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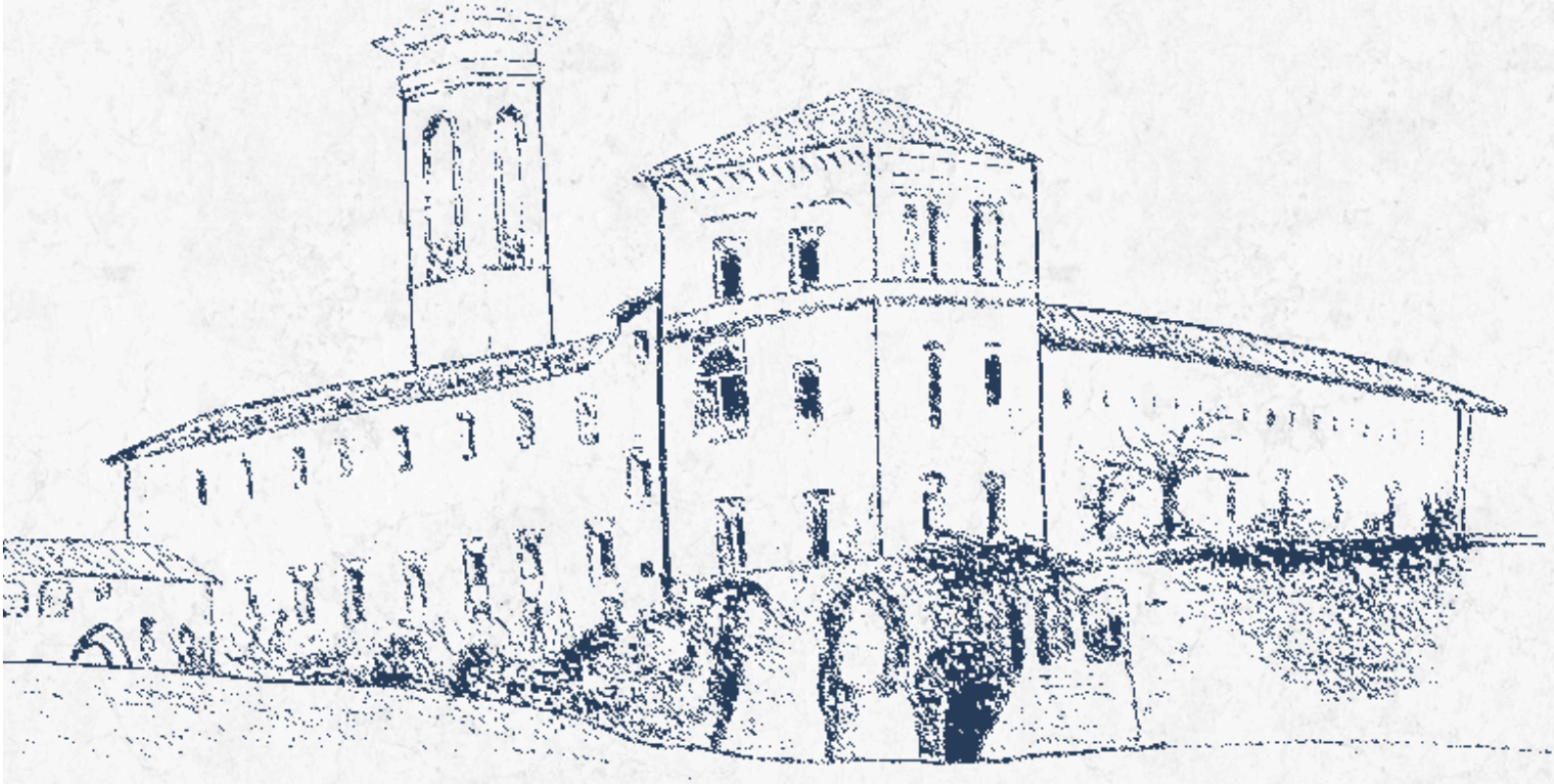

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E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

Editorial

David Lewis and Wim Vandekerckhove [·]

Readers of this special issue may wish to know some of the background to its publication. In June 2009 a conference was held at Middlesex University in London to mark the fact that whistleblowing legislation had been in force in the UK for a decade. This event included a public lecture and attracted delegates from a range of backgrounds, including academics, legal and management practitioners, trade unionists, whistleblowers and students. At the end of the conference the decision to establish an International Whistleblowing Research Network was taken. People can join this network simply by consenting to their email address being used for distribution purposes. At the time of writing, October 2013,there are over 100 names listed. The current convenor of the network is David Lewis, who can be contacted via d.b.lewis@mdx.ac.uk.

There have been many developments in the law and practice of whistleblowing since the network was established. Legislation has been introduced in several countries (for example, Ghana, Jamaica and Malaysia) and amended in others (for example, Australia, the UK and the US). Empirical research has shown that employers are increasingly recognising both the need and desirability of having effective whistleblowing policies and procedures in place. Of course, some will be responding in order to comply with the law, for example the requirements of the Sarbanes –Oxley and Dodd –Frank legislation in the US, but others may have acted out of enlightened self-interest.

Another development has been the disclosure of information by Wikileaks. This has led to questions being asked about the relationship

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between whistleblowing and leaking and about how people can be persuaded to raise their concerns internally rather than internationally. A particular issue for organisations is that many individuals have come to realise that if whistleblowers are not protected by law it might be wiser to leak information anonymously than to use official channels. The problem of being identified is amply demonstrated by the cases of Bradley Manning and Edward Snowden. In August 2013 the former was sentenced to 35 years imprisonment for passing restricted military information to Wikileaks and the latter was in exile in Russia after revealing data about the activities of the US National Security Agency.

Another trend worth highlighting is the more widespread acceptance that whistleblowing is an important tool in the fight against fraud and corruption. This is evidenced in Europe by reports, consultation and specialist hearings. For example, the Budgetary Control Committee of the European Parliament commissioned a full report on this topic in 2011 and the Council of Europe Committee on Legal Co-operation invited experts to give evidence at a meeting in May 2013. Subsequently,in June 2013 Middlesex University hosted its third international whistleblowing research conference. This was attended by more than sixty delegates and speakers from eighteen different countries. The sessions were inter-disciplinary and involved contributions from academic social scientists, philosophers and lawyers as well as NGO's and management consultants. This special issue on whistleblowing is based on the papers presented and, to our knowledge, is the first of its kind to be published in an international journal.

The first article points out that whistleblowing is an orphan, in the sense that it belongs within no academic discipline or professional occupation. Peter Bowden argues that, for several reasons, such a home is vital. All disciplines and occupations experience whistleblowing issues. Where do people find the information to teach, consult or manage whistleblowing in practice? Where do potential whistleblowers go to find out how to report and how do they protect themselves from the retribution that will possibly follow? Bowden observes that there are many institutional questions about how a society effectively ensures wrongdoing is stopped yet fully protects the whistleblower. He asks how and where are those questions best answered and from what academic base is that knowledge passed on to other disciplines? The author points out that research on whistleblowing is conducted by many disciplines and that researchers are likely publish in their respective specialist journals. How then are these findings cross- fertilised? Finally, Bowden maintains that we do not seem to learn from the different arrangements around the world. We do not

know which systems maximise the ability of ordinary people to speak out safely and effectively against wrongdoing. The author concludes with an exploration of the institutional and academic options that could provide an effective "mother".

In his contribution, Rodney Smith notes that whistleblowing research has progressed considerably over the past decade. However, one area that has not advanced in the same way is the theorisation of the organisations within which whistleblowing takes place. He asserts that the survey-based literature tends to ignore questions about the nature of organisations, while much other writing on whistleblowing repeats the simple dichotomy between whistleblowers as "ethical resisters" and organisations as "bureaucratic hierarchy" that became prominent in the 1970s. Smith's article identifies some of the problems with this typical way of thinking about organisations and whistleblowing. It challenges the view that bureaucracy in itself is particularly inimical to whistleblowing. He maintains that bureaucratic hierarchy presents opportunities as well as problems for effective whistleblowing. The article also challenges the assumption that, because bureaucracy presents problems for whistleblowing, alternative participative forms of organization must be the solution. Smith concludes by arguing that the application of Mary Douglas's grid-group theory suggests that all forms of organisation have the potential to produce mixed results for whistleblowers.

The third and fourth articles arise out of specific empirical research projects. Marit Skivenes and Sissel Trygstad investigate whether the type of misconduct that is reported – subjective or objective issues – has any impact on how Norwegian managers assess the legitimacy of whistleblowing. Misconduct involving harassment will involve a larger element of subjectivity than is usually seen in cases of corruption, which tend to be characterized by more objective facts. The authors' sample included 1,940 municipal managers from 107 medium-sized and large municipalities. One half of them assessed a vignette that described a situation involving harassment, while the other half was presented with the same vignette but with harassment replaced by corruption. Their analysis found that, when controlled for gender, education, seniority or number of subordinates, there were no differences in the perception of whistleblowing. The only difference detected related to the management level of the respondents. Senior managers stood out in terms of their significantly lower acceptance of whistleblowing in cases of harassment. The authors conclude that senior managers take a more positive view of whistleblowing about financial wrongdoing and a less positive view in cases involving harassment.

Wim Vandekerckhove and Cathy James examine data from the Public Concern at Work advice line in the UK to identify the extent to which trade unions are recipients of whistleblower concerns and how successful raising a concern with these institutions is. The authors define successful whistleblowing as being both safe for the person reporting as well as effective in stopping wrongdoing. Their findings demonstrate that trade unions are not the favourite recipient for workers who want to raise a concern about wrongdoing. If they raise their concern at all with a union, workers tend to raise it with others first. However, their results also show that it is safer for a whistleblower to report to a union than it is to other recipients. Significantly, their findings reveal that raising a concern with a union is less effective in stopping wrongdoing than using other external or internal recipients.

In his contribution, Peter Bowal observes that whistleblowing legislation and corporate policies typically prescribe that reports of wrongdoing must be made in "good faith." Sometimes this requirement is stated in the negative, that reports made with "malice" or "bad faith" will be disqualified from investigation or protection, or both. Although malice appears to be a popular and effective screening instrument, if not a strong signal to deter potential whistleblowers, the author points out that the rationale for the no-malice rule is rarely articulated by legislators and policy drafters. Definitions in whistleblowing law and policy are hard to find. The author poses a number of related questions. Is someone who personally seeks justice and an end to wrongdoing an actuator of malice? Given the no-malice rule, are individual and personal victims of wrongdoing ever permitted to blow the whistle? How much malice is required to disqualify a report, or is an all-or-nothing approach in effect by default? What is the process for a preliminary determination of malice or good faith when a report is received? Bowal argues that the good faith standard, which focuses entirely on the messenger and not at all on the message, may not be well understood by legislators, policy makers and whistleblowing administrators. It is likely to be a standard that is unevenly applied in practice. This article critically analyses the no-malice rule and recommends discarding it.

The remaining articles discuss various aspects of the law. Richard Hyde and Ashley Savage point out that whistleblowing legislation tends to be territorial. However, concerns disclosed by whistleblowers can cross national boundaries, affecting members of the public in more than one country and requiring a response by regulators and governments in several States. This is particularly the case where workers operate in an industry that is globalised and operates transnationally. Two examples of such

industries, aviation and food, are explored in this article but clearly there are others. Surface transportation, such as shipping and road haulage, energy production and financial services are all capable of posing risks to the public throughout the world. The authors argue that the need to address a concern in order to reduce the risk to the public, whilst protecting the whistleblower from suffering detriment, raises particular issues in transnational situations. This article outlines these issues and considers how they can be best addressed, in the long term, by policymakers and, in the more immediate future, by those advising whistleblowers. In their conclusion, Hyde and Savage offer policy guidance intended to ensure that cross-border concerns are handled in a consistent manner that enables issues to be raised and adequately addressed as well as protecting both the whistleblower and the public.

In his contribution based on extensive experience as a specialist attorney in the US, Tom Devine maintains that legal burdens of proof are unsurpassed for the impact they have on whistleblower laws in actually protecting rights. He notes that the U.S. Whistleblower Protection Act ("WPA") has pioneered modern burdens for fair rules on what it takes to win or lose a case. Its standard governs all thirteen U.S. corporate whistleblower statutes passed since 1989, covering nearly all the private sector. Devine also observes that this standard has been adopted by inter - governmental organizations, ranging from the United Nations to the World Bank. The WPA burdens of proof consist of three parts: 1) only requiring a causal link between protected speech and the challenged personnel action; 2) in relation to the whistleblower's burden to prove a prima facie case, replacing the "predominant factor" requirement with the more realistic "contributing factor" test; and 3) for the employer's reverse burden of proof in an affirmative defence that it would have taken the same action for legitimate reasons in the absence of whistleblowing, replacing the "preponderance of the evidence" standard only requiring 50% plus of evidence, with a "clear and convincing evidence" standard requiring 70-80%. Devine asserts that these legal burdens of proof are currently not in any other nation's whistleblower laws, most of which are silent on the quantum of evidence. He concludes by arguing that the burden of proof should be carefully considered in drafting new whistleblower laws since its omission could turn well-intentioned laws to protect freedom of speech into Trojan horses.

In a very timely piece that highlights the lessons to be learned from the evolution of legislation in Australia, AJ Brown notes that the form of legal protections and regimes remains contentious. The search for "ideal" or "model" laws is complicated by the diversity of approaches attempted by

jurisdictions; frequent lack of evidence of their success; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing. By using Australia's 2013 federal statute as a case study, this article seeks to aid understanding of the ways in which different policy purposes, approaches and legal options can be combined in the design of better legislation. The 2013 Act is one of the first national laws to seek to integrate divergent approaches to the "anti-retaliation" model of whistleblower protection, including its place in the nation's employment law system, as well as setting new standards for the role of "public whistleblowing". The article suggests how different legal approaches might be better integrated and provides a new, indicative schema of how whistleblower protection might be defined relative to other forms of complaint.

With this special issue, we aim to draw the attention of researchers in the field of Industrial and Labour Relations to the issue of whistleblowing. The contributions in this special issue show whistleblowing as a viable topic for such research from a comparative and international perspective. Because of the complex organisational dynamics whistleblowing triggers, and the public interest in discovering organisational wrongdoing, whistleblowing is more of focal point than a contested place for organization studies, political sociology, psychology, legal research, philosophy, and labour studies, as the various approaches used in the papers presented here shows. It has recently also become a topic on which not just academics from various disciplines interact, but also where academics, campaigners, managers, and policy makers collaborate. We hope this special issue can further facilitate such collaboration.

Adapt International Network

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

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