as a jurisdiction that is in a transition phase from one lacking whistleblower protection to one beginning to adopt such measures. The objective is to critically evaluate the effectiveness of the current Chilean termination system in providing anti-retaliation protection for whistleblowers, especially when compared with the systems in the Anglo-American system.[604]

### 2. Chile: Whistleblowers without Specific Whistleblowing Laws

Same as other civil law jurisdictions, Chilean employment laws focus on the struggle between capital and labour. The foundation of Chilean employment law is the 'principle of protection', which is a concept that is difficult to be translated into Anglo-American legal standards. Legal

[603] Morvan (n 24) 1016–17.
[604] Lewis, Brown and Moberly (n 27).

scholars in Chile and Latin America consider this principle a binding source of employment law in two ways. First, it binds lawmakers to enact laws that benefit employees; secondly, in terms of the principle of '*in dubio pro operario*' (resolving cases in favour of the employee), it is binding on judges entrusted with the adjudication of employment disputes. In their book *Principled Labour Law. US Labor Through a Latin American Method*, Gamonal and Rosado have remarked that: '[*i*]*n dubio pro operario* is nothing but the crystallization of the protective principle into a legal rule. It mandates that, in a hard case, the judge or other adjudicator must decide the case in favour of the worker.'[605] However, the obvious question is: what qualifies as a 'hard case'? The authors reply that it is 'when the law is ambiguous or vague or when there is a gap in the rules.'[606] This biased perspective in favour of the interests of employees is canonical in Chile and the rest of Latin America. Every treatise or textbook on employment law contains a specific chapter on the *Principio Protector* (principle of protection) and *in dubio pro operario* (in favour of the employee).[607]

From an outsider's perspective, the framework of a unilaterally 'protective' employment law has been characterised as overly simplistic. For instance, Guy Davidov offers a critique of the principle of *in dubio pro operario* (in favour of the employee), arguing that: '[i]t seems too simplistic with the regard to interpretation of legislation or the filling of lacunas. Why are we in doubt in the first place? We need to have a method of solving hard cases, and the method cannot be that "workers always win"'.[608] This reductionist perspective of Chilean law has confined labour law to disputes between employers and employees, thereby neglecting crucial issues related to the public interest in the workplace. Moreover, it appears that scholars who are comparative analysing whistleblowing laws have largely ignored how this philosophical foundation of employment law in Latin America and other civil law jurisdictions may have stifled the evolution of public interest disclosures in the workplace. The ramifications of these narrow viewpoints are evident in policies that blur the lines between whistleblowing and ordinary workplace grievances, demonstrating a concerning lack of understanding of the broader implications on the development of whistleblower protection.

[605] Gamonal and Rosado (n 459) 40.
[606] ibid.
[607] Thayer and Novoa (n 53); Pedro Irureta, *Derecho del Trabajo Chileno* (Tirant lo Blanch 2023).
[608] Guy Davidov, 'Principled Labor Law: US Labor Law Through a Latin American Method' (2020) 41(2) Comp Lab L & Pol'y J 289, 291.

For example, in 2023 a significant reform of the Chilean Labour Code was introduced after a nurse committed suicide due to workplace bullying. In 2018, Karin Salgado, a nurse at a public hospital, was subpoenaed to testify as a witness in an internal investigation for theft of surgical material. Salgado testified that her boss (the nurse-in-chief) had been stealing surgical material from the hospital's warehouse together with other nurses. The investigator was a friend of the accused nurses, and he warned Salgado not to snitch on her boss. After Salgado's deposition, the accused nurses presented an alibi, blaming Salgado for stealing the surgical material from the warehouse. The investigator found against Salgado, and she was sanctioned with a fine of 30% fine of her salary and a negative entry in her professional record. In the aftermath, she left a letter announcing that workplace bullying was unbearable and committed suicide in May 2019. Salgado's case was a big scandal in Chile, and it was featured in the national news for weeks.[609] Politicians and lawyers created a legal campaign for '*no otra Karin'* (We do not want another Karin) and proposed a bill to amend the Labour Code. Owing to the legal community's lack of familiarity with the concept of whistleblowing, the bill failed to consider the key element of disclosures in the public interest and simply treated Salgado's situation as another employment conflict.

Under the Anglo-American standards, Salgado was a whistleblower: she was a witness in an internal investigation disclosing a wrongdoing committed against the public purse in her workplace. Nevertheless, the law, which was passed by the Chilean Congress, purportedly to address the root cause of her case, disregarded all references to the public interest disclosure she made and only focused on the harassment she suffered. Law No 21.643 of 2023,[610] or *Ley Karin* (Karin's Law), is an example of how employer retaliation about a public interest disclosure in the workplace fails to fit neatly into the Chilean conception of employment law. Instead of providing protection and remedies for whistleblowers, Karin's law brought three main reforms: (1) employers should issue policies to investigate and prevent harassment in the workplace; (2) a new, broader legal category of 'violence in the workplace' was introduced, since violence may come from customers or third parties beyond the employment relationship; and (3) employees do not need to prove that multiple bullying

[609] Ignacio Hermosilla, 'Quién era Karin Salgado: El suicidio que motivó la nueva ley contra el acoso laboral' (*BioBioChile*, 2 May 2024) <www.biobiochile.cl/noticias/servicios/explicado/2024/05/02/quien-era-karin-salgado-el-suicidio-que-motivo-la-nueva-ley-contra-el-acoso-laboral.shtml> accessed 30 September 2025.
[610] Law 21.643 of 2023 (Chile).

incidents have taken place for submitting a harassment claim, as one isolated incident will now be enough.[611] Surprisingly, none of these reforms addressed the problem of the public interest disclosure made by Salgado. Nor did the new law treat Salgado's deposition as a protected activity in the workplace as it would have been the case in the Anglo-American law.

Under the recently enacted Karin's Law, the legal framework governing workplace harassment in Chile does not differentiate between instances motivated by public interest disclosures and those arising from personal animosity. Both forms of harassment are subject to identical legal scrutiny. This law's treatment of public interest disclosures starkly contrasts with the established 'international best practices' regarding whistleblower protection, as these were analysed in Chapter 3.

In the Anglo-American legal tradition, a central challenge in litigating retaliation cases lies in establishing a causal connection between the public interest disclosure – activity to protect the community – and any adverse employment action against the whistleblower. In the US, this structural framework is the same for all sources of whistleblowing law, whether federal law, common law or constitutional provisions. A fundamental criterion for a whistleblowing claim is that the whistleblower's disclosure pertain to matters of public interest, distinguishing it from routine workplace grievances.

Karin's Law illustrates how the Chilean legal context varies fundamentally from the Anglo-American paradigm. Whilst Anglo-American jurisprudence safeguards whistleblowers primarily due to the ethical and socially beneficial nature of the disclosures, Chilean law does not extend similar recognition to the pro-social conduct of employees who report misconduct within their organisations. Consequently, employees lack specific legal redress when subjected to retaliation or harassment motivated by a public interest disclosure.

In Chapter 2, we analysed collateral causes of action for whistleblowers under Chilean law, namely free speech, and infringement of physical and psychological integrity (harassment). Other possible legal avenues for addressing whistleblower retaliation may include claims for

[611] The law contains other amendments to the Labour Code, but these are not directly related to the situation faced by Salgado.

wrongful discharge, as these can be perceived as functional equivalents. The subsequent sections examine the cause of action associated with wrongful discharge in greater detail.[612]

## C. The Just-Cause Termination of the Employment Contract: A Weak and Collateral Protection for Whistleblowers in Chile

### 1. Job Security Versus Public Interest

The various just causes for the termination of the employment contract are listed in the Chilean Labour Code. Pedro Irureta has stated that the regime regulating dismissals/termination of employment in the Labour Code aims to privilege the most extended duration of the employment contract for the benefit of the employee and to protect third parties interested in the preservation of the contract. By third parties, Irureta means the employee's dependants, such as his family and relatives,[613] rather than the public or broader society as in a whistleblower case.

Consequently, the protection for dismissed whistleblowers is indirect through the termination system. In general, a whistleblower must file a suit for unfair dismissal challenging the alleged just cause relied upon by the employer in the dismissal notice. However, the Chilean legal termination system is a just-cause with certain variations depending on the circumstances of the employee. As a result, a whistleblower working in the private sector may find their situation governed by any one of three termination regimes: (1) total job stability (this is also the default rule for the public sector), (2) relative job security and (3) termination at will. Relative job security operates as the default rule in the private sector.[614]

### 2. Total Job Stability

In the Chilean legal system, employees who enjoy total job stability can only be dismissed for just cause plus judicial authorisation. For workers in the private sector, total job stability is exceptional. The Labour Code provides for a few cases of employees that cannot be dismissed

[612] In Chapter 2, constitutional protection and free speech protection were analysed.
[613] Irureta (n 607) 723.
[614] This just-cause termination system is influenced by ILO Convention No. 158 of 1982.

without prior judicial authorisation, for example union representatives,[615] employees participating in the process of collective bargaining,[616] employees involved in the organisation of a new union[617] and workers who are pregnant women.[618] To dismiss any of these workers, the employer must have a just cause (not an economic reason or redundancy) for the termination and raise legal proceedings in an employment tribunal to obtain prior authorisation from a judge.

Meanwhile, in the public sector, employees must undergo a disciplinary investigation by an administrative agency prior to dismissal. This framework is designed to prevent cronyism, the potential capture of state institutions by political parties, and serves as the default rule for public servants employed by the state. Public sector employees hired indefinitely – rather than those on fixed-term contracts or in specific roles – can only be terminated for disciplinary reasons, after a prior and fair investigation.[619]

An exception to this regime is political appointments for head or policymaker officers of the governmental agencies. In this case, these officials may be fired at will. Under article 7 of the Public Sector Statute Act, these officials fall within the 'exclusive trust' (*exclusiva confianza*) of the Head of the Public Service. This means that they keep their position for as long as they maintain the 'trust' of the political authorities (i.e. at his discretion).[620] There is no cause of action for wrongful discharge where these employees are dismissed.

Under the total job stability scheme, the employee has the right to reinstatement and to claim unpaid salary or benefits when the public or private employer fails to adhere to the prescribed procedures and mandatory authorisations. Technically, the employee retains seniority and all benefits as if the relationship had never ended. Therefore, the only possible remedy is the reinstatement of the employee, which operates as if the dismissal never happened (i.e. it is a nullity).

[615] Labour Code, art 243 (Chile).
[616] ibid art 309 (Chile).
[617] ibid art 221 (Chile).
[618] ibid art 201 (Chile).
[619] Law 18.834, art 119 (Chile).
[620] ibid art 7 (Chile).

### 3. Relative Job Security: The Chilean Default Rule

The second regime of termination is relative job security. Job security means the right of the employees to continue in their job and that they cannot be dismissed as long as there is no just cause for the termination of the employment contract that is established by the law.[621] Under this regime, an employee can be fired for just cause without prior authorisation of a judge or agency. Consequently, the employee can file a suit for wrongful discharge if the employer fails to invoke a fair cause for termination. In a case of unfair dismissal, the employee can only file legal proceedings for statutory damages, and reinstatement is not an available remedy. Under article 168 of the Labour Code, an unfair dismissal terminates the contract of employment, giving the employee a cause of action for wrongful discharge, regulated as follows:

> Article 168. The worker whose contract is terminated due to the application of one or more of the causes established in articles 159 [objective dismissal], 160 [disciplinary dismissal], and 161 [redundancy], and who considers such application to be unjustified, improper, or unwarranted, or that no legal cause has been invoked, may appeal to the competent tribunal within sixty business days from the separation, in order for it to declare accordingly. In this case, the judge shall order the payment of the severance referred to in the fourth paragraph of article 162 [30 days of notice] . . . as appropriate, increasing the latter according to the following rules:
>
> a) By thirty per cent, if the termination was due to improper application of article 161;
>
> b) By fifty per cent, if the termination was due to unjustified application of the causes in article 159 or if no legal cause was invoked for such termination;
>
> c) By eighty per cent, if the termination was due to improper application of the causes in article 160.

Article 168 of the Labour Code has been interpreted as imposing a set of tariffs on the misuse of the recognised just causes of termination, each of which depend on how recklessly the employer behaves. The employer must pay a percentage increase over the severance

[621] Irureta (n 607) 727.

compensation the employer as follows: (a) 50% for invoking causes that do not comprise a breach of contract (Article 159), (b) 80% for invoking breaches of contract (Article 160) and (c) 30% for misusing economic reasons or misuse of the exception of high-rank employees (Article 161).

The requirements for compensation severance are regulated by Article 163 as follows:

> Article 163. If the contract has been in force for one year or more and the employer terminates it in accordance with Article 161, they must pay the worker severance pay for years of service as agreed upon individually or collectively by the parties, provided that it exceeds the amount established in the following paragraph. In the absence of such stipulation, which also includes one that does not meet the requirement mentioned in the preceding paragraph, the employer must pay the worker severance pay equivalent to thirty days of the last monthly salary earned for each year of service and any fraction exceeding six months, provided continuously to said employer. This severance pay shall have a maximum limit of three hundred and thirty days of salary.

According to article 163, there are three restrictions on severance payments. First, only employees dismissed for economic reasons are entitled to a severance payment. Employees whose contracts are terminated for objective reasons or for breach of contract are not entitled to any payment. Second, there is a minimum length of service requirement for an employee to qualify for a payment. Only employees with at least a year of uninterrupted service qualify for a severance payment when dismissed. An employee with less than a year, regardless of the misuse or non-use of a just cause, does not qualify for a monthly salary payment as compensation for termination. Third, the severance payment is capped at 330 days or 11 months. It means that employees with 12 years of seniority are only entitled to a maximum of 11 months of severance for termination.

Thus, the remedies for a typical unfair dismissal are: (1) statutory damages depending on seniority, (2) salary for the period (30 days) of notice that the employer has failed to give, and (3) increased statutory damages, amounting to between 30% and 80% of the statutory damages, depending on how recklessly the employer invoked the cause of dismissal. This

system of relative job security is the default rule on dismissal/termination under Chilean law.[622]

### 4. Termination Without Cause in the Labour Code

The Labour Code also covers situations where an employer may dismiss an employee without cause. Chilean legal scholars have equated these situations to the at-will rule in US employment law. For example, Irureta has stated that:

> While [at-will termination] is common in the Anglo-Saxon legal culture [US], the truth is that it is also used in some cases regulated by the Chilean Labour Code. This occurs, for example, in the case of the contractual termination of exclusively trusted personnel and high-level executives (eg managers, assistant managers, agents, or attorneys with general administrative powers), whom the legislator allows free termination of the contract due to the special organizational position held by the employee.[623]

Article 161, paragraph 2 of the Chilean Labour Code regulates dismissals and/or terminations of the contract of employment without cause:

> Article 161. In the case of workers who have the power to commit the employer to contracts with third parties, such as managers, assistant managers, agents, or attorneys-in-fact, provided that, in all these cases, they are endowed, at least, with general administrative powers, and in the case of domestic workers, the employment contract may also be terminated by written notice of termination from the employer, which must be given with at least thirty days' notice, with a copy to the respective Labour Inspector. However, this advance notice shall not be required when the employer pays the worker a cash compensation equivalent to the final earned salary at the time of termination. This rule shall also apply in the case of positions or jobs of

[622] Thayer and Novoa (n 53); Irureta (n 607) 375.
[623] Irureta (n 607) 725.

> exclusive trust of the employer, whose nature as such arises from their inherent characteristics.

As such, high-ranked employees and domestic workers in Chile are excluded from the just cause termination system.

However, this exceptional rule does not equate to the at-will rule applicable in US employment law. To illustrate this point, a Chilean manager dismissed under Article 161 paragraph 2 of the Labour Code still retains the right to receive 30 days' notice of termination in advance of the end of the employment relationship. If the employer chooses to dismiss without prior notice, it must pay the employee's salary for a complete month (i.e. 30 days). A second difference is that those employees retain the right to receive one-month of severance pay for every year worked with the employer, subject to a cap of 11 months. Thus, an employee with managerial powers can be dismissed without cause but is entitled to notice and severance compensation. The only difference here between the dismissed high-ranked employee and the rest of the workforce under the just cause system is that the former cannot challenge the termination's fairness in an unfair dismissal in an employment tribunal. This means that these employees cannot obtain an increase in the statutory damages reserved for unfairly dismissed employees. The same rule applies to domestic employees who cannot challenge the cause of termination, subject to the caveat that they receive payment after dismissal, with the employer contributing to a Social Security organisation by depositing a sum.[624] Such employees receive a severance payment regardless of the cause of the dismissal.

In conclusion, in the Chilean employment termination scheme, three regimes coexist. One is designed to provide maximum protection against dismissal and is reserved for highly vulnerable employees who may be dismissed for political reasons (public servants), union activities or pregnancy. Their dismissals require prior authorisation and can only take place for disciplinary reasons (no economic reasons or redundancy). The remedy for a breach of these strict rules of termination is reinstatement. The second regime constitutes the general rule of dismissal and operates by just cause, which is the default rule prescribed by the Labour Code. Under this framework, an employee should be notified of the cause of dismissal and

[624] Labour Code, art 163 bis (Chile).

retain the right to raise legal proceedings to challenge its fairness.[625] The remedy for these cases is statutory damages rather than reinstatement. In this case, the unfair dismissal remains valid (i.e. it is not treated as a nullity). Finally, some employees may be dismissed without cause and retain the right of prior notice and seniority compensation. The only restriction is that they cannot raise legal proceedings to challenge the dismissal.

To sum up, a potential whistleblower facing dismissal under the Chilean Labour Code has little to gain under the unfair dismissal cause of action. Even if the court finds in their favour, reinstatement generally remains out of reach as a legal remedy (unless one of the exceptional cases of total job security applies in the employee's case). The only remedy available is statutory damages of one month of salary for every year of service and a fraction over six months of seniority, subject to a cap of eleven months. To illustrate how the law works, we can consider the following hypotheticals: (a) a whistleblower is dismissed, and if they had two years' length of service in the workplace, the termination payment would be two months of salary; (b) a whistleblower with 13 years of seniority would be subject to the cap of 11 months of salary after dismissal; and (c) an employee with less than one year of service would receive no payment at all. Under the Chilean unfair dismissal cause of action, there is no connection between the employee's actual damages and the amount paid as severance. The situation of a whistleblower with union responsibilities would be more favourable because union representatives have total job security and a right to reinstatement. However, the cases of total job security in Chile are rare.[626]

In light of this discussion, how might a whistleblower prevail in a system of termination that does not recognise whistleblowing as a protected activity? As it will become clear in the following section, public interest disclosures are eclipsed by the just causes prescribed for a legitimate dismissal.

[625] ibid 375–76.
[626] Thayer and Novoa (n 53).

### D. The Limits of a Just Cause Dismissal Regime as a Form of Whistleblower Protection: A Comparative Perspective

To evaluate the level of protection under the Chilean termination system, the just causes of termination in the Labour Code must be analysed. It is noticeable that public interest disclosures are not included in the list of just causes for termination of the employment contract. However, failing to prescribe a public interest disclosure as a good cause for termination does not necessarily mean that a whistleblower is automatically protected. Owing to the logic of the just cause system – which works as a menu of breaches of contract or economic reasons allowing the employer to dismiss – the fact that certain situations are not listed means that the employer cannot use them as a fair reason to dismiss. In Chilean law, where a reason is not listed as a just cause and the employer adopts that as its justification for dismissal, there will be an unfair dismissal, which will trigger the remedies analysed in the preceding section. As such, albeit indirectly, a dismissal attributable to a public interest disclosure will be unfair.

However, this collateral protection for whistleblowers does not mean that they are protected in the same way as under US employment law. To understand the difference, we should consider that even though the at-will rule is the default position in the US, it coexists with a just cause system for certain employees. Mark Rothstein and others[627] explain three circumstances in which the just cause system may arise in the US. First, when the employment contract is for a fixed term. In this case, to dismiss the employee before the agreed term is a breach of contract. Second, contracts of indefinite terms may contain a provision for cause for termination. Third, from the interpretation of employer handbooks, oral agreements, or certain conduct, the judge may conclude that just cause is needed for termination.[628] Under these three scenarios, if an employee is dismissed for blowing the whistle, the cause of action for unfair dismissal and statutory anti-retaliation protection overlap. However, these two causes of action have a different rationale. The just cause regime is designed to protect job security, whereas whistleblowing protects the interests of broader society.[629] Since both

[627] Rothstein and others (n 449) 748–49.
[628] ibid 748.
[629] Nicole B Porter, 'The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause' (2008) 87 Neb L Rev 104.

causes of action have different objectives, the whistleblowing statutory protection usually supersedes the common law wrongful dismissal.

The evidence suggests that the scope of just cause dismissal regimes has been rather overestimated as whistleblower protection mechanisms. For example, Fasterling has pondered whether the just cause system is equivalent to the US whistleblowing protection system.[630] However, a thorough analysis shows that the just cause system, when available in the US, does not affect the availability of statutory rights for whistleblowers. Just cause and anti-retaliation protection for whistleblowers have different scopes of action. It does not seem relevant whether, in certain jurisdictions, the default rule of termination is at will or just cause.[631]

The causes of action to protect whistleblowers involve breaching rules beyond the employment relationship. The interests of third parties are decisive in distinguishing whistleblowing protection from unfair dismissal: statutory, constitutional and common law protection for whistleblowers requires a public interest. Conversely, an unfair dismissal is always an employment law breach affecting the parties involved. Consequently, the assumption that whistleblower protection developed first in the US because of the absence of a just cause system overlooks the significance of whistleblowing in the Anglo-American tradition. Whistleblower rights are not a defective substitute system of protection against termination, as continental authors have portrayed.

As such, the disdain of continental authors for the American at-will rule of termination has affected comparative analyses of whistleblowing. Moreover, for some French authors,[632] it seems inconceivable that whistleblowing is a form of protection that their protective Labour Codes never contemplated. The origins of Labour Codes seem overly focused on the struggle between capital and labour (*in dubio pro operario*), but they have never led to the creation of a legal construction that would protect the public interest in the workplace.

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[630] Fasterling (n 3) 336.
[631] For example, the state of Montana replaced the at-will rule for a just cause of employment termination, see The *Montana Wrongful Discharge from Employment Act 1987,* Mont Code Ann §§ 39-2-901–915 (2023).
[632] Morvan (n 24) 1030.

Given these considerations, it does not seem reasonable to equate whistleblowing rules with just-cause termination systems.[633]

Furthermore, whistleblowing and unfair dismissal cannot be conflated because, when available, the just cause system in the US is built on similar foundations as the Chilean one. To illustrate, the just causes for termination in US employment law may be classified into two groups: (1) the economic reasons that do not involve the intervention of the employee, and (2) breaches of the employment contract for misconduct or inadequate performance.[634] This first type of dismissal occurs when an employee who has been hired for an indefinite term has their contract of employment terminated because the business faces changes in the market, such as a lower demand for its products, rising prices, including those of suppliers, or an economic crisis. Under the Chilean Labour Code, this dismissal is called 'necessities of the business, factory or service'.[635] The Labour Code provides that economic reasons are a good cause for dismissal. However, the employer must tender a severance payment to the employee of one month of salary for every year of service and a fraction of six months of seniority, with a cap of 11 months. In the US, the remedy for breaching the just cause system is contractual damages (punitive damages are unavailable).[636]

Regarding the second type of dismissal, namely misconduct or inadequate performance, the Labour Code lists a fixed number of breaches that amount to a fair dismissal:

> Article 160. The employment contract shall terminate without any right to compensation when the employer terminates it by invoking one or more of the following grounds:
>
> 1. Any serious misconduct, duly proven, as follows: a) [l]ack of probity by the worker in the performance of their duties; b) [a]cts of sexual harassment; c) [a]cts of physical aggression by the worker against the employer or any worker who performs in the same company; d) [i]nsults uttered by the worker to the employer; e) [i]mmoral

[633] See Davidov and Eshet (n 425) 170.
[634] Rothstein and others (n 449) 748–49.
[635] Labour Code (Chile), art 161.
[636] Restatement of the Law, Employment Law (n 247) § 9.01–9.02.

conduct by the worker affecting the company where they work; and f) [a]cts of workplace harassment.

2. Negotiations carried out by the worker within the business scope, which have been prohibited in writing in the respective contract by the employer.
3. Failure of the worker to attend to their duties without justified cause for two consecutive days, two Mondays in the month, or a total of three days during the same period; likewise, the unjustified absence, or without prior notice by the worker who is in charge of an activity, task, or machine, whose abandonment or stoppage implies a serious disruption in the progress of the work.
4. Abandonment of work by the worker, understood as: a) [t]he untimely and unjustified departure of the worker from the work site and during working hours, without permission from the employer or their representative; and b) [t]he refusal to work without justified cause in respect of the tasks agreed upon in the contract.
5. Reckless acts, omissions, or imprudence that affect the safety or operation of the establishment, the safety or activity of the workers, or their health.
6. Intentional material damage caused to installations, machinery, tools, work equipment, products, or merchandise.
7. Serious breach of the obligations imposed by the contract.

Under the Labour Code, employees fairly dismissed for disciplinary reasons are not entitled to severance pay. In addition, the only good reasons for disciplinary dismissals are the ones enumerated by Article 160. The seventh category of '[s]erious breach of the obligations imposed by the contract' works as a catch-all for other possible breaches not included in the prior six categories.

The text of the disciplinary reasons listed in the Labour Code confirms that blowing the whistle is not a fair ground for dismissal. Thus, an employee cannot be dismissed because of reporting wrongdoing, but if dismissed, the employee has a cause of action for unfair dismissal. However, the fact that reporting misconduct is not a good cause for dismissal does not mean that the Labour Code recognises whistleblowing as a phenomenon that demands protective laws.

The closest legal equivalent to whistleblowing in the Chilean employment law is the so-called *ius resistendi.* As explored in Chapter 4, this resembles the passive whistleblowing of the US employment law. Modesitt, Schulman and Westman have classified whistleblowing as passive and active, depending on whether there is an actual report or mere opposition to illegitimate commands from the employer.[637] An employee who refuses illegal orders from the employer is a passive whistleblower, whilst an employee reporting the wrongdoing is an active whistleblower. In Chile, *ius resistendi*, a possible avenue for passive whistleblowing, has emerged as a form of protection for workplace grievances.

Irureta describes *ius resistendi* whilst explaining the duty of obedience in the employment relationship.[638] Accordingly, the duty to obey the employer's commands is limited by the legitimacy of the orders.[639] The principle is that the employer's commands have a presumption of legitimacy, and only under restricted circumstances does the employee have the legitimate power to resist compliance with orders.[640] These circumstances of disobedience of illegitimate orders are similar to the passive whistleblowing category addressed by Modesitt, Schulman and Westman.

For Chilean authors, an employee exercising *ius resistendi*, in the case of a disciplinary dismissal for insubordination, would be entitled to an action of wrongful dismissal. This doctrine is enshrined as an exception to the duty of obedience, and consequential dismissal for insubordination.[641] In those cases, public interest may be relevant.

However, in Chilean practice, *ius resistendi* lacks the public interest element described in Chapter 4. *Ius resistendi* provides a cause of action for unfair dismissal by opposing unlawful workplace commands. But we must add that the cause of action is indirect and, in practice, unsuitable for the whistleblowing retaliation dynamic. Indeed, employees identify *ius resistendi* as a means to oppose breaches of the employment contract or other illegalities where their interests are at stake. All the reported cases where the *ius resistendi* has been invoked concern employees complaining about their own personal interests. For example,

[637] Modesitt, Schulman and Westman (n 88) 7-12. See Chapter 4 for a detailed analysis of passive whistleblowing.
[638] Thayer and Novoa (n 53).
[639] Irureta (n 607) 375–76.
[640] ibid 375.
[641] Thayer and Novoa (n 53); Irureta (n 607) 375.

employees who refused to load shelves in a shop because no extra pay was involved;[642] employees refusing to be relocated because it was not a term agreed upon in the employment contract;[643] and a refusal to take up an extra workload beyond what was initially contained in the employment contract.[644] The case law shows that the public interest and concerns of third parties beyond the employment relationship have not been the main reason for the opposition to the order. As such, cases where the employee is the only victim of wrongdoing – breaches of employment contract – are not considered real whistleblowing.

## E. Whistleblowing as a Protected Activity in the UK

### 1. Whistleblowing in the UK before the PIDA

For Cover and Humphreys, before the PIDA, the United Kingdom was a 'legislative desert' regarding whistleblowing.[645] Because of this absence in regulation the most relevant source of whistleblowing was case law.[646] For example, in *Initial Services v Putterill*,[647] the plaintiff employer issued a writ against the defendant employee for disclosing information to a co-defendant reporter. The documents revolved about the involvement of the employer in a combination to keep prices up against the interest of the consumers. The question for the court was whether the public interest of the information disclosed outweighs the employee's confidentiality duties. The court found for the defendants under the grounds that the disclosed information about employer's misconduct was in the public interest.

The public interest defence was revisited in *Lion Laboratories Ltd v Evans*.[648] In that case, the employer brought proceedings against two former employees for breach of confidence and breach of trust after they disclosed information to a newspaper concerning a breath-testing device manufactured by the company. The technicians revealed that the device, approved by the authorities for use in drink-driving cases, was unreliable. The court held in favour of the

[642] '*Zambrano con Servicios'* (n 479).
[643] '*Sarmiento con Gestión'* (n 481).
[644] '*Quiroz con Tech'* (n 480).
[645] Cover and Humphreys (n 8) 93.
[646] Ibid.
[647] *Initial Services v Putterill,* [1968] 1 Q.B. 396.
[648] *Lion Laboratories Ltd. v Evans and Others*, [1985] Q.B. 526.

defendants, finding that the public interest in ensuring the accuracy of a device upon which criminal liability depends outweighed the duty of confidentiality.

Beyond the public interest defence, which applies when the employer takes legal action against the whistleblower, employees victimised because of their disclosures also attempted actions against their employers. Since no specific cause of action was available for whistleblowing, they relied on general employment law claims. For instance, in *Kirby v Manpower Services Commission,*[649] the plaintiff who was an interviewer at the employer's job centre, reported to the Community Relations Council three incidents of discrimination by prospective employers. The employee was moved by his employer to a less desired position after the reports. Kirby filed a lawsuit for victimisation under the Race Relations Act 1976.[650] However, the court found that the reports made by the pursuer were note in connection with proceedings under the meaning of the race act.

Another non-specific protective regime was the dismissal regimen. In her 1994 book, *The Legal Implications of Disclosure in the Public Interest*, Yvonne Cripps addressed the issue of protection for whistleblowers when the default rules of unfair dismissal and constructive discharge were the main causes of action for employees making public interest disclosures. Cripps claimed that: '[e]mployees who disseminate information which they acquire in the course of their employment may be dismissed on account of their disclosures even though their actions are in the public interest'.[651] A breach of a duty of trust was the rationale for this approach.

The leading case for this restrictive view was *Thornley v Aircraft Research Association Ltd,*[652] where the Employment Appeal Tribunal (EAT) held that the dismissal of a research employee who had revealed to a newspaper the existence of defects in an aircraft designed by the employer was in breach of trust. Considering that the public interest disclosures were not a protected activity, the public interest was not considered to be a relevant element in the decision.

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[649] *Kirby v Manpower Services Commission,* [1980] I.C.R. 420.
[650] Race Relations Act 1976 s.2(1).
[651] Cripps (n 167) 313. See also Lewis (n 171)
[652] *Thornley v Aircraft Research Association Ltd, 1976 WL 423526.*

However, employees were more successful when they disclosed the information in the workplace instead of spreading it to the public. For example, in the case of *Smith v Youth Hostel Association*,[653] an employee prevailed after reporting wrongdoing to the organisation's managers. Mr Smith raised an action for constructive dismissal after being pressured by management to conceal certain stock that had disappeared from the organisation's premises. Mr Smith reported this to his supervisor, but no action was taken. Cripps distinguishes *Smith* from *Thornley* on the basis that the fate of Smith would have been less successful if he, as in the case of Thornley, had published the complaint in the press.[654] Nevertheless, the EAT's ruling is far from a typical whistleblowing case where the public interest is part of the reasoning. Instead, the EAT focused on whether the lack of response from the manager constituted a breach of contract.[655]

Under the same rationale, opposition to illegal orders was considered sufficient ground for a constructive dismissal claim. Michael Cover and Gordon Humphreys[656] discussed case law where employees, after opposing illegal instructions, were held entitled to resign and claim compensation for unfair constructive dismissal from their employers. The case law includes employees resisting instructions to drive untaxed vehicles,[657] falsifying company records over the drawing of petrol,[658] or cooperating to conceal a loss of stock (the already mentioned Smith case).[659] The dynamic of these cases is very similar to the passive whistleblowing cases of the US and the *ius resistendi* of the Chilean legal system; each one of these involve an employee who has resisted participation in an employer's illegal activities rather than reporting the employer's wrongdoing to the authorities or the public. However, the old UK

[653] *Smith v Youth Hostel Association*, COIT, 977/213 (1980). See also, *Callanan v Surrey Area Health Authority*, COIT, 994/36 (1980).
[654] Cripps (n 167) 323.
[655] The EAT held that '[f]rom the evidence we heard we were satisfied that Mr Smith was frustrated by the action or inaction of the respondents in carrying out his work as the person in charge of the stockroom from April 1978 to his resignation in January 1979 . . . . We had to consider the question whether the treatment of Mr Smith by the respondents during 1978 amounted to a breach of a fundamental term of his contract of employment which entitled him regard himself as dismissed. We were satisfied that it did. Not only were the respondents in breach of his contract by making it impossible for Mr Smith effectively to carry out his job of Stockroom Supervisor; we also considered that their attitude was such as to be a breach of the implied term in any contract of employment that there should be a relationship of trust and confidence between the parties'. See *Smith v Youth Hostel Association*, COIT, 977/213 (1980).
[656] Cover and Humphreys (n 8) 95–96.
[657] *Donnelly v Renilson & Co Ltd* (Unreported, 1983, WL 914359).
[658] *Morrish v Henly's (Folkestone) Ltd* [1973] ICR 482.
[659] *Smith v Youth Hostel Association*, COIT, 977/213 (1980).

case law comprises wrongdoing involving the public interest, which distinguishes them from the Chilean *ius resistendi*, which is only used to gain protection after the employer retaliates against the employee for raising employment grievances.

According to Cripps, a seminal recognition of anti-retaliation protection for dissent in the workplace was also present in the now-repealed Trade Union Reform and Employment Rights Act 1993 ('TURERA').[660] The TURERA made the dismissal of employees automatically unfair where they were 'asserting relevant statutory [employment] rights or alleging their infringement by an employer regardless of whether the employer has infringed it, provided the employee acted in good faith'.[661] Nevertheless, this form of protection against retaliation does not necessarily address the problem of employees disclosing public interest information. Instead, it regulates victimisation in respect of labour-related grievances.

Using the US as a comparator, Cover and Humphreys concluded that the general law in the UK was insufficient and needed major reform. They proposed that the UK should adopt a specific statute regulating whistleblowing to solve the uncertainty caused by the different pieces of the law regulating the topic:

> The law is inadequate so far as whistleblowers are concerned and unclear from the point of view of employers. Technical legal debates over such matters as the meaning of public interest, racial discrimination, combined with minimal damages for heads of claim, such as injury to feelings, does little to encourage employees to reveal wrongdoing. What is needed is specific legislation so that a greater degree of clarity is brought to bear on this subject.[662]

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[660] In the relevant sections, Cripps argued that '[t]he employment protection (Consolidation) Act 1978 defines other situations in which dismissals will automatically be unfair. The most important of these for the purposes of this book is the new section 60A of the Employment Protection (Consolidation) Act 1978, as inserted by section 29 of the Trade Union Reform and Employment Rights Act of 1993; this renders the dismissal of employees automatically unfair if they are dismissed solely or principally *for asserting relevant statutory rights or alleging infringement of them by an employer* regardless of whether the employee has the statutory right and regardless of whether the employer has infringed it, provided the employee acted in good faith'. See Cripps (n 167) 320.

[661] ibid.

[662] Cover and Humphreys (n 8) 100.

This specific legislation was enacted four years after the publication of Cover and Humphreys' work in the form of the PIDA, which amended the ERA.[663]

2. The Public Interest Disclosure Act 1998 and the Grounds of Discrimination

Significantly, the PIDA 1998 introduced a specific cause of action for unfair dismissal by amending the ERA. Section 103A of the ERA provides that: '[a]n employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.' Notwithstanding its incarnation as a form of automatically unfair dismissal, the action resembles a cause of action for direct discrimination regarding participation in a protected activity. The cause of action requires that the dismissal should be motivated by the protected disclosure.[664]

For comparative purposes, the British system works under the same legal framework as the US: (a) participation in a protected activity, (b) dismissal, and (c) a causative link between the disclosure and the dismissal.[665] To bring a viable claim, the employee must identify the actual reason for the dismissal and demonstrate that it is the employee's protected disclosure. This involves leading indirect evidence about the actual motivation of the employer. Same as in the US, the employer bears the burden of proving the reason for the dismissal. As shown, the main elements of the cause of action of retaliation are recognisable in section 103A of the ERA, irrespective of the fact that the domestic legislation has positioned the legal proceedings as an action for an automatically unfair dismissal.

Nonetheless, the ERA provides additional employee protection by conferring a right not to suffer a detriment short of dismissal because of a public interest disclosure. The protection for whistleblowers extends to detriments beyond dismissal protection regulated by section

[663] See also, Jenny Mendelsohn, 'Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing' (2009) 8 Wash. U. Global Stud. L. Rev. 723.
[664] Employment Rights Act 1996, s 103A. Likewise, in the US law, the British system regulates motivation when multiple causes concur in the dismissal (mixed-motive cases), requiring that disclosure be the 'principal reason' of termination. For a discussion on mixed-motive cases, see Chapter 3.
[665] However, the legal regulation of discrimination and whistleblowing are separate, see David Lewis, 'Providing Rights for Whistleblowers: Would an Anti-Discrimination Model be More Effective?' (2005) 34 Industrial Law Journal 239.

103A of the ERA. This right not to suffer a detriment is regulated by section 47B(1) of the ERA: '[a] worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'

The term 'detriment' in this context refers to any disadvantage or mistreatment short of dismissal that has been suffered by the worker because of the public interest disclosure. The structure of this right not to suffer a detriment is unmistakably framed as a cause of action for direct discrimination for participating in a protected activity. In their treatise on whistleblowing, Lewis and others underline the key elements of the 'detriment' cause of action. They underscore the typical causal link between discrimination/retaliation claims as follows:

> Was the act or deliberate failure to act 'done on the ground that' the worker made one or more protected disclosures? This focuses on the reason for the act or omission: whether the protected disclosure was more than a trivial influence on the decision to do the act complained of (or failure to do what the claimant says ought to have been done).[666]

This legal language is a recognition that whistleblowing should necessarily take the form of an action that resembles a direct discrimination claim.

Before the Equality Act of 2010, the case of *Woodward v Abbey National Plc (No.1)*[667] concerned the scope of the cause of action under section 47B(1) of the ERA and other discrimination statutes. Lord Justice Ward expressly confirmed that a case of retaliation is a form of discrimination:

> Victimisation [retaliation] is established by showing inter alia the discrimination of the employee by 'subjecting him to any other detriment' — see s. 6(2) of the 1975 Act and s. 4(2) of the 1976 and 1995 Acts. Under s. 47B of the ERA a worker likewise has the right 'not to be subjected to any detriment'. Although the language and the

[666] Lewis and others (n 146) 363.
[667] *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] ICR 1436.

> framework might be slightly different, it seems to me that the four Acts are dealing with the same concept, namely, protecting the employee from detriment being done to him in retaliation for his or her sex, race, disability or whistle-blowing. This is made explicit by the long title to the Public Interest Disclosure Act 1998, which is, as I have already set out:
>
> 'An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation.'
>
> All four Acts are, therefore, dealing with victimisation in one form or another. If the common theme is victimisation, it would be odd indeed if the same sort of act could be victimisation for one purpose, but not for the other.[668]

After the coming into force of the Equality Act of 2010, in the case of *Tiplady v City Bradford MDC*,[669] Lord Justice Underhill reiterated the reasoning of Lord Justice Ward in *Woodward* concerning the common framework governing retaliation cases under section 47B of the ERA and other discrimination grounds:

> As Ward LJ observed in *Woodward* [2006] ICR 1436, despite the differences in their particular structure and language, the whistleblower legislation and the discrimination legislation are fundamentally of the same character . . . . Likewise, at para 26 of my judgment in *Royal Mail Group Ltd v Jhuti* [2018] ICR 982, while I referred to Mummery LJ's warning in *Kuzel*, I also observed that the frequently used phrase 'whistleblower discrimination' was not inapt, since the concept underlying section 47B was the same as that of the discrimination legislation; and I said that, that being so, it made sense to interpret identical language in the two statutes, where it occurred, in the same way (p 991). Similarly, in *Timis v Osipov* [2019] ICR 655 I observed, at para 69 of my judgment, that even though it was not possible entirely to assimilate the statutory schemes of protection for whistleblowers and other workers with protected characteristics 'the two situations are nevertheless essentially similar and, other

[668] ibid.
[669] *Tiplady v City Bradford MDC* [2019] EWCA Civ 2180.

> things being equal, one would expect Parliament to have intended to follow the same substantive approach in each.[670]

These passages suggest that, under UK labour law, that cases of retaliation/detriment adopt the same framework as cases of direct discrimination.

Since whistleblower retaliation under the ERA links the detriment to the employee with the disclosure, causation is a decisive factor in triggering protection. In the same way as the US, the judges in the UK had to find a solution to the issue of proving a causal link between the protected disclosure and the detrimental employment outcome. Owing to the lack of direct evidence of the employer's motivation, the *prima facie* nomenclature already present in the US has been adopted. The solution finds its illustration in section 136 of the Equality Act of 2010 and follows the US legal position very closely, whereby the judge must make an automatic finding for the employee when: 'there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned [of the EqA]'.[671] These facts usually come as indirect evidence, enabling an inference to be drawn that attributes the detriment to the protected disclosure. Thus, the proximity between the protected disclosure and the detriment has been expressed in a way that a *prima facie* case must be made by the employee to shift the burden to the employer, who must then prove a non-discriminatory purpose of the detrimental act.

### 3. Protected Activity and Public Interest: Structuring Whistleblower Protection Beyond Just Cause

The shared legal framework of the US and the UK provide useful guidance for other countries in case they want to adopt whistleblowing protection. In both systems, whistleblowing is framed as a protected activity, similar to status discrimination, which is crucial to render anti-retaliation protection effective. By contrast, when only the unfair dismissal cause of action is available, litigation focuses on the economic or disciplinary reasons for dismissal, while the public interest value of the disclosure remains invisible. Without recognising the public

[670] Ibid. See Lewis and others (n 146) 364–65.
[671] Equality Act 2010, s 136(2). See Lewis and others (n 146) 435.

interest disclosure as a protected activity, whistleblowing risks being absorbed into a just cause regime.

The Chilean system may learn from the reform of the *Public Interest Disclosure Act 1998* ('PIDA'). To illustrate, in *Parkins v Sodexho*,[672] the claimant relied on section 43B(b) PIDA after being dismissed for raising concerns about the risks of operating machinery. The Employment Appeal Tribunal held that a breach of contract could qualify as 'any legal obligation' under the statute. This effectively allowed employees to present grievances rooted in self-interest as whistleblowing claims –a problem that mirrors the Chilean position, where employment complaints are often conflated with whistleblowing.

Recognising the risk of such over-extension, the UK Parliament amended section 43B of the *Employment Rights Act 1996* ('ERA') through section 17 of the *Enterprise and Regulatory Reform Act 2013* ('ERRA').[673] The amendment introduced a public interest requirement, ensuring that only disclosures with a broader societal dimension qualify for whistleblowing protection.

Yet, the public interest requirement does not demand that the disclosure benefits the society as a whole. In *Chesterton v Nurmohamed*,[674] for instance, the disclosure concerned mismanagement of accounts that primarily affected the claimant's commission. However, because the misconduct also impacted 100 other employees, involved deliberate manipulation, and concerned a large well-known company, the court held that the disclosure met the public interest test. This case illustrates that even self-interested claims can carry public interest significance, when assessed contextually.[675]

[672] *Parkins v Sodexho Ltd* [2002] IRLR 109 (EAT).
[673] Jeanette Ashton, '15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 Ind Law J 34.
[674] *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731.
[675] How public and private interests can be intertwined in a whistleblowing case is analysed in detail by David Lewis, 'Is a Public Interest Test for Workplace Whistleblowing in Society's Interest?' (2015) 57(2) International Journal of Law and Management 141.

From a human rights perspective, disclosures in the public interest may also be recognised as a form of protected speech. Indeed, the Human Rights Act 1998[676] (HRA) recognises domestically free speech as set out in article 10 of the ECHR:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

This provision was central in the whistleblowing case *Guja v Moldova*.[677] In Guja, an employee of the Moldovan Prosecutor's Office was dismissed after disclosing information to the media concerning alleged corruption. The plaintiff employee argued that the information leaked did not constitute a legitimate ground for dismissal and sought remedies in the domestic courts, unsuccessfully. The case was subsequently brought before the European Court of Human Rights (ECtHR), where the issue was whether the dismissal for disclosing information about alleged corruption violated the employee's right to freedom of expression.

To assess the claim, the Court applied a six-part proportionality test considering: (i) whether the applicant had alternative channels for the disclosure, (ii) the public interest in the information disclosed, (iii) the authenticity of the information, (iv) detriment to the employer, (v) whether the applicant acted in good faith, and (vi) the severity of the sanction.[678] In light of these factors, the Court found in favour of the applicant, holding that whistleblowing concerning wrongdoing falls within the protection of article 10 of the ECHR.

Regarding the interaction between human rights and PIDA in whistleblowing cases, Lewis and others have stated that statutory protection is preferable. Indeed, when statutory protection is available, they say:

> [T]he domestic UK scheme of protection may be regarded as more favourable because protection is an automatic consequence of a finding that the disclosure falls within

[676] Human Rights Act 1998, s 6.
[677] *Guja* (n 397).
[678] ibid 24.

> section 43C to 43F. There is no room for broader assessment based on weighing factors such as whether the public interest outweighed the harm to the employer or whether the whistleblower acted in good faith.[679]

However, freedom of expression may play a crucial role where PIDA falls short. Human rights play a supplementary role. This observation is also illustrative of countries such as Chile, where, in the absence of specific statutory protection like PIDA, freedom of expression has served as a substitute mechanism for protection.[680]

### 4. Significance of the Public Interest element in the transplant to Chile

As such, the comparative assessment undertaken above shows that a just cause termination system – where the law stipulates different good causes to dismiss – is insufficient to ground anti-retaliation protection in the workplace.[681] Expressing the public interest disclosure as protected activity in the statutory language provides specific protection for whistleblowers, since it recognises the whistleblower's role as a collaborator with law enforcement. Legal systems that lack this protected ground will mix-up protection for employees' complaints and whistleblowing.

Comparative scholars have neglected the importance of employment discrimination law for the protection of whistleblowers. As already stated,[682] 'international best practices' represent recommendations based on the assumption that all countries have discrimination systems based on protected personal characteristics/status or employees' protected activities. This means that whistleblowing cases work under the framework of direct discrimination. This is true for the US and the UK, but not necessarily for countries outside the Anglo-American tradition, such as Chile.

In essence, it is crucial that comparatists and policymakers review the domestic framework of their employment discrimination laws prior to introducing whistleblowing protection. The

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[679] Lewis and others (n 146) 84-85. Similar rationale may be found in *Bates v Clyde & Co LLP* [2014] UKSC 32.
[680] See Chapter 2.
[681] Lewis, Brown and Moberly (n 27).
[682] See Chapter 3.

US and UK cases show that employment discrimination law provides the legal framework for anti-retaliation protection for whistleblowers. Therefore, an essential step before whistleblowing protections is legally transplanted involves an evaluation as to whether the reception jurisdiction's employment discrimination system functions similarly to the donor's legal system. Where the system of employment discrimination does not recognise 'grounds of discrimination' that apply in the US or the UK, hardwiring the rules governing anti-retaliation entails additional challenges. For example, it is necessary to address how the element of the public interest should be recognised by a system where the grounds of discrimination are irrelevant.

As analysed in Chapter 2, certain countries such as Chile operate employment discrimination systems that do not recognise a typical direct discrimination case known to common law jurisdictions such as the US and UK. For example, in Chile, the employment discrimination system rejects the notion of a closed number of protected grounds and accepts the existence of 'open grounds' for discrimination that is limited by the principle of 'proportionality'.[683] As such, any differentiation in the treatment of employees (relative to another employee) – if disproportionate in its impact – may be challenged as employment discrimination and will be unlawful.

Since legal systems like Chile already protect job-related grievances, whistleblowing overlaps with mere grievances. Usually, whistleblower protection is subsumed and masked within ordinary job-related grievances, and whistleblowers' contributions to the community are ignored during litigation. Given this scenario, all grievances under Chilean labour law are treated in the same manner, irrespective of whether the public interest in engaged. As the legal system prioritises the resolution of private disputes and conflicts between the employer and the employee, all employee grievances receive the same treatment and remedies. Even if the category of 'disclosing public interest information' was introduced, the question would arise as to how it might be possible to compel the law and the courts to engage in reasoning that addresses the relevance of the employee's 'protected activity' rather than obscure it under the notion of 'proportionality' or unfair dismissal. In contrast to the US and the UK, in Chile, whistleblowing based on 'causation' would be isolated from the rest of the employment

[683] Constitución Política de la República de Chile [CP] art 19 No 16 (Chile); Labour Code, art. 485 (Chile).

discrimination based on 'proportionality', according to the traditional legal understanding of the relevant legal actors (e.g. lawyers and judges). Introducing the Anglo-American incarnation of whistleblowing protection in civil jurisdictions such as Chile seems much more radical than most comparatists are willing to admit.

## F. Conclusion

This chapter undertakes a comparative analysis of whistleblower protection systems, focusing on the Chilean legal framework and contrasting it with those of the US and the UK. The exploration reveals significant disparities in the recognition and legal frameworks of public interest disclosures across these jurisdictions, highlighting the complexities inherent in the legal transplant of a legal category not rooted in a civil law country such as Chile.

In Chile, the historical absence of explicit whistleblower protection laws has left a legal gap that the just-cause termination system has attempted to fill but failed to do so adequately. Whilst legal scholars have labelled just cause regimes as capable of accommodating whistleblower protection, the protection conferred is indirect and falls short of targeting the public interest that is essential for effective whistleblowing recognition. Likewise, the *ius resistendi* legal doctrine, though a useful step towards recognising the importance of resisting illegal orders, has not been leveraged to its full potential as a form of passive whistleblowing.

The case of Karin's Law in Chile illustrates the challenges faced in translating the Anglo-American model of whistleblower protection into the Chilean context. Despite its laudable intentions to address workplace bullying and harassment, the law's failure to explicitly protect public interest disclosures underscores the critical need for explicit recognition of the distinctiveness of legal cultures.

The analysis also highlights the importance of recognising whistleblowing as a separate legal category from workplace grievances. This distinction is crucial for ensuring that the unique contributions of whistleblowers to the public interest are acknowledged and protected under the law. The Anglo-American approach, which frames whistleblowing as a protected ground

akin to discrimination law, offers a valuable model for jurisdictions seeking to enhance their whistleblower protection regimes.

This chapter makes a case for the critical evaluation of the legal transplant of whistleblower laws, especially in jurisdictions with the characteristics of Chile, where the existing legal framework may not readily accommodate the Anglo-American approach. In this Thesis, we call for a tailored approach that considers the cultural and legal specificities of the recipient jurisdiction whilst ensuring that the law recognises the public interest contribution of the whistleblower.

# Conclusion

## A. Research Question and Methodology

This Thesis has analysed the challenges and implications of transplanting Anglo-American whistleblowing law into the Chilean legal system. By focusing on anti-retaliation protection, the discussion has centred on how the causes of action, legal frameworks, and cultural assumptions underpinning whistleblowing law in 'international best practice' and the US and the UK could be received appropriately and litigated and adjudicated upon effectively within a civil law jurisdiction such as Chile. Three core methodological approaches in comparative law have guided our inquiry: Watson's legal transplant, Legrand's cultural critique and the functional method; each one of them has contributed distinct, yet complementary, analytical lenses.

Watson's legal transplant approach enabled us to identify the migration of whistleblowing law originating in the Anglo-American law into the Chilean setting. Evidence shows that in its earlier inception, whistleblowing is a form of private collaboration with law enforcement, fitting the old English adversarial procedures. In countries that followed the continental inquisitorial system of legal procedures, law enforcement was centralised in the government and legal bureaucracies. In this way, private collaboration with law enforcement did not develop. From this perspective, Chile's reception of whistleblowing protections can be viewed as a typical instance of 'law out of context'. This is a reference to rules moving from one jurisdiction to another, regardless of the different settings. Legal history provides insights into how the legal families involved in the legal transplant contribute to an explanation of the negative cultural connotation of whistleblowing in civil law countries. The suspicion towards whistleblowing is a factor undermining public interest disclosures in the workplace in civil law countries, such as Chile.

These findings are consistent with Legrand's reluctance towards legal transplants. For this author, law is inextricably linked to the society where it originates. Rules are not self-sufficient, but are embedded in cultural, historical, and institutional frameworks. This notion is central to this Thesis. As demonstrated in Chapters 1 and 3, key features of Anglo-American whistleblowing law –such as how it is embedded within private law enforcement, relies on

adversarial litigation structures, and how it is connected inextricably with employment discrimination law–lack direct counterparts in Chilean law. Legrand's approach explains why whistleblowing in Chile has been associated with workplace harassment, constitutional infringement of personal integrity or conflated with workplace grievances and complaints. Whilst relevant to protecting whistleblowers, these legal categories do not capture the public interest element that is so essential to whistleblowing claims in the Anglo-American tradition.

The functional method of comparative law was applied to reconcile these competing perspectives and evaluate Chilean law's performance in protecting whistleblowers. This method enabled a comparison of legal institutions by their intended function rather than their outward form. Seen from this functionalist perspective, whistleblowing law clearly fosters accountability, exposes corruption, and protects the public interest by disclosing wrongdoing within organisations. As Zweigert and Kötz rightly claim: 'the only things that are comparable are those which fulfil the same function'. Consequently, the central comparative question becomes: can Chilean law, as it stands, effectively perform the function that 'international best practices' on whistleblowing –which are rooted in the Anglo-American model of whistleblowing laws– perform in their US jurisdiction of origin?

Based on the analysis in this Thesis, the answer is rather negative. Chapters 2 and 5 have shown that Chile's employment discrimination framework relies on a different constitutional doctrine that is incompatible with 'international best practices' on whistleblowing and Anglo-American whistleblowing. The constitutional foundation of the Chilean employment discrimination system differs from the statutory Anglo-American one, which is based on a list of protected characteristics. Consequently, whistleblowers have relied on causes of action that cannot reproduce the litigation found in the Anglo-American system. Moreover, in Chapter 5, it was shown that the procedural features of American US employment litigation –such as standards of proof, duties of disclosure (discovery), and the adjudication structure– pose substantial obstacles to the reproduction of this kind of litigation in Chile. Building on these findings and theoretical insights, this Thesis makes several original contributions to comparative law, whistleblowing law, and legal reform in Chile.

## B. Key Contributions

### 1. Reconceptualising whistleblowing protection as a form of direct discrimination

One of the principal contributions of this Thesis is to establish that whistleblowing, as conceived in the Anglo-American law and recognised by 'international best practices', is not an isolated legal innovation, but a legal category structurally embedded in this legal tradition. First, because whistleblowing is an expression of private participation with law enforcement, the historical analysis in this Thesis shows how whistleblowing may be conceptually associated with jury trials, *qui tam* actions and adversarial procedures. Second, modern whistleblower protection is a derivative of employment discrimination law, and specifically a form of direct discrimination. In Chapter 3, it has been demonstrated that whistleblower protection in the US is an extension of the direct discrimination system created by Title VII, and the attendant case law that is used to interpret whistleblowing statutes. Likewise, Chapter 6 shows how whistleblower protection is a form of direct discrimination in the UK under the PIDA. The Court of Appeal in England and legal scholars agree that cases of protected activity for public interest disclosures share the same framework as direct discrimination.

Legal authors have not emphasised the importance of whistleblowing protection as a direct discrimination claim. Indeed, this insight reframes whistleblowing as an organic dimension of an employment discrimination system rather than as an isolated category. As a result of the peculiarities of Chilean discrimination law, this finding spotlights how any jurisdiction attempting to transplant Anglo-American whistleblowing law must not only import statutory language but reform its employment discrimination system to enable it to handle whistleblower cases in a manner structurally equivalent to direct discrimination claims. The case of Chile exemplifies how, in the absence of these reforms, the borrowed law cannot replicate the expected protection and instead will turn a system into one that simply handles workplace complaints.

2. Demonstrating the incompatibility between Chilean discrimination law and Anglo-American whistleblower practices

A second contribution of this Thesis lies in exposing the deep doctrinal incompatibility between the Chilean constitutional conception of equality in the workplace and the Anglo-American direct discrimination framework. In Chile, employment discrimination cases are adjudicated under a judicial test of proportionality, rather than requiring a causal link between a protected characteristic and the detrimental employer's decision. Cases of whistleblowing retaliation are litigated as conflicts of constitutional rights in Chile. For instance, they are considered infringements against the right to physical and moral integrity or violations of free speech – both approaches which fail to capture the public interest element central to whistleblowing in 'international best practices' and Anglo-American law. The Thesis demonstrates that Chilean courts cannot effectively process whistleblower claims without significant doctrinal realignment.

3. Showing that whistleblowing requires a supportive procedural and evidentiary system

The Thesis also contributes to comparative procedural law by showing that whistleblower protection depends on a specific litigation infrastructure. In the US, this infrastructure includes pretrial discovery, evidentiary standards such as 'preponderance of the evidence' and administrative adjudication bodies. These procedural elements are not merely technicalities but functional preconditions for the success of whistleblowing laws. Chapters 2 and 5 show that Chile lacks these procedural mechanisms and, as such, whistleblower claims are likely to fail even if the substantive rules are adopted.

4. Identifying the limitations of the functional equivalents adopted to emulate whistleblowing protection rules

The Thesis demonstrates that Chilean equivalents, such as the *ius resistendi*, the infringement of physical and moral integrity (harassment), and unfair dismissal partially overlap with whistleblowing protection. However, these causes of action cannot be considered the equivalent of whistleblowing protection in a functional sense. Treating them as

whistleblowing erodes the public interest element of the disclosure. Furthermore, these partial matches provoke confusion, as discussed in the case of French authors who have overextended the term ‘whistleblower’ to include contractual infringements or workplace dissidence, thus weakening the protection for genuine public interest disclosures.

5. Providing a comparative law case study layered in different theoretical approaches

By assessing whistleblowing laws, this Thesis has made a methodological contribution to comparative law by showing how doctrinal, contextual and functional approaches can be layered to produce a more realistic analysis. This approach has not been considered before in the case of whistleblowing, which makes this Thesis truly unique and ground-breaking. The Thesis proposes a model of comparison that does not idealise the slavish borrowing of whistleblowing protection rules based on ‘international best practices’, but instead critically evaluates whether the transplanted institution can survive and function under the constraints of the host legal system; in other words, whether the transplant will be rejected in its new body. This Thesis applies this eclectic method to whistleblowing, where well-intentioned anti-corruption reforms risk becoming paper rights for employees who expose wrongdoing inside their organisations.

Notwithstanding these contributions, it is important to acknowledge the scope and limitations of this research.

## C. Limitations

Whilst this Thesis offers an original comparative analysis on the potential for a legal transplant of whistleblowing laws grounded in ‘international best practices’ to Chile, several limitations should be acknowledged regarding the jurisdictional scope, methodological focus and thematic coverage.

1. Jurisdictional Scope and Comparative Focus

The comparative analysis in this Thesis has deliberately centred on three jurisdictions: The US, Chile and the UK. This choice is grounded in both the author's academic training and the

genealogical origins of whistleblowing as a legal institution, which the evidence shows emerged within the Anglo-American tradition. The US was selected as the primary reference point due to its direct influence on Chilean legislation and more developed whistleblower protection rooted in anti-discrimination law. At the same time, the UK served as a secondary comparator, offering a transplanted functional model akin to the American one.

However, this comparative effort excludes other important jurisdictions, particularly the EU, which has developed its own supranational framework for whistleblower protection. This study has not considered the recent Whistleblowing Directive (EU) 2019/1937, given that the transposition process has only recently been completed and there is no well-established body of case law for assessment.

The comparative method is oriented towards law reform in Chile. Hence, the comparative analysis is subordinate to this goal rather than to the development of new approaches to comparative law as a discipline. The contribution of this Thesis is to highlight the challenges associated with the legal transplant of whistleblowing in Chile, rather than developing a general theory of comparative law on the topic. This approach allows for a deeper understanding of the nuances involved in the reception of whistleblowing and its practical implications in similar jurisdictions.

### 2. Methodological Emphasis on Doctrinal Analysis

The methodological core of this work is doctrinal legal analysis, supported by comparative, historical, and cultural interpretation. This approach has served to shed light in the elements of the causes of action, procedural rules and adjudicative structures involved in the whistleblowing protection. However, the Thesis does not evaluate the effectiveness of whistleblower laws, nor does it account for the lived experiences of those subjected to retaliation arising from whistleblowing. Instead, the doctrinal approach explores challenges in legal transplantation, which inherently limits the capacity to assess the socio-legal operation of the whistleblowing protection laws.

### 3. Thematic Boundaries: Remedies and Enforcement Mechanisms

Although the Thesis provides an in-depth treatment of the cause of action and legal framework of whistleblowing protection, it does not provide a detailed comparative analysis of remedies. For instance, the study does not assess the kind of damages that should be awarded, if rewards/bounties should be considered part of whistleblower protection, or whether reinstatement should be available for whistleblowers in lieu of damages. All these elements are relevant but were omitted because they are too specific for a meaningful comparative analysis. The advantages and disadvantages of punitive damages, reinstatement rights and other deterrent remedies, such as rewards, etc, are all topics for discussion that go beyond the scope of this Thesis. A more comprehensive treatment of remedies, particularly in terms of punitive damages, reinstatement, and rewards, would enrich the functional analysis and may reveal other obstacles in transplanting whistleblower laws into civil law systems, such as that of Chile.

Additionally, institutional design, including the roles of ombudsman agencies, employment tribunals, or quasi-judicial agencies, was only partially addressed. A deeper analysis of institutional capacity and procedural constraints would have further strengthened the reception assessment, particularly in terms of rule enforcement and the scope for the 'rejection' of the transplant. These limitations also open up promising avenues for further research, that are both doctrinal and empirical.

## D. Further Research

Given the limitations mentioned above, several avenues for further research emerge. First, the insights emerging from this Thesis could be applied to other Latin American jurisdictions undergoing whistleblowing law reform. Furthermore, the challenges found in the adoption of whistleblowing in Chile may shed light on other countries with similar employment law systems. Since most Latin American jurisdictions are signatories to international anti-corruption conventions, they should adopt whistleblowing protections in their domestic legal systems. Comparative studies in those countries may identify additional challenges or confirm the findings of this Thesis in different setting.

Second, future research should integrate a remedies-focused analysis, examining the availability, litigation, and suitability of punitive damages, reinstatement and rewards. Such a study could reveal whether the borrowed laws require reshaping, or whether the domestic remedies can substitute for those observed in comparative jurisdictions.

Third, the EU model of whistleblower protection that is still maturing may offer a rich field for contrast and an act as a donor legislation. Countries in Latin America, such as Chile, are highly interested in legal developments in Europe in order to nourish their legal system in areas such as employment and discrimination law. Nonetheless, the findings of this Thesis show that whistleblowing is something of a novelty in both continental Europe and Latin America.

Ultimately, empirical research may also be useful to evaluate the law beyond the doctrine presented here. For instance, interviews with whistleblowers, practitioners, and policymakers would add depth to the normative and doctrinal insights presented here. The disposition, interpretation, and motivations of these agents may shed light on how the dynamics of the practice of the law work beyond the doctrinal lenses.

### E. The Final Balance

In sum, this Thesis demonstrates that without doctrinal realignment and legal reform, Chile, as in other civil law jurisdictions, risks reducing whistleblower protection to a mere instrument in workplace disputes, rather than as a safeguard for the community beyond the employment relationship. This investigation, by layering doctrinal, contextual and comparative-functional analysis, has revealed both the difficulties and promises associated with the legal transplant of whistleblowing. It remains for legislators and scholars to build on this work and ensure that whistleblowing emerges as an operative tool against corruption and abuses of power across Latin America rather than as a paper right.

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