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Whistleblowing in the Swedish private sector

- A legal framework in transition

HT16

Bachelor thesis in labour law, HARH16

Author: Michaela Hanzén

Supervisor: Vincenzo Pietrogiovanni

Examiner: Andreas Inghammar

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Abstract

This bachelor thesis focuses on the current legal framework transition in Sweden concerning whistleblowing. The aim is to clarify the legal framework today in Sweden for employees in the private sector through a supranational and national perspective. A comparison and analysis of possible changes that will occur with the new law, that is soon to be entered into force in Sweden, aiming to protect the whistleblower against reprisals from the employer, will be made. The significance of such investigation is based on the uncertainty an employee faces today in the disclosure of misconducts within an organisation.

There is no explicit and direct law concerning whistleblowing in Sweden, meaning that the regulations and directives are to be found in several legal sources, such as statutory law and case law. Sweden offers some degree of possibility to whistleblow through the fundamental right of freedom of expression, but it is restricted by e.g. the employee's duty of loyalty towards the employer. Furthermore, the protection against reprisals is in some cases statutory regulated, but in most cases the protection is non-existent for the employee.

This uncertain framework affects both the employee, the employer and the society. There could be a constant conflict of interest between them and when they consider whistleblowing legitimate. An assessment is therefore made in every individual case. The uncertain interpretation of the legal sources and the conflict of interest may hinder many employees to address wrongdoings within an organisation, since it weakens the employee's prediction of the possible outcomes of the action. Although, with a new law there is a possibility for an increased courage among the employees to whistleblow.

Keywords: whistleblowing, whistleblowing in Sweden in the private sector, the freedom of expression, the duty of loyalty, the right to criticism, reprisals, the European Convention on Human Rights, the European Court of Human Right.

Abstract in Swedish

Uppsatsens huvudsakliga fokus är den pågående förändringen av regelverk gällande whistleblowing i Sverige. Syftet är att klargöra gällande rätt i Sverige för anställda i den privata sektorn genom ett överstatligt och nationellt perspektiv. En jämförelse och analys av de förändringar som kommer att ske med den nya lagen som förväntas träda i kraft januari 2017, vilken syftar till att skydda arbetstagaren mot repressalier från arbetsgivaren, kommer att göras. Betydelsen av en sådan undersökning är baserad på den osäkerhet en anställd idag står inför när denne påtalar missförhållanden inom en organisation.

Det finns ingen nuvarande explicit och direkt lag om whistleblowing i Sverige, vilket innebär att regleringen kring detta återfinns i olika rättskällor såsom ett flertal lagar och rättspraxis. Sverige erbjuder en viss grad av möjlighet till whistleblowing genom den grundläggande rättigheten i form av yttrandefrihet, men det begränsas av exempelvis arbetstagarens lojalitetsplikt gentemot arbetsgivaren. Vidare är skyddet mot repressalier i vissa fall lagstadgat reglerat, men i de flesta fall är skyddet obefintligt för den anställda.

Den osäkra rättsregleringen påverkar både den anställde, arbetsgivaren och samhället. Det kan uppstå en intressekonflikt mellan dem och när de anser whistleblowing legitim. En bedömning görs därför i varje enskilt fall. Den osäkra tolkningen av rättskällorna och intressekonflikten försvagar den anställdes förutsägelse av de möjliga utfall denne kan utsättas för, vilket kan hindra anställda att adressera missförhållanden inom en organisation. Den nya lagen kan dock öka modet för whistleblowing bland de anställda.

Nyckelord: whistleblowing, whistleblowing i den privata sektorn i Sverige, yttrandefrihet, lojalitetsplikt, kritikrätt, reprissalier, den Europeiska konventionen för de mänskliga rättigheterna, Europadomstolen.

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Acronyms

AD	Arbetsdomstolen (the Swedish Labour Court)
ECHR	the European Convention on Human Rights
ECtHR	the European Court of Human Rights
LAS	Lagen om anställningsskydd (the Swedish Employment Protection Act)
SOU	Statens offentliga utredningar (Official Reports of the Swedish Government)
Prop.	Proposition (Government bill)
RF	Regeringsformen (the Swedish Constitutional Act)

Definitions

There is no universal definition of whistleblowing, which makes it difficult to manage its actual content. However, it is used in different contexts where an employee has revealed misconduct, corruption and criminal proceedings within an organisation.[1] The definition made by Transparency International, which is a global civil organisation leading the fight against corruption, is consistent with this and add that the wrongdoings concerns the public interest:

"Whistleblowing – the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action"[2]

Furthermore, the Council of Europe, a supranational organisation that counts Sweden among its members, has in its recommendation of a protection for whistleblowing an even more precise explanation of the concept:

"a) "Whistleblower" means any person who reports or discloses information on a threat or harm to the public interest in the context of their workbased relationship, whether it be in the public or private sector;

b) "Public interest report or disclosure" means the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest;

c) "Report" means reporting, either internally within an organisation or enterprise, or to an outside authority;

d) "Disclosure" means making information public"[3]

In this essay, the definitions above will be used in this way:

Whistleblowing: An employee or former employee who discloses information, internal or external, about wrongdoings within a public or private organisation that effects the public security and safety.

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[1] Fransson, Susanne, *Yttrandefrihet och whistleblowing – Om gränserna för anställdas kritikrätt,* Premiss förlag, Stockholm, 2013, p. 12.

[2] Transparency International, *International Principles for whistleblower legislation: Best practice for laws to protect whistleblowers and support whistleblowing in the public interest*, 2013, p. 4.

[3] The Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2014)7 and explanatory memorandum: Protection of whistleblower,* 2014, p. 6-7.

Employee: A person who is permanently employed by the employer, excluding contractors and those with a temporary employment.

Wrongdoing: Will be used synonymously with the words misconduct and corruption.

Private sector: Concerns private owned companies, including those who are financed with state resources.[4]

Public interest: Is equated with the "society's interest".

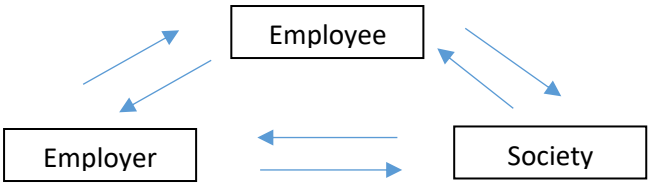
[4] Fransson, 2013, p. 82.

1. Introduction

1.1 Background

The conditions for a whistleblower to disclose wrongdoings within an entrepreneurial organisation, and the consequences of such an event have been a controversial topic for many years in the legal field and in the public debate. All around the world there is an uncertain legal situation on how and when whistleblowing is justified, which is problematic for the effective protection of those who leak business wrongdoings. In some cases, the whistleblowers are seen as heroes and are therefore rewarded, but in some other cases they are labelled as traitors and punished thereafter.[5] Based on the lack of regulations on whistleblowing, it is difficult to predict the consequences of such behaviour that might hinder many employees to whistleblow.

What labels a whistleblower depends on the points of views of the actors on the labour market. The employee, employer and society have different interests and there could be a conflict between them.



In short, the employer's interest is to safeguard the business's success and further its private interest without the public's knowledge of any possible wrongdoings.[6] The society, however, has an interest of knowing that businesses are handled legally and do not affect their security or safety.[7] Research shows that the interest of an employee who blows the whistle could be motivated by a personal desire to do the right thing and correct something wrong, or aiming for a practical consequence to create an ethical and trustworthy working place and protect the society.[8] All the same, there is a contractual relationship between the employer and the employee, which, regulates duties and obligations towards each other.[9] In order for the employer to safeguard its right to not be damaged, the employer values the duty of loyalty and the right to confidentiality from the employees.[10] The employee has, nonetheless, a fundamental right to freedom of expression and a right to criticism the employer, but the whistleblower's

[5] Fransson, 2013, p. 12-13.
[6] Fahlbeck, Reinhold, *Lagen om skydd för företagshemligheter: En kommentar och rättsöversikter*, Vol. 3, Norstedts Juridik AB, Stockholm, 2013, p. 25, 31.
[7] Fransson, 2013, p. 83.
[8] Dussuyer, Inez & Armstrong, Anona & Smith, Russell, *Research into Whistleblowing: Protection Against Victimisation*, p. 37. Source: *Journal of Business Systems, Governance & Ethics*, Vol. 10, Issue 3, Melbourne, 2015, p. 34-42.
[9] Fransson, 2013, p. 36.
[10] Fahlbeck, 2013, p. 133-134.

rights meet its limit in the obligations towards the employer.[11] There will always be different points of views about which interest weights the most. Although, whistleblowing has been more recognized in later years based on the increasing adoption of legalisations around the world aiming to protect the whistleblower.[12]

Per Larsson, PhD at Stockholm University, describes in his doctoral thesis the uncertain legal situation for whistleblowers in Sweden today.[13] He addresses the issue that Sweden does not fulfil its duty to follow the protection for whistleblowers set by the Council of Europe.[14] The State of Sweden is a member of this supranational organisation and is therefore obliged to ensure that national legislation complies with its Conventions.[15] For example, Article 10 in the European Convention on Human Rights (ECHR) protects the freedom of expression, which is an important cornerstone of a democratic society and should be guaranteed for all human beings. This fundamental right is strictly related to whistleblowing.[16] The European Court of Human Rights (ECtHR) rules on applications alleging that a Member State of the Council of Europe has violated the rights set by the Convention[17], and the Court has stated that this freedom should concern all individuals and workers in the public and the private sector.[18] However, this is not always a certainty in Sweden, which questions if Sweden fulfils its duty to promote democracy and the human rights.[19]

Larsson also addresses the fact that Sweden lacks an internal law for the protection of whistleblowing.[20] Nevertheless, Sweden is in a transition period by going from no statutory regulations about whistleblowing to an actual law. On January 1st 2017 the new law[21] is expected to enter into force, which aims to give employees, in both the public and the private sector, who blow the whistle a better protection against reprisals from the employer.[22] This law could lead to more whistleblowers and a more secure society where the employer prevents serious wrongdoings.

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[11] See Chapter 3.
[12] Dussuyer & Armstrong & Smith, 2015, p. 34.
[13] Larsson, Per, *Whistleblowing - Förutsättningar och skydd för dem som slår larm om korruption och andra oegentligheter*, No.1, Transparency International Sweden, Stockholm, 2012, p. 9.
[14] Larsson, 2013, p. 7.
[15] Larsson, 2013, p. 17.
[16] See Chapter 2.
[17] Nyström, Birgitta, *EU och arbetsrätt*, Vol. 4, Norstedts Juridik AB, Stockholm, 2011, p. 91.
[18] Voorhof, Dirk & Humblet, Patrick, *The right to Freedom of Expression in the Workplace,* p.237. Source: *The European Convention on Human Rights and the employment relation*, Oxford, 2013, p. 237-286.
[19] Fransson, 2013, p. 40. See also Chapter 3.
[20] Larsson, 2013, p. 7, 22.
[21] Lag (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden.
[22] Proposition 2015/16:128: *Visselblåsare – Ett särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden,* p. 1.

1.2 Purpose and research questions

The purpose of this essay is to focus on the legal framework transition in Sweden and compare the current legal framework about whistleblowing and the new law. Since the employee's interest is one of the most uncertain one based on the lack of regulations about whistleblowing and since the new law is directly addressed to the workers, the focus will mainly be on the whistleblower's perspective.

The content will be made in the light of the Swedish private sector in the matter of the distinction between the duty of loyalty, the right to criticism and the freedom of expression. There will also be an investigation of the possible protection against reprisals from the employer. The research will be based on Swedish regulations and case law, the impact of the ECHR and the ECtHR and how those ones affect the employee's possibility to whistleblow. Furthermore, I aim to investigate if and how the new law will strengthen and/or weaken the whistleblower's interest, her possibility to address wrongdoings and the protection against reprisals from the employer. Therefore, this essay will answer these questions:

- What is the legal framework today in Sweden for employees in the private sector when it comes to whistleblowing? What effect do supranational legalisation and case law have on this matter?
- To what extent are employees protected against reprisals from the employer today?
- How will the new law strengthen and/or weaken the employee's interest of whistleblowing, the possibility to whistleblow and the protection against reprisals from the employer?

1.3 Methodology and material

In order to answer the questions above, the essay will be based on the traditional legal dogmatic method. This method aims at determining the law and systematizing it, *de lege lata,* by taking into account existing legal sources.[23] In order to be able to analyse the material, it must first and foremost be described.[24] This method will consider law in a hierarchical order for the interpretation of the jurisprudence traditional sources, which means that first the statutory law will be presented followed by preparatory work, case law and doctrine.[25] This also motivates

[23] Lehrberg, Bert, *Praktisk juridisk metod*, Vol. 9, Iusté Aktiebolag, Uppsala, 2016, p. 32.
[24] Sandgren, Claes, *Rättsvetenskap for uppsatsförfattare: ämne, material, metod och argumentation*, Norstedts Juridik AB, Stockholm, 2007, p. 66.
[25] Samuelsson, Joel & Melander, Jan, *Tolkning och tillämpning*, Vol. 2, Iustus Förlag AB, Uppsala, 2012, p. 39-45.

the hierarchical structure of the essay, which first presents the regulations from a supranational perspective since it goes above national law, by having a constitution-like status in Sweden.[26]

Since the legal dogmatic method is descriptive in its form, it is of relevance to expand the understanding of the current legal framework with previous comments on the legal question.[27] This will be done with a secondary source of law: doctrines. The doctrines, which have the lowest legal value of the legal sources stated above[28], will therefore only be used in explaining what seems unclear in sources higher up in the hierarchy. The chosen doctrines show great knowledge of the legal framework and have played a major part in the discussion of the inadequate protection for whistleblowing. Furthermore, they have discussed case law thoroughly, which, has contributed to a wider description of the legal framework in this essay.

Except from the doctrines that I have motivated above, the chosen literature has different scope of use. The literatures that have been the basis for the presentation of the chosen method are the ones reappearing in several papers, which strengthens their reliability. Furthermore, the chosen journals and books have been directly connected to my research questions and has widened my perspective and knowledge of the situation, which gives them the reason to be represented here. Finding the sources has started from reading several doctrines concerning, either, the freedom of expression and whistleblowing worldwide or in Sweden. By reading the literature referred to in these, the sources being used the most by several authors became the basis of this essay. I also used reports like the one from, for instance, Transparency International, that has come in handy in order to define the concept of whistleblowing. The organisation plays a significant role in the development of the regulations of whistleblowing[29], whereas, their definition is well used in several other papers and doctrines. The reports are not scientific research but, nevertheless, they are very effective on matters like this.

The width of the research questions demands a variety of perspectives whereas several legal sources are included. The ECHR and the case law from the ECtHR is the obvious choice when describing whistleblowing from a supranational perspective, since they have had the biggest impact on the regulations of whistleblowing than any other organisation dealing with the fundamental rights.[30] Since whistleblowing is not regulated in Swedish law it will mainly be described through case law from both the Swedish Labour Court (Arbetsdomstolen - AD),

[26] Larsson, 2013, p. 17.
[27] Samuelsson & Melander, 2012, p. 51.
[28] Hellner, Jan, *Metodproblem i rättsvetenskapen: studier i förmögenhetsrätt,* Jure, Stockholm, 2001, p. 25.
[29] Larsson, 2013, p. 7.
[30] Voorhof & Humblet, 2013, p. 238.

which is the highest and, in some cases, the only instance in disputes between the employer and the employee[31], and the ECtHR. The cases from AD explain what possibility and restriction there is to whistleblow in Sweden. The chosen cases from ECtHR are directly concerning the freedom of expression and show which criteria that shall be fulfilled in order to whistleblow, and, how this fundamental right also could be applicable in the private sector. Nevertheless, the freedom of expression is regulated in the Swedish Constitution whereas Swedish statutory law also will be included in describing the legal framework of whistleblowing.

I have read aforesaid doctrines to find relevant court cases from both courts. Many of the chosen cases are therefore based on their repeated appearance in legal science literature. Since the amount of case laws on the subject would be impossible to take into consideration, many of the chosen cases are based on their precedential impact. This is motivated by the fact that in Sweden the judgments are not binding from one case to another, but it creates a praxis that plays a significant role in cases to come.[32] Rulings from the ECtHR are, however, binding under international law for the State concerned.[33]

Since I will take into consideration many court cases, it is of great importance that I have an understanding of how to interpret them. Mainly I need to sort out the judgment means, that is, the legal consequence and the legal facts that justify this, and identify the constituent elements that have led to this.[34] Important to keep in mind is that the interpretation will be objective by interpreting the text and its legal context and not pay a subjective assessment, which may misguide and lead to uncertainty.[35] However, there will not be a thorough description of the course of events in the cases, but rather a discussion of the assessment of whistleblowing. This is since many authors before me already have described the contents well.[36]

In order to clarify the content of the new law and the possible effect it will have on the employee's possibility to whistleblow and its protection against reprisals, chapter 4 will be based on preparatory work; the investigation[37] of the new law, the comments from the Law Council[38], and the proposition.[39] Preparatory work is an important source of law in Sweden when it comes to the interpretation of legalisation, since it describes the purpose of the law and

[31] Lehrberg, 2016, p. 168.
[32] Lehrberg, 2016, p. 165.
[33] Fransson, 2013, p. 41.
[34] Lehrberg, 2016, p. 176.
[35] Lehrberg, 2016, p. 179-180.
[36] See for example Susanne Fransson (Case law from AD) and Voorhof, Dirk & Humblet, Patrick. (Case law from ECtHR).
[37] SOU 2014:31: *Visselblåsare – Stärkt skydd för arbetstagare som slår larm om allvarliga missförhållanden*.
[38] Lagrådsremiss*: Ett särskilt skydd för arbetstagare som slår larm om allvarliga missförhållanden,* Stockholm, 2016.
[39] Proposition 2015/16:128: *Ett särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden.*

discusses the practical problems and the rationale behind the design of the rules.[40] So instead of only interpreting the law literally but also including preparatory work, a wider perspective of the new law's content and purpose will be accounted for.

1.4 Delimitations

In order to keep a clear focus throughout the essay several delimitations have been made. The choice of focusing only on the private sector is based on its lack of legislations and regulations. The public sector's legal status on whistleblowing is also uncertain in many cases, but it has a statutory protection in the Swedish Constitution, which the private sector lacks. This concern, among other things, both the right to criticism and the protection from reprisals[41], and therefore the public sector's legal situation on this matter will not be as much affected as the private sector when the new law enters into force. However, the public sector will somewhat be included when describing the freedom of expression in Chapter 2 and 3.

All people have an inherent right to protect the society and fellow citizens, and in some cases the employee also has a duty to report wrongdoings in order to do so.[42] In Sweden there are industries that have a duty to address wrongdoings according to the statutory law in the healthcare, *Lex Maria*[43], and social services, *Lex Sarah*[44]. My focus is however to investigate the situations where the employees address wrongdoings without having a duty to do so, whereas this perspective will not be included.

Many companies give the employees an extended possibility to whistleblow through policies and internal whistleblowing-systems.[46] Even though I find this interesting, I wish to keep my focus on the legal sources mentioned earlier. The same applies for collective agreements, where the issue of confidentiality could be regulated. Furthermore, various forms of confidentiality clauses or regulations of business secrets can be used.[47] Neither collective agreements, confidentiality clauses nor business secrets will have a more detailed discussion other than as a statement of its existence. Likewise, the protection against reprisals regarding redeployment and those regulated in the Discrimination Act[48] will not be included. Besides the lack of space

[40] Lehrberg, 2016, p. 149.
[41] Larsson, 2013, p. 64-67.
[42] Transparency International, *International Principles for whistleblower legislation: Best practice for laws to protect whistleblowers and support whistleblowing in the public interest*, p. 2.
[43] Socialtjänstlagen (2001:453) - The Social Service Act.
[44] Patientsäkerhetstlagen (2010:659) – The Patient Safety Act.
[46] Larsson, 2013, p. 41.
[47] Fahlbeck, 2016, p. 132-134.
[48] Diskrimineringslagen (2008:567).

in this essay, the reason for this omission allows a more general treatment of the issue. Furthermore, I will not take into consideration any issue relating whistleblowing and the role of trade unions at workplace on this matter, which may be really interesting, but for obvious reasons of space, this will not be possible.

Finally, despite being several international human rights laws concerning the freedom of expression, such as Article 11 of the Charter of Fundamental Rights of the European Union, Article 19 of the International Covenant on Civil and Political Rights, and Conventions and Recommendations from ILO, they have not had as much impact on the practice situation as Article 10 of the ECHR.[49] Therefore, I will focus on the role that ECHR has played on this matter.

1.5 Disposition

The essay consists of six chapters, including the present Introduction, that aim to create an easy overview and make it manageable for the reader to follow the text.

The second chapter describes how the freedom of expression is regulated at a supranational level. An investigation of the ECHR and if it is applicable on the private sector, and how and when whistleblowing is justified through case law from the ECtHR will be made.

The third chapter deals with the regarding legal framework in Sweden. It consists of the Swedish statutory law and case law to give a thorough description of which possibilities and delimitations a whistleblower in the private sector has, what consequences there might be for blowing the whistle and if there is any protection against reprisals from the employer.

Chapter four describes the background and contents of the new law in Sweden, and what changes that might occur concerning the protection against reprisal from the employer, which wrongdoings that could be a legal cause for whistleblowing and what criteria that have to be fulfilled in order to blow the whistle.

All of this falls into an analysis in chapter five, aiming to discuss the research questions and come to a conclusion in chapter six of how the legal situation may change, if it is a positive and/or negative step towards more defined whistleblowing regulations and supporting the employees' interest.

[49] Voorhof, & Humblet, 2013, p. 238.

2. Whistleblowing from a supranational perspective

2.1 Whistleblowing as a human right

Whistleblowing is mainly regulated as a fundamental right, strictly related to the freedom of expression. The fundamental rights, synonymous for human rights, are a set of legal protections meant as basic or inalienable rights applicable to all individuals.[50] The fundamental rights are, as mentioned earlier, recognised in several legal documents as national Constitutions or international and supranational treaties and declarations.[51]

The ECHR is one of the most important legal documents concerning human rights. The general obligation that each State Party of the Council of Europe, including Sweden, has undertaken is shown in Article 1 of the Convention, where it is said that States shall guarantee every one that is under their jurisdiction the rights and freedoms set out by the Convention.

The freedom of expression is regulated by Article 10 of the ECHR and states in paragraph 1: *"Everyone has the right to freedom of expression".* The provision does not impose any requirements on what form the opinion should have: it could be written, verbal or messages disseminated for commercial purposes.[52] In a democratic society, this freedom is considered one of the most basic fundamental rights, but when it concerns individuals at the workplace it is not self-evident. The article was written concerning the relationship between the citizens and public authorities, *ab initio,* and sets that the freedom of expression should not be interfered by public authorities. This means, by a literal interpretation, that it is directly applicable in the relationship between the State and the individuals, including the workers in the public sector. However, after an undeniable case law, Article 10 is now applicable also among individuals in the private sector,[53] as will be discussed below.[54]

The ECtHR has described the freedom of expression as "*one of the basic conditions for the progress of democratic societies and for the development of each individuals"*.[55] Even so, paragraph 2 says that this is not an absolute freedom and restrictions by the States are possible if legitimate for national security and public safety. However, restrictions must be prescribed by law only if it is necessary in a democratic society. If the conditions in the second paragraph

[50] Fransson, 2013, p. 13-16.
[51] See Chapter 1.4"Delimitations".
[52] Danelius, Hans, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, Vol. 5, Norstedts Juridik AB, Stockholm, 2015, p. 458.
[53] Voorhof & Humblet, 2013, p. 241.
[54] See Chapter 2.2.
[55] ECtHR, *Handyside v. the United Kingdom*, Application No. 5493/72, 7 December 1976, 24 § 49.

are not fulfilled, the Convention is violated.[56] The generally kept article entails a wide interpretation. To firmly infer its application, answers need to be sought from judges by the ECtHR.

2.2 Whistleblowing in the private sector

As the ECHR shall be taken into consideration when dealing with freedom of expression on a national level, shall also the judgements from the ECtHR be followed regardless. The Court is not an appellate court to national courts and can therefore not change a national judgment, but it can cause a Member State to change its legislation to be in accordance to the Conventions.[57]

If an individual believes that her fundamental right has been violated and overseen by the State, she could turn to the ECtHR for justice. Although, before turning to the ECtHR all legal domestic systems must have been exhausted.[58] An individual cannot sue another individual, *ratione personae*, to the Court.[59] With other words, an employee in the private sector could not bring up a case against the employer. Westregård, Associate Professor at Lund University, questions in her academic dissertation if this means that the ECHR is not applicable in the private sector. She draws the conclusion that ECHR still has significance in the private sector because the employee can indirectly bring cases against the employer by directing the complaint against the State.[60] The Court thereafter judges whether the State has breached the obligation to protect the human rights.[61]

2.2.1 Justified whistleblowing

The ECtHR has dealt with several whistleblowing cases[62] that have developed the legal framework on this matter. In these cases, the Court takes into consideration six aspects corresponding to some sort of principles:

a) Has the employee first and foremost dealt with the internal criticism?
b) Is the action proportional to the mean?
c) Is the criticism correct?
d) What damage has the employer suffered because of the whistleblowing?

[56] The Council of Europe, *Freedom of expression in Europe: Case-law concerning article 10 of the European Convention on Human Rights*, No. 18, Human Rights Files, 2007, p.7-8.
[57] Fransson, 2013, p. 41.
[58] Fransson, 2013, p. 41.
[59] Westregård, Annamaria, *Integritetsfrågor i arbetslivet,* Juristförlaget i Lund, Lund, 2002, p. 290.
[60] Westregård, 2002, p. 290.
[61] Fransson, 2013, p. 4.
[62] See for example: ECtHR, *Guja v. Moldova,* Application No. 14277/04, 12 February 2008 and ECtHR, *Heinisch v. Germany,* Application No. 28274/08, 21 July 2011.

e) What is the aim of the whistleblowing?
f) What sanction has the employee suffered? Is it proportional to the harm the employer has suffered? [63]

As reference from the case *Heinisch v. Germany*, there will be a description of what these principles entail. As a short background, Heinisch was a German nurse working at a private owned health care company. The employees worked in understaffed units, which affected the caretaking negatively. Heinisch reported her employer to prosecutors and was thereafter terminated.

The Court argued, in the first step a), that Heinisch at several occasions had talked to the employer about the abuse and tried to respect the duty of loyalty by not going directly to public authorities. Since the employer had not taken any actions the last resort was to do an external whistleblowing. Concerning the evaluation of principle under b), the Court recognises that an employee has a duty of loyalty towards the employer, and that an assessment of the public interest must be done in order to decide if the action is justified. The duty of loyalty could in some cases be overlooked if the whistleblowing is in the public interest. Since the information concerned health care and was necessary for the society to know about in order to prevent abuse towards the patients, there was an undoubtable public interest. In the assessment of the third principle c), the information that Heinisch put forward was correct. Since some of her criticism was supported by an investigation from an independent supervisory body, the criticism was strengthened and therefore considered legitimate.

Even though the company suffered a major economic loss, as for the aspect d), the Court believes that the public interest weighs more than the employer's interest of business and reputation. Heinisch motive, as for point e), was after all to protect the exposed patients. At last, under point f), the sanction that Heinisch suffered in form of termination of employment without notice, since the employer believed that she had broken the duty of loyalty, was the most serious possible labour law sanction and not proportional to the harm the employer had suffered. If, for example, a dismissal is directly connected to whistleblowing it is an unlawful violation by the employer according to Article 10, paragraph 1, of the ECHR. The violation of her freedom of expression could therefore not be an argument for the termination. The States

[63] Voorhof & Humblet, 2013, p. 274.

have after all an obligation to protect the freedom of expression in relation to the employer and employee.[64]

The Court also takes into consideration if the interference of the freedom of expression was prescribed by law in accordance to Article 10, paragraph, 2 of the ECHR. In the case *Fuentes Bobo v. Spain*[65], Bobo was an employee at a private owned Spanish television company that was financed by state resources. A conflict between Bobo and the employer occurred whereas Bobo decided to tell the public, thorough radio interviews, about how badly the management treated the employees and that they did not follow the regulations set by the Law of Radio. This statement led to him being dismissed. The Constitutional Court of Spain believed that the criticism was offensive since it directly pointed out certain persons. The ECtHR agreed and stated that the restriction "prescribed by law" pursued a legitimate aim which was the *"protection of the reputation or rights of others",* but since the company in fact broke the law, it was of the public interest, which motivated Bobo's right of freedom of expression.

To sum up, the case law from ECtHR shows that the freedom of expression applies to both civil servants, employees in the public sector, as well as the ones in the private sector.[66] Since ECtHR had made it clear *"that article 10 applies also to the workplace, and that civil…servants enjoy the right to freedom of expression*",[67] the application of Article 10 of the ECHR cannot be overlooked by any State, including Sweden. However, it is unclear whether the Convention should be directly applicable between individuals in the private sector, increasing the employer's obligation to protect the freedom, or if the fact is that the States have an obligation to take positive measures to safeguard the individual's fundamental right.[68]

[64] ECtHR, *Heinisch v. Germany*, Application No. 28274/08, 21 July 2011 and Voorhof & Humblet, 2013, p. 237f.
[65] ECtHR, *Fuentes Bobo v. Spain*, Application No. 39293/98, 29 February 2000.
[66] Voorhof & Humblet, 2013, p. 241.
[67] Voorhof & Humblet, 2013, p. 237.
[68] Westregård, 2002, p. 300.

3. Whistleblowing from a national perspective

3.1 The possibility to whistleblow

3.1.1 Through the freedom of expression

As already said, there is no definition of whistleblowing in Swedish legislation[69], but it is considered a part of the fundamental human right of the freedom of expression.[70] The ECHR has had a major impact on Swedish law whereas the ECHR is implemented by Law of the European Convention for the Protection of Human Rights and Fundamental Freedoms[72]. The Instrument of the Government 2:19§ (Regeringsformen – RF) states that it is not allowed to issue laws or other provisions contrary to the Convention.

The freedom of expression is regulated in the Constitution of Sweden, more precisely by 1:1§ the Fundamental Law of Freedom of Expression[73] and 1:1§ the Freedom of the Press Act[74], which both states that the freedom of expression includes the right to express whatever opinion both in writing, orally, pictorially or in any other way. RF 2:1§ regulates the individual's freedom of expression:

"*Every citizen shall be guaranteed the following rights and freedoms in his relations with the public institutions: 1. freedom of expression: that is, the freedom to communicate information and express thoughts".*

Since it is addressed to "*every citizen*" it includes all people, both individuals and workers.[75] Although, it also states that it concerns "*citizen… in relations with the public*" and therefore it only includes the public sector when it comes to the labour market. This means, as individuals, employees in the private sector have a freedom of expression, but as workers this freedom may be restricted. AD has in several court cases rejected the idea of an extended protection in the private sector, such as the one in the public sector, and kept referring to the protection of the *"general freedom of expression*".[76] This despite the fact that another case law has stated that all employees should have a freedom to express themselves towards the employer or otherwise the labour market would be undemocratic.[77]

[69] SOU 2014:31, p. 51f.
[70] See chapter 2.1
[72] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.
[73] Yttrandefrihetsgrundlagen (1991:1469).
[74] Tryckfrihetsförordningen (1949:105).
[75] Larsson, 2013, p. 32.
[76] Fransson, 2013, p. 83. See for example: AD 1982:110, AD 1994:79 and AD 1997:57.
[77] Fransson, 2013, p. 83. See AD 1982:110.

The freedom of expression gives whistleblowing a possibility to exist, even though it may be restricted in the private sector. However, there is also an opportunity to express opinions through the right to criticism.

3.1.2 Through the right to criticism

The right to criticism applies to the parties in an employment agreement, the employer and the employee, and is seen as a labour law principle.[78] There is no general regulation that sets the limits of employees' right to criticism, in other words it is not illegal for an employee to report the employer to authorities. Even so, the criticism is not always justified since it is restricted by the duty of loyalty. The right to criticism is a part of phenomenon of whistleblowing and it may be exercised in two different ways: internally and externally.[79]

3.1.2.1 Internal and external right to criticism

Internal: The internal right to criticism is the employee's right to address existing conditions at the workplace to the employer. The internal whistleblowing aims to have the right to influence, which is important to achieve changes and improvements.[80] Some might say that internal criticism is not to be seen as whistleblowing since it necessarily does not reach the public[81], but since internal and external criticism is part of the same process when addressing a wrongdoing,[82] both ways will be included in this essay.

External: The external criticism goes public to other authorities outside the business organisation.[83] This kind of criticism, however, does not have legal regulations in the private sector and it could only be accurate if the employee first and foremost has handled the criticism internally. If the whistleblower suspects, among other thing, that evidence will be destroyed if going internal, external criticism could be justified.[84]

[78] Fransson, 2013, p. 59, 84.
[79] Fransson, 2013, p. 13, 84.
[80] Fransson, 2013, p. 77-78.
[81] Miceli, P. Marcia & Near, P. Janet & Dworkin Morehead, Terry, *Whistle-blowing in Organizations*, Routledge, 2008, p. 7-8.
[82] Larsson, 2013, p. 13.
[83] Fransson, 2013, p. 77.
[84] Larsson, 2013, p. 13.

3.2 The restriction of whistleblowing

It is not only the lack of protection by the Constitutions of Sweden that restricts the freedom of expression in the private sector. There are contractual obligations such as the duty of loyalty[85] and other laws, for example the Law on the Protection of Business Secrets[86] that among other things regulates the confidentiality clauses, which also limits this fundamental right.[87]

3.2.1 Through the duty of loyalty

The duty of loyalty – which requires that the employee is faithful and trustworthy to the employer - is also not regulated by law, but is a generally applicable rule in the employment contract. It does not have to be clearly expressed in the contract since it is seen as an implied duty[88], which aims to protect the employer's enterprise. It therefore restricts the possibility to engage in competing businesses[89] and since it is the employer who sets how much insight the public should have in the company, the duty of loyalty also restricts the employee's possibility to reveal business secrets.[90] This is based on the duty of confidentiality, which concerns that the information the employee is exposed to through the employment contract, shall be kept secret from the public, in order not to damage the employer's business.[91] Furthermore, the basic view point is that the employee must not damage the employer and could not use the freedom of expression nor the right to criticism to do so.[92]

This duty could hinder the employee addressing illegal activities within an organisation and hold back the interest of the healthy and secure workplace and society. Bowden captures the essence of the problem a whistleblower can face:

"If we are to assess by the extent of the ethics of an action, then we must rank loyalty to the wider community or the ethical precepts of society, at a higher level than loyalty to an employer. The whistleblower is making a judgment of the harm he or she may be inflicting on the organisation by exposing a wrong, balanced against the alternative of keeping quiet."[93]

[85] See Chapter 3.2.1.
[86] Lag (1990:409) om skydd för företagshemligheter.
[87] Fahlbeck, 2016, p. 132-134.
[88] Nicander, Hans, *Lojalitetsplikt före, under och efter avtalsförhållandet*, p. 31. Source: *Juridisk Tidskrift*, No. 1, 1995-96, p. 31-49, See also AD 2003:21 and AD 2003:84.
[89] DS 2002:56, p. 302.
[90] Fahlbeck, 2013, p. 113.
[91] Fahlbeck, 2013, p. 133.
[92] AD 2003:21 and AD 2003:84.
[93] Bowden, Peter, *In the Public Interest: Protecting Whistleblowers and Those Who Speak Out,* Melbourne, 2014, p. 11.

Research shows that an employee would rather choose to be loyal to the employer and raise the issue internally before going to public authorities, even though this might ignore the interest of the society.[94]

3.2.2 Serious misconduct

The different kinds of alarms are many times treated as one single issue. There is a severe difference between revealing state secrecy, corruption within an organisation or something that is for personal interest. An employee who, in public, criticizes the employer personally is directly harming the reputation of the employer and is not protected from any reprisals.[95] If the alarm concerns serious wrongdoings, such as, health care, environmental crimes or violation of the Discrimination Act or the fundamental rights, reprisals are not necessary allowed to be exposed to the employees.[96] If it is a matter of very serious wrongdoings, the right to criticism external increases independent from the employer's interest. It may be e.g. matter of very serious economic crimes or gross violation of environmental protection legislation. If it is not a serious misconduct involved, the infringement of the duty of loyalty cannot be motivated.[97] Nevertheless, the assessment of what wrongdoing is considered serious could in some cases be difficult to do.[98]

3.3 The possibilities v. the restrictions

A whistleblower is legally somewhere in between the right to criticism, which is a part of the freedom of expression, and the duty of loyalty and confidentiality. When an employee uses the right to criticism, the action is judged by the extinction of these duties.[99] Case law from AD shows that the duty of loyalty should not be an obstacle for an employee to address wrongdoings, but that the actual notification does in fact involve the employee somehow overriding this duty.[100] Drawing the line between the duty of loyalty and the right to criticism is complex, and there are no clear answers, since the justification may differ from each individual case.[101] AD has tried to clarify where the line is drawn between the right to criticism and the duty of loyalty as a directive to show when whistleblowing is considered justified.

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[94] Tsahurida, E.E. & Vandekerchehove, W.J., *Organisational whistleblowing policies: making employees responsible or liable?* Source: *Journal of Business Ethics*, Vol. 82, Issue 1, 2008, p. 107-118.
[95] AD 2006:103.
[96] SOU 2014:31, p. 59.
[97] AD 1986:95, AD 1994:79 and AD 2005:124.
[98] Fransson, 2013, p. 86
[99] Fransson, 2013, p. 84.
[100] AD 2005:124.
[101] Fransson, 2013, p. 84.

First and foremost, the criticism shall be dealt internally, either with the employer or the trade union, to enable the employer to correct the anomaly that causes the criticism.[102] It is important that the employee follows the internal policy of how criticism shall be put forward, since there is a duty to follow the directives set by the employer.[103] If the employer does not take actions, it might be justified for the employee to go to public authorities, especially if a serious wrongdoing is involved.[104]

Deciding if the external whistleblowing is justified depends on both the aim of the criticism and if it is in fact correct. If the aim is to harm the employer, the whistleblowing is directly breaking the contractual duty of loyalty.[105] This occurred in two cases from the 1980s. In AD 1986:95 there were legal ground for terminating two employees at a hotel since they had spread a rumour of that the hotel engaged in prostitution. The same goes for the case AD 1988:67 where the employee reported his employer for illegally selling alcohol. In these cases, the criticism was untrue, which led to the conclusion that they aimed to harm the business. AD consider it unacceptable for the employee to use his right to criticism to spread outright lies.[106] The criticism must be objective and be factual correct. If there is no true basis in the allegations, the employee breaks the duty of loyalty.[107]

Another thing that affects the possibility to whistleblow is what working position an employee has. The higher the employment position the more responsibility to be loyal.[108] For example, it has appeared through case law that a position of trust reduces the right to criticize the employer and the business, unlike workers with lower positions.[109] AD has ruled on that it should be given that someone who is in command shall set an example for the other employees.[110] All employees, but certainly ones in higher positions, have a representative role which leads to third parties associating their actions with the employer. The employee thereby affects the employer's reputation.[111]

AD´s general statement is that an employee has an extensive right to criticize and question the employer's conduct. This is after all a citizen's freedom of expression and is the basis of Sweden's democratic social system. AD further suggests that the right to criticize the employer

[102] AD 1986:95.
[103] AD 1994:79 and AD 1997:57.
[104] AD 1986:95, AD 1994:79 and AD 2005:124.
[105] AD 1986:95 and AD 2006:103.
[106] AD 2005:124.
[107] AD 1986:95.
[108] Fahlbeck, 2013, p. 129.
[109] AD 1982:110.
[110] AD 2010:50.
[111] AD 1982:110.

is an important prerequisite for good working conditions and work performance.[112] Pure principle partly can be argued that the relationship between loyalty and the right to criticism does not necessarily have to be dichotomous: to be quiet does not directly mean being loyal. Rather, a critical employee could be an asset to the company,[113] it is after all the employees who often discover misconduct before the employer does (when the employer is not directly involved in it, of course).[114]

3.4 Reprisals, any protection?

The consequences that might occur by revealing information leads to different outcomes, such as reprisals like blackmailing, redeployment and lower wage trend.[115] Common to most definitions of reprisals is that it is some sort of undesirable intervention as a reaction to a whistleblower's action.[116] Since the level of possible outcomes are tremendous, I will treat this matter as one problem, a contractual issue between the employee and the employer and the possible outcomes there might be if the employee breaks this: dismissal and summarily termination.

Important to know is that the private sector lacks tracing prohibition, which gives the employer the possibility to research who has spread the criticism. This simplifies to either punish or reward the employee. How far the employer's investigations are suitable depends on how the term 'good practice' is interpreted in the labour market, which is not going to be further discussed here.[117]

The most important protection that an employee has against unlawful dismissals is the statutory protection of the Employment Protection Act (Lag (1982:80) om anställningsskydd – LAS). 7 § LAS regulates termination of an individual employee and states that there must be just cause in order for the employer to be able to dismiss an employee. An investigation of what constitutes just cause and serious breach of the duties of the employer is outside the area of this essay, but according to preparatory work the causes must be documented on several occasions and the employer must give the employee the opportunity to rectify the actions.[118] If the conduct is so serious that the employee must be terminated on the spot, according to 18§ LAS, such a

[112] AD 1982:110.
[113] Larsson, 2013, p. 40.
[114] ECtHR, *Guja v. Moldova*, 2008.
[115] Armstrong, A.F & Francis R.D & Foxley I., *Whistleblowing: a three part view.* Source: *Journal of Financial Crime,* Vol. 22, Issue 2, 2015, p. 209.
[116] SOU 2014:31, p. 277.
[117] Fahlbeck, 2013, p. 49-50.
[118] Proposition 1973:129: *Kungl. Maj:ts proposition med förslag till lag om anställningsskydd m.m*, p. 124.

dismissal is only allowed if the employee has grossly neglected the duties and obligations arising from the employment. It can be said that the breach of the duty of loyalty can be seen as a just cause for termination and, in severe cases, even a serious breach of the duties.[119]

If the employer overlooks these statutory regulations, the employee could go to court and request both annulment of the dismissal and resignation in accordance to 34-35§§ LAS, and the employer is obliged to compensate for the damages set by 38§ LAS. However, there is no statutory protection against reprisals such as bullying, unless it is connected to discrimination in accordance to the Discrimination Act.

[119] Slorach, Martina et., *Rätten att slå larm. En handbok om yttrandefriheten på jobbet – råd för whistleblowers*, Vol. 1, Swedish Confederation of Professional Employees, Stockholm, 2011, p. 32.

4. Future legislation on whistleblowing in Sweden

4.1 Why is it necessary?

As mentioned before, Sweden lacks a definition of and a statutory protection for whistleblowing. There is a worldwide debate calling for a stronger protection for those who aim to blow the whistle, and many international legal acts demand that countries take action on this matter.[120] For example, Chapter 1 in Article 9 of the Criminal Law Convention on Corruption (ETS No. 174) states that:

"*Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities",* which, Sweden so far lacks.

Furthermore, there is a difference between the protection from the ECHR and Swedish statutory law, especially when it comes to the protection in the private sector. This new law could bring those legal provisions closer together and Sweden would fulfil its duty to follow what is set by the Convention.

The investigators of the new law have discussed the fact that an employee who is considering to blow the whistle must take into consideration several legal provisions in order to try to determine the possible outcomes, which could be complex to do. A crucial reason why a worker avoids alerting is the fear of being exposed to reprisals, since the employee cannot decide whether the action is legitimate or not.[121] According to the Government, it is unacceptable for employees to be exposed to reprisals when they are trying to fulfil their duty towards the society. If grievance becomes public and can be fixed, it cannot least mean big profits for e.g. residents in the society who does not have to be a subject to neglect, but also buyers not running a risk for deficiencies in the activity they are taking part of.[122] Since it is important that all workers have the possibility to address wrongdoings in order to create a secure and healthy society, the Government realizes that the new law shall protect both the public and the private sector.[123]

[120] Lagrådsremiss*: Ett särskilt skydd för arbetstagare som slår larm om allvarliga missförhållanden,* Stockholm, 2016, p. 10.
[121] SOU 2014:31, p. 276.
[122] Lagrådsremiss, 2016, p. 11.
[123] Lagrådsremiss, 2016, p. 27.

4.2 Its application

The new law aims to create a certain protection for employees against reprisals from the employer, which could easily be read from the laws title: "the Act on Special Protection against Reprisals for Workers who sounds the Alarm about Serious Misconduct"[124].[125] The law gives the employee, who has blown the whistle about serious misconduct within the employer's organisation, a right to get damage pay if reprisals have been given without fair reason.[126] Important to know is that the law is not a fully covered protection for whistleblowers. It shall be used in parallel with other laws concerning labour law such as LAS and the Law on Business Secrets.[127] The law will be semi-dispositive, meaning that it will be possible to waive the law by regulations in a collective agreement.[128] However, this could be problematic for the provisions of the ECHR since 2:9§ RF states that it should not be possible to put aside the fundamental rights.

4.3 The possibility to whistleblow

4.3.2 Internal and external whistleblowing and it criterion

To simplify the assessment of what justifies whistleblowing, the law aims to limit the criteria to take into consideration. It separates the regulations of internal and external criticism.

Internal: 5§ states that an employee has protection against reprisals if she has dealt with the problem directly with the employer, through an internal system or through a trade union. Such action is considered to be in accordance with the basis of the duty of loyalty.[129] At internal alarms there shall be no need to any additional requirements to be met for the protection to arise, since the employer namely has an interest at an early stage to receive signals about wrongdoings within the business, independent of the facts being correct or not.[130] The internal alarms are less likely to harm the employer as much as the external whistleblowing might do. Nonetheless, the internal criticism should consider serious misconduct in the employer's organisation.[131]

External: If the employee deals with the issue internally, but no actions are taken by the employer, or if the employee has reasonable cause for going directly to public authorities, even external alarms could be legal according to 6§. Reasonable cause could for example be if the

[124] My own translation.
[125] Lag (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden.
[126] SOU 2014:31, p. 23.
[127] SOU 2014:31, Chapter 18.
[128] SOU 2014:31, p. 299.
[129] SOU 2014:31, p. 256.
[130] Lagrådsremiss, 2016, p. 47.
[131] SOU 2014:31, p. 238-241.

employee fears to be exposed to reprisals if the employer gets the information before a public authority. This could be based on how the employer has reacted before in similar cases.[132]

When dealing with external whistleblowing to public authorities, the criterion for the internal criticism shall first and foremost be fulfilled, and the information must be connected to the employer's business that is considered a threat to the public interest.[133] According to the investigations, the other criteria that shall be heard by the court, when it comes to external whistleblowing, should be limited to the seriousness of the wrongdoing and the employee's knowledge of the facts.[134] The employee shall have the basis for the claim.[135] If the employee does not bring forth correct criticism about "serious misconduct" regulated in 1§, there is a possibility to be exposed to reprisals from the employer.[136] The limited criteria aim is to make the conception of the possible outcome easier for the whistleblower. If these criteria are met, the employee's behaviour is in general consistent with the basic requirements of the duty of loyalty.[137]

4.4 The restriction of whistleblowing

4.4.1 Serious misconduct

The law applies only on certain situations and it depends on the seriousness of the wrongdoing within the organisation. 1§ states that "serious misconduct" refers to crimes with imprisonment sentencing range or comparable to this. Other reasons that do not include an imprisonment are not protected by this law.[138] Violation of laws or the human rights, and risks for the individual health and safety or the environment may be legal grounds for whistleblowing, even though it may lead to the business being damaged.[139] Examples are from the Penal Code[140], chapter 8-10: acquisitive, fraud and corruption, and from crimes regulated in the Working Employment Act[141] and the Environmental Code[142].[143] The phrase in the 1§ "comparable to this" refers to actions that might miss a certain objective criteria regulated in e.g. the Penal Code, but are still contrary to public accepted standards.[144]

[132] SOU 2014:31, p.271.
[133] Prop. 2015/16:128 , p. 26.
[134] SOU 2014:31, p. 238-241.
[135] Prop. 2015/16:128, p. 46.
[136] Lagrådsremiss, 2016, p. 18.
[137] SOU 2014:31, p. 241.
[138] SOU 2014:31, Chapter 12.2.2.
[139] Prop. 2015/16:128, p. 38.
[140] Brottsbalken (1962:700).
[141] Arbetsmiljölagen (1977:1160).
[142] Miljöbalken (1998:808).
[143] SOU 2014:31, p. 246.
[144] Lagrådsremiss, 2016, p. 40.

Both AD and the ECtHR have in several cases made clear that the worse abuses involved and the larger the public interest is, the bigger protection for the whistleblower. In other words, the serious misconduct, the wider possibility to whistleblow.[145] This motivates why the law takes into consideration those misconducts that are considered very severe. If other misconducts also should be included, the employer's interest of keeping a successful business and its labour management's rights would be undermined and effect the competitiveness negatively.[146] When an employee could question the employer in public must be restricted, or else the contractual relationship would get a total new meaning, whereas serious wrongdoings will proceed.[147]

4.5 Reprisals, any protection?

Whether the employer exposes the employee who has followed the regulations to reprisals, the employer will be obliged to pay damage pay for the economic loss and the violation that the employee has endured, according to 9§ in the new law. In labour law, damage pay is a commonly applied sanction and gives the right to be compensated for the damage the reprisal has caused.[148] If the appeal to the court is based on dismissal or termination of the employment contract according to 7§ LAS, the replacement of financial loss for the employee can only be equivalent to the amount regulated by 38§ LAS. A possibility to be rehired is, however, not included in this law.[149] It is the employer who bears the burden of proof if the employee claims that this violation has occurred, 10§.

The Government has realized that an extended interpretation of reprisals must be made. If only including the reprisals in LAS, the purpose of the new law could be defeated, since many employees fear to also, for example, get worse employment conditions. According to the Government, a reprisal shall consider omission by the employer which adverse treatment for the employee, including e.g. dismissal, termination, high workload, or other negative changes in the employment.[150] Therefore, the Discrimination Act and the regulations in ECHR, will also be taken into consideration when judging the seriousness of the reprisals.[151] Although, if an employee breaches the duty of loyalty and harms the employer, reprisals from the employer may be a consequence.[152]

[145] Prop. 2015/16:128, p. 37.
[146] Prop. 2015/16:128, p. 15.
[147] Lagrådsremiss, 2016, p. 32-35.
[148] Prop. 2015/16:128, p. 74.
[149] SOU 2014:31, p. 364.
[150] Prop. 2015/16:128, p. 49.
[151] Lagrådsremiss, 2016, p. 44-45.
[152] Prop. 2015/16:128, p. 26.

5. Analysis

5.1 The impact of supranational regulations

The major impact the supranational regulations have had in Sweden concerning the possibility to whistleblow, occurred with Article 10 of the ECHR. It has after all been implemented in Swedish law and is thereby a statutory right for all individuals. According to ECtHR the State has an obligation to protect the employee's fundamental rights, which Sweden fulfils by implementing a new law. In that way, this supranational organisation has contributed to an increased guarantee of everyone's freedom of expression at the national level.

Even though the freedom of expression mainly concerns the public sector, the interpretation by ECtHR and how the Court has judged in cases concerning this in the private sector has set some guidance in Sweden. This could not least be seen in the cases from AD where the freedom of expression *contra* the duty of loyalty have been dealt with concerning the private sector. Also, the criteria taken into consideration by AD and ECtHR are equivalent, showing a common interpretation of when whistleblowing is justified.[153]

It has previously been discussed whether the employer has the same responsibility to protect the fundamental right as the State, either way, with the new law the employer must safeguard this fundamental right by not exposing the whistleblower for reprisals. Today, it is a breach of the human rights if the employer takes action in accordance to 7§ and 18§ LAS, associated with whistleblowing, but with the new law being linked to these kinds of situation, the employer's obligation to protect the human rights increases and therefore also the possibility for the employee to whistleblow.

5.2 The possibility to whistleblow

Laws concerning the protection of whistleblowing found in other countries, has primarily been developed for two reasons. The first is set to prevent accidents, scandals and corruption from continuing or happening again. The second reason is to protect human rights, particularly the freedom of expression in the working life.[154] The aim of the new law in Sweden is consistent with this and takes into consideration all the interests of the actors; the employee, the employer and the society, which will be presented throughout the analysis. The conflict of interests continues affecting the possibility to whistleblow.

[153] Fransson, 2013, p. 153.
[154] Fransson, 2013, p. 154-155.

The focus in this essay is primarily the interest of the employees, since they are the subjects as whistleblowers. The employee, who becomes aware of abuse, often refrains from raising the alarm. There may be several reasons for this. One reason may be that the employee is afraid of suffering reprisals. Another reason may be that the employee is uncertain of what protection she would have. Thirdly, there may be a lack of clarity in terms of how the employee should proceed and to whom.[155] Article 10 of the ECHR, LAS and case law from ECtHR and AD set some directions but the outcomes depend on the circumstances in every individual case. AD has said that if there will be any legal change regarding the freedom of expression and the possibility to whistleblow, a new law is required.[156] The employee's interest of whistleblowing could be strengthened by the new law, since it after all tries to identify how the proceeding shall go about and to whom, and what wrongdoings that could be legal ground for whistleblowing.

Although, the fact that the whistleblower must still have knowledge of several other legal documents, since the law should be used in parallel with other laws and collective agreements, it could complicate the assessment in each individual case. In order to assess what regulations are accurate, the employee must have the ability to find and interpret the legal sources, which could be just as complex to do as the interpretation of legal sources she faces today. Furthermore, the possibility given to collective agreements to restrict the law, could have a negative effect for the possibility to whistleblow. However, restrictions are not allowed contrary to the ECHR and RF, which hopefully will be respected.

5.2.1 The possibilities v. the restrictions

The possibility for employees in the private sector to whistleblow today is very restricted. A balance between several duties and rights, such as, the duty of loyalty, the right to criticism and the freedom of expression must exist. As previously stated, the distinction of these three have been complex for many years, but some clarifications have been made through the new law. The question is whether it is enough or if the possibility to whistleblow will continue to be hindered?

Even with the new law, the freedom of expression will still be a fundamental right applied to all individuals. The contents of ECHR and the Swedish Constitution will not be changed, but will still be addressed *ab initio.* The public sector will continue having a statutory freedom of expression, whereas the private sector's freedom of expression will not be strengthened by the

[155] SOU 2014:31, p. 21.
[156] AD 1994:79.

Constitution. This is consistent with AD's former scepticism that the freedom of expression in the private sector shall be motivated by the *"general freedom of expression".* Nonetheless, the ECtHR cases according to which the freedom of expression is applicable for private individuals strengthens the private employees' fundamental right.

The duty of loyalty will continue not to be statutory regulated. It will have the same significance as today, being a contractual bond between the employee and the employer. The duty of loyalty has been taken into consideration when developing the application of the new law, since the employee should first and foremost deal with the issue internally. The possibility to address grievances is clarified when there are clearer directives on how the workers shall go about in order not to break the duty of loyalty. Although, the risk for an employee to be considered disloyal to the employer will continue to exist, and a breach of this could lead to being exposed to reprisals. This fear of being punished could continue hindering the public interest of knowing misconducts independent from the contractual relationship between the employer and the employee.

One right that will be regulated differently, is the right to criticism, which will be indirectly statutory defined, by separating internal and external whistleblowing. The internal whistleblowing is nowadays not in all cases considered whistleblowing since the harm that the employer suffers is smaller than the external alarms, and since the employer actually could have an interest of knowing wrongdoings in the organisation. However, the new law addresses the internal criticism as a part of the whistleblowing process, and states that the employee should first address internally. These statutory regulations will make it easier for the employee knowing where to begin the process of whistleblowing and decrease the risk of breaking the duty of loyalty.

The criteria set in order to justify the whistleblowing could make it easier for the employees to predict the outcome of their action. There are similarities between the criteria in the new law and those previously stated by AD and ECtHR, but the criteria for external whistleblowing will be more precise and limited to only three criteria. Nowadays, dealing with external alarms the employee's position in the company, the seriousness of the wrongdoing, the purpose of the whistleblowing, if it is correct, what harm it has caused and whether the criticism has been spread internal or external must be taken into consideration.[157] The new law focuses only if the whistleblowing has been dealt with internally, the seriousness of the misconduct and the

[157] SOU 2014:31, p. 238 and Prop 2015/16:128, p. 18.

employee's knowledge of the facts.[158] This restriction will hopefully make the predictability easier for the employee, since there is less to take into consideration.

Since the criteria earlier have been developed by case law, and since judgments are not binding from one case to another in Sweden, it has not been entirely clear what consequences each individual situation will bring. By having them statutory regulated it could make the assessment easier. Nevertheless, a concern is raised if the criteria will still be unclear, and that a continued assessment of those in every individual case is obvious. Will the employee be able to assess the limitation of serious wrongdoings, and knowing if their facts is actual correct before whistleblowing internally?

5.2.1.1 Serious misconduct

Today, the general principle is that the more serious wrongdoing involved in the whistleblowing, the bigger right to criticize the employer. This assumption will continue being the ground for what misconduct an employee is allowed to criticise in public. If the wrongdoing concerns negative impact on the public health and safety, environmental issues, and the fundamental rights etc., it is more legitimate to disclose the wrongdoing.

"Serious wrongdoing", will be more defined by the new law by referring to crimes in accordance to imprisonment. Although, this restriction is necessarily not positive for the employees. First of all, the whistleblower could have other wrongdoings they consider necessary for the public to know. A concern that arises along with this is how an employee will be able to determine when a deed is assessed in accordance with prison sentences or what wrongdoings that are "comparable to this". The assessment requires an interpretation of the situation. A risk that can arise here is that the employee will be unsure if the wrongdoing is legitimate by the law, and that this uncertainty leads to them not expressing their concerns. This can further lead to a reduction of the interest of the society since actual serious wrongdoings are not being exposed. Needless to say, whether the limits of serious misconduct had been lowered, it would still be a matter of interpretation.

Defining "serious misconduct" could mostly be seen as a strengthening of the interest of the employer, and to some extent the interest of the society. Limiting the level of the wrongdoing strengthens the employer's right to keep a successful competition towards other companies. If all wrongdoings would have been included in the law, employer's superior position in the

[158] SOU 2014:31, p. 238-241.

employment contract would be undermined and the width of the employee's duty of loyalty would be reduced. The society's interest mostly concerns the wrongdoings affecting health and security, other aspects that is for the employee's personal desire is not necessarily in their concern. Defining the fact that whistleblowing shall concern serious misconduct could give the employer and society a peace of mind.

5.3 Protection against reprisals from the employer

As mentioned before, a crucial reason for the employee avoiding whistleblowing is the fear of being exposed to reprisals. Today, there is already a statutory protection for the permanently employed in LAS when it comes to dismissal and termination, which will continue to exist. I question whether the new law will strengthen this, since the regulated protection will mainly be as the one in LAS. Although, since there will be another statutory regulation that the employer is obliged to pay damage pay, the employee could feel more protected by the fact that the employer must relate to if the reprisal could constitute a violation of the law.

Although, an area that is perceived as problematic from a Swedish perspective is the limited ability to get damage pay for the whistleblower who suffer less coercive measures than the ones stated in LAS. The Government has realised that other reprisals should be protected as well, e.g. lower salary trend. Although, my concern is that the employer could prove that there is no connection between the whistleblowing and such reprisal. However, if the employer cannot prove otherwise, the protection could in fact be real.

The possibility to sound the alarm internally will continue to exist along with the right to criticize the employer. The employer is not allowed to expose the employee to reprisals since the employee has acted in accordance to the duty of loyalty. However, since those alarms will not necessarily go public, it could be hard for the employee to get support from others if the employer exposes her for reprisals. The happening is not necessarily known by anyone else. The outcomes and reprisals for internal whistleblowing could, based on this, continue being uncertain and unprotected. This could be problematic, since the criticism first and foremost should be handled internal. All whistleblower will therefore run a risk to be exposed to reprisals in the first step of the process, if they do not have a legitimate reason for directly going external. To reduce this, I believe it lies on the employer's shoulder to create an environment that encourages internal whistleblowing. The fear of being exposed to reprisals is without this, likely to continue.

6. Conclusion

The legal framework of whistleblowing has been uncertain for many years. National and supranational legalisation and case law have tried to guide the whistleblower throughout the process and ensure that the freedom of expression also should be an enforceable right at work. The current legal framework in relation to how it predictably will be after the new law enters into force, will not be remarkably different. The employee will continue being legally between the rights and duties towards the employer, which continues protecting the employer's interest of keeping business secrets and loyal employees. However, since the process of whistleblowing will be legislated, it will make the assessment of the legal outcome a bit easier for both the employee and the employer.

The new law could be a way to protect the whistleblowers from unfair treatment, but since there is still a need of interpretation of e.g. the implication of "serious misconduct" and an uncertainty of which reprisals the employee is protected from, this law could just as much be a false security blanket. Moreover, the employee still needs to have a great knowledge of several legal acts, which could make the assessment of the possible outcomes uncertain for the employee. I believe that this continued ambiguity will impede the courage to whistleblow. To be on the safe side, the employee should first and foremost respect the duty of loyalty by addressing the wrongdoings internally before going to external authorities, which could hinder important serious misconduct being revealed to the society.

Only time can tell how the new law will affect the legal possibility for whistleblowers in the future. Since this will be the first time that Sweden has such a statutory protection, it is important that in the near future an assessment is made to see whether the law actually has led to the desired effect. It could just as well create new problematic cases, which at their turn will produce other lacks of regulation. Hopefully, this could be a way to strengthen the employee's interest, or maybe even better ensure everyone's interest; the employee, the employer and the society.

7. Bibliography

Legal sources

Supranational legalisation

The Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2014)7 and explanatory memorandum: Protection of whistleblowers,* 2014.

The Criminal Law Convention on Corruption (ETS No. 174).

The European Convention on Human Rights.

International legislation from the European Union

The Charter of Fundamental Rights.

The International Covenant on Civil and Political Rights.

National legislation

Swedish Ministry Series

DS 2002:56.

Preparatory work

Lagrådsremiss*: Ett särskilt skydd för arbetstagare som slår larm om allvarliga missförhållanden,* Stockholm, 2016.

SOU 2014:31: *Visselblåsare – Stärkt skydd för arbetstagare som slår larm om allvarliga missförhållande.*

Proposition 2015/16:128: *Visselblåsare – Särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden.*

Proposition 1973:129: *Kungl. Maj:ts proposition med förslag till lag om anställningsskydd m.m.*

Case law

The European Court of Human Rights

ECtHR, *Fuentes Bobo v. Spain*, Application No. 39293/98, 29 February 2000.

ECtHR, *Guja v. Moldova*, Application No. 14277/04, 12 February 2008.

ECtHR, *Heinisch v. Germany*, Application No. 28274/08, 21 July 2011.

ECtHR, *Handyside v. the United Kingdom*, Application No. 5493/72, 7 December 1976.

The Swedish Labour Court – Arbetsdomstolen (AD)

AD 1982:110

AD 1994:79

AD 1997:57

AD 1986:95

AD 1988:67

AD 2003:21

AD 2003:84

AD 2005:124

AD 2006:103

AD 2010:50

Literature

Journals

Armstrong, A.F & Francis, R.D & Foxley, I, *Whistleblowing: a three part view*. Source: *Journal of Financial Crime*, Vol. 22, Issue 2, 2015.

Dussuyer, Inez & Armstrong, Anona & Smith, Russell, *Research into Whistleblowing: Protection Against Victimisation*. Source: *Journal of Business Systems, Governance & Ethics*, Vol. 10, Issue 3, Melbourne, 2005.

Nicander, Hans. *Lojalitetsplikt före, under och efter avtalsförhållandet.* Source: *Juridisk Tidskrift*, No.1, 1995-96.

Tsahurida, E.E. & Vandekerchehove, W.J., *Organisational whistleblowing policies: making employees responsible or liable?* Source: *Journal of Business Ethics*, Vol. 82, Issue 1, 2008.

Books

Bowden, Peter, *In the Public Interest: Protecting Whistleblowers and Those Who Speak Out,* Melbourne, 2014.

Danelius, Hans, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna,* Vol. 5, Norstedts Juridik AB, Stockholm, 2015.

Fahlbeck, Reinhold, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikter*, Vol. 3, Norstedts Juridik AB, Stockholm, 2013.

Fransson, Susanne. *Yttrandefrihet och whistleblowing - Om gränserna för anställdas kritikrätt*, Premiss förlag, Stockholm, 2013.

Hellner, Jan, *Metodproblem i rättsvetenskapen: studier i förmögenhetsrätt*, Jure, Stockholm, 2001.

Larsson, Per, *Whistleblowing – Förutsättningar och skydd för dem som slår larm om korruption och andra oegentligheter,* No. 1, Transparency International Sweden, Stockholm, 2012.

Lehrberg, Bert, *Praktisk juridisk metod*, Vol. 9, Iusté Aktiebolag, Uppsala, 2016.

Miceli, P. Marcia & Near, P. Janet & Dworkin Morehad, Terry, *Whistle-blowing in Organizations,* Routledge, 2008.

Nyström, Birgitta. *EU och arbetsrätt*, Vol. 4, Norstedts Juridik AB, Stockholm, 2011.

Samuelsson, Joel & Melander, Jan, *Tolkning och tillämpning*, Vol. 2, Iustus Förlag AB, Uppsala, 2012.

Sandgren, Claes, *Rättsvetenskap for uppsatsförfattare: ämne, material, metod och argumentation*, Norstedts Juridik AB, Stockholm, 2007.

Voorhof, Dirk & Humblet, Patrick, *The right to Freedom of Expression in the Workplace,* Source: *The European Convention on Human Rights and the employment relation,* Oxford, 2013.

Westregård, Annamaria, *Integritetsfrågor i arbetslivet,* Juristförlaget i Lund, Lund, 2002.

Reports

Slorach, Martina et., *Rätten att slå larm. En handbok om yttrandefriheten på jobbet – råd för whistleblowers*, Vol. 1, Swedish Confederation of Professional Employees, Stockholm, 2011.

The Council of Europe, *Freedom of expression in Europe: Case-law concerning article 10 of the European Convention on Human Rights,* No. 18, Human Rights Files, 2007.

Transparency International, *International Principles for whistleblower legislation: Best practice for laws to protect whistleblowers and support whistleblowing in the public interest,* 2013.