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Whistleblowing: an effective tool in the fight against corruption

Whistleblowing is increasingly recognised as an important tool in the prevention and detection of corruption and other malpractice. By disclosing wrongdoing in an organisation, whistleblowers can avert harm, protect human rights, help to save lives and safeguard the rule of law. The clandestine nature of corrupt behaviour means that it may never come to light unless cases are reported by people who discover them in the course of their work. But reporting can come at a high price: whistleblowers often expose themselves to great personal risks in order to protect the public interest. As a result of speaking out, they may lose their jobs, dampen their career prospects, and even put their own lives at risk. To provide a safe alternative to silence, TI recommends policy and legal measures to provide:

- 🌀 **Effective legal protection of whistleblowers against retaliation with full compensation in case of reprisals;**
- 🌀 **Adequate mechanisms in public, private and not-for-profit organisations to ensure that disclosures are properly handled and thoroughly investigated;**
- 🌀 **Public research, data collection, information and training to inform about the public benefit of whistleblowing.**

Whistleblowing and Corruption: What Happens Without Legal Protections?

In 1995, Allan Cutler, a Canadian public servant, reported procurement practices that failed to follow proper procedures in a Canadian sponsorship program. His reports were dismissed and he was demoted. Five years later the programme was suspended and significantly reviewed. Allan Cutler was ultimately reinstated and his case raised awareness on whistleblowing in Canada. Canadian legislation protecting whistleblowers in federal civil service was passed in 2007.³

John Githongo is a former Kenyan journalist who investigated bribery and fraud in his home country and later took a government position to fight corruption. In 2005 he resigned from that position and subsequently reported four high-level politicians as allegedly responsible for a major corruption scandal. He later went into exile in the UK, returning to Kenya in 2008.⁴

In 2005, Nicole Barlow raised concerns about the construction of a petrol station on wetlands in South Africa. It came to light that allegedly 35 million Rand (€ 3.6 million) worth of bribes had been paid to start construction. As she had no money to bring about a legal case she reported the issue to the media. After months of pressure, a government investigation was launched. It found the government authorisations had been forged. The developer took legal action against Ms. Barlow but she won the case.⁵

Eugene McErlean, a former auditor at Allied Irish Bank, disclosed alleged fraud to state regulatory bodies in 2001. The allegations were not followed-up and he had little choice but to leave the bank one year later. Only in 2009 did the bank's Chief Executive Officer apologise for their treatment of him. The country's financial regulator has continued to be criticised for allegedly not overseeing the Irish financial sector properly.⁶

1. What is whistleblowing?

Whistleblowing is the disclosure of information about perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.¹ The ultimate goal of whistleblowing is to protect the public interest. It achieves this by informing people or organisations that are in a position to prevent harm, to investigate or to take action against those responsible for wrongdoing. Prominent whistleblowers have revealed the cover-up of SARS and other dangerous diseases and helped to avoid environmental and health hazards in the United States and elsewhere.

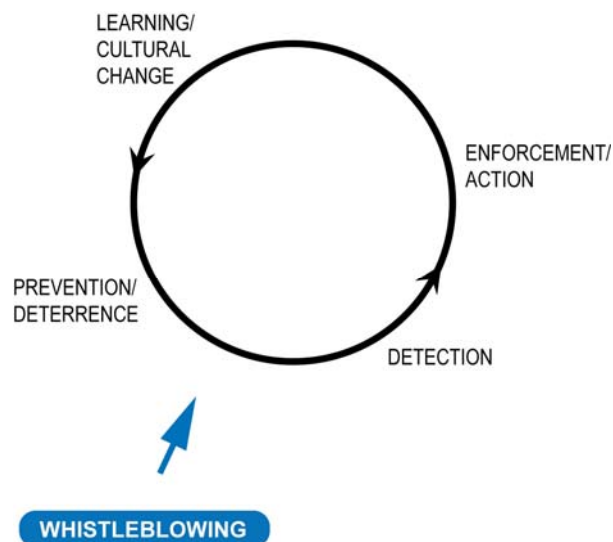
Data shows that occurrences of fraud in companies often come to light thanks to whistleblowers who have been found in some studies to detect internal problems more frequently than any other actor, including regulators, auditors and the media.²

Protecting one's right to come forth with wrongdoings is closely related to protecting one's freedom of expression and conscience. It also is based on the principles of transparency and accountability.

2. The role of whistleblowing in the fight against corruption

Corruption is a notoriously secretive activity and it is usually only those engaged in corrupt deals or those who work with them that are aware of it. Insiders are among the few people who are able to report cases of corruption (past or ongoing) and identify the risk of future wrongdoing. By helping to detect corruption cases, whistleblowers play a critical role in converting a vicious cycle of secrecy into a virtuous cycle (see figure below). Detection of corruption is a pre-condition to initiate related investigations and prosecution. However, only if corruption cases are effectively prosecuted can a culture of corruption change.

Fighting Corruption – A Virtuous Cycle



Major bribery and corruption scandals demonstrate the damage done by the failure to report wrongdoing as soon as it is discovered. Yet indifference, fear of reprisal, and misplaced loyalty as well as an overall culture of silence often deter potential witnesses and whistleblowers from speaking out.

3. The relevance of appropriate whistleblowing legislation

Appropriate whistleblowing legislation and the means to enforce it are necessary to support a culture of compliance and integrity. Several international conventions recognise whistleblowing as an effective tool for fighting corruption, fraud and mismanagement, and commit the signatory countries to implement appropriate legislation.⁷ However, existing legal provisions are fragmented and weakly enforced in most jurisdictions. Only in rare cases do they provide sufficient protection for whistleblowers. Many laws may cover only the public sector or may be not tailored to the specific needs of whistleblowers. Comprehensive legislation, as provided under the United Kingdom's Public Interest Disclosure Act, is the exception rather than the rule.⁸

Research conducted by Transparency International on whistleblowing policies and practice in ten European countries found that legal provisions tend to be included in or derived from national labour codes.⁹ This feature limits protection to formal employees, leaving informal workers, consultants, contractors or suppliers outside the scope of the law.

Also, there may be an over-reliance on general criminal laws that oblige individuals to report criminal offences to a country's law enforcement authorities. In such circumstances, the assumption is that individuals would automatically be exempted from any form of retaliation if a crime was involved. Practice has shown, however, that the existence of a legal duty to report is seldom a satisfactory alternative to a proper whistleblowing policy and protective measures. The same problem applies to the reliance on witness protection mechanisms. Not all whistleblowers are witnesses. They often do not have any concrete evidence, but only suspect wrongdoing. As a result, witness protection mechanisms do not provide sufficient protection to whistleblowers, nor do they pursue the same goal.

At the same time, the overall legislative framework needs to provide sufficient protections and compensation for those wrongly accused, even by whistleblowers who report in good faith. The assumption of innocence needs to be respected until responsibility is sufficiently proven.

Recommendations

Together with international experts, Transparency International has produced a set of guiding principles for drafting whistleblowing legislation. These principles provide a comprehensive framework for related laws, building on international best practice.¹⁰ Below are the recommendations derived from these principles.

A single, comprehensive legal framework is most effective

To ensure a safe alternative to silence for whistleblowers, the legal framework should be clear, comprehensive and easy to use for protecting the whistleblower. Ideally, a single legislative framework should be in place, but provisions in different bills can fulfil the same purpose if they do not leave loopholes or become too complicated. In all cases, the legislation should cover the public, private and not-for-profit sectors and provide for reliable reporting channels to communicate concerns. Legislation should include a broad range of issues, from criminal offences to the potential harm that wrongdoing can cause, such as to the

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The Three-Tiered Model of Disclosure in the UK

The UK Public Interest Disclosure Act (PIDA) establishes three levels of disclosure. Each tier implies an increased level of evidence needed to substantiate the allegations of wrongdoing.

However, these different levels afford safeguards for whistleblowers reporting externally. At the same time, it places more responsibility on the whistleblower to substantiate her or his claims before going public and outside the organisation.

The three levels are as follows:

1. *protected internal disclosure* (i.e. existence of evidence that raises genuine suspicion on the part of the whistle blower);
2. *protected disclosure to the regulator* (i.e. whistleblower is in possession of factual evidence that raises concern but no serious doubts about the validity of the claim);
3. *protected wider disclosure* (i.e. factual evidence that raises concerns while at the same time there is no serious doubt about the validity of the claim; there is also a good reason to go further in the process).

health and safety of citizens and the environment. Whistleblowing legislation should provide that organisations in the public and private sector establish, maintain, and routinely publicise appropriate mechanisms for internal reporting.

Safety should be ensured for whistleblowers

Both public and private employees and those outside the traditional employee-employer relationship (e.g. consultants, temporary workers, trainees, etc.) should be protected from reprisal for honestly reporting concerns. Protection should also be extended to those attempting to report or corroborating reports and include a right to refuse participation in wrongdoings. Any individuals closely associated with the whistleblower, such as family members, should be covered as well. In case of retaliation against the whistleblower, the burden of proof to show that this discrimination is not related should lie with the employer. These protections should be guaranteed by access to normal court procedures.

Whistleblowers should be protected against any damages suffered as a consequence of their disclosure. They should receive some kind of professional or social recognition for having prevented excessive harm to the organisation or society. Such a system, potentially including financial rewards, should be carefully designed, taking the particular national and legal contexts into account.

Internal and external reporting should be protected

Where possible, reports or concerns should first be raised internally and to the appropriate body set up by the organisation with assurances that whistleblower confidentiality is clearly established. This allows organisations time and space to investigate the nature and substance of a report without unfairly exposing the subject of a report or the organisation to unfounded allegations.

In many instances, however, initially reporting internally might not be a possibility. Whistleblowers may fear retaliation for filing an internal report, the report may not be followed up internally for various reasons (e.g. where malpractices are institutionalised or where managers are concerned about the negative impact on the image of the institution or on themselves), or the public interest may be best served by immediately filing the report externally to the authorities or other agencies. Whistleblowers should have a safe option to report externally to the regulator, enforcement authorities or to other competent oversight bodies. This is particularly important in cases where there is an immediate risk to the health and safety of people. As a last resort, disclosures to the media should also be protected.

The British Public Interest Disclosure Act (PIDA), for instance, takes different factors and consequences of whistleblowing for people and organisations into account. It is an example of a model that allows for internal and external reporting, establishing three levels of disclosure (see side bar).

Enforcement is essential

While the existence of a legal framework is a pre-condition for whistleblower protection, it is not sufficient. Legislation needs to be effectively enforced and should be as sound and consistent as possible. To ensure the proper implementation of legal provisions, an independent public body with sufficient

autonomy should be set up or designated to oversee the functioning of the law and to receive and investigate complaints. Enforcement should include consultations with key stakeholders like trade unions, business associations and civil society actors so that whistleblowing policies can be agreed upon and put into effect.

4. The need for effective follow-up mechanisms in organisations

To realise the potential of whistleblowing legislation, the legal framework should be complemented with effective follow-up mechanisms in organisations. There also must be a willingness in organisations (whether a public institution, private company or not-for-profit) to provide sufficient resources, to investigate cases through independent bodies, to implement necessary changes and to hold those responsible for wrongdoing to account.

In recognition of the potential of whistleblowing for effective risk management in organisations, a number of related provisions and guidelines have been developed. The Sarbanes-Oxley Act, a law in the US which sets financial reporting standards for public companies, mandates whistleblower protection mechanisms for public companies registered in the country.¹¹ The International Chamber of Commerce also has adopted voluntary guidelines¹² and the British Standards Institute has developed a code which establishes best practice for whistleblowing in organisations.¹³

But recent cases show that existing laws and practices are not enough and that much more needs to be done to realise the potential benefits of whistleblowing. For example, the multi-billion dollar fraud scheme of Bernard L. Madoff, a US-based hedge fund manager, was first detected in 1992, but no action was taken. An official investigation into the case found that six substantive complaints were filed by whistleblowers to the appropriate bodies but the government never followed up on them. Madoff's scheme eventually cost thousands of investors billions of dollars.¹⁴

Recommendations:

Strong and transparent internal policies are needed in organisations

Trustworthy and effective policies and procedures are essential to create the right environment for honest reporting in organisations. As part of well-designed ethics and anti-corruption codes, organisations should implement a clear and distinct whistleblowing policy. Whistleblowing procedures should provide for a variety of easy and accessible channels that can be used to disclose information, such as to the line manager, an ethics committee, the Ombudsperson, internal hotlines or web-based reporting tools. Policies and procedures should also clearly separate personal grievances from whistleblower reports, offer guidance and procedures for internal and external reporting, provide sufficient feedback to the whistleblowers, establish appropriate follow-up mechanisms with timeframes, and protect people from retaliation. It is essential that whistleblower procedures are supported by the top management and accepted and well-known by the members of the organisations.

According to the new Dodd-Frank Wall Street Reform & Consumer Protection Act (2010) in the United States, whistleblowers will for the first time be entitled to collect between 10 and 30 per cent of the money recovered by the U.S. government in order to encourage reporting of wrongdoing in the financial sector.¹⁵

The Financial Gains from Whistleblowing in the US

The US False Claims Act is considered one of the strongest and most effective whistleblowing laws in the world. It contains *qui tam* provisions, a mechanism that allows citizens with evidence of fraud against government contracts to sue, on behalf of the government, in order to recover the stolen funds.

In compensation for the risk and effort of filing a *qui tam* case, the whistleblower may be awarded a portion of the funds recovered, typically between 15 and 25 per cent.

According to the US Department of Justice Civil Fraud Division, the United States has recovered more than US\$ 21 billion since 1986 thanks to the False Claims Act. Studies estimate the fraud deterred by the *qui tam* provisions runs into the hundreds of billions of dollars.¹⁷

Confidential reporting must be ensured

Reporting channels in an organisation should offer people the opportunity to report concerns confidentially or even anonymously. Confidentiality is needed to establish trust with the whistleblower who faces numerous risks when reporting, while also allowing the organisation to establish the facts of a case. The whistleblower's identity should be protected and only be disclosed if she or he agrees to this or if it is required by law. Confidentiality also helps to protect the fundamental rights of the person suspected of wrongdoing.

Impartial and accountable investigations need to be carried out

After a disclosure is received, the organisation should focus on the nature and substance of a report, and not on the person making it. Reports should be fully and fairly investigated; while the organisation should also take suitable corrective action when a report is well-founded. A record should be kept on how a report was managed so the organisation can learn from the experience.

Good communication and consultation with staff is needed

Whistleblowing policies must be fully supported by the leadership of the organisation and should be adequately promoted and clearly communicated throughout the organisation. When designing and implementing the policy, employees, directors and other stakeholders should be properly consulted, briefed and trained. The achievements of whistleblowing mechanisms should be regularly communicated to the members of the organisations and to the public, and staff should be consulted regularly in order to identify areas for improvement.

5. The demand for a shift in culture

The importance of whistleblowing in the detection and prevention of wrongdoing is still generally under-valued. It is an inexpensive risk management tool with particular benefits for emerging democracies with less established oversight mechanisms. Whistleblowing is also a tool to sound the alarm at early stages, potentially even before any damage has been caused. Nevertheless, whistleblowers are often perceived as disloyal, rather than as champions of the public interest. In many countries they are viewed as untrustworthy, and sometimes even as spies or traitors.¹⁶

Recommendations

Public support is needed to promote whistleblowing

To change this perception, whistleblowing needs to be promoted as an effective tool for stopping corruption and serving the public interest. Governments should lend their support to public information campaigns as well as initiatives to promote whistleblowing that are carried out by professional groups, Ombudspersons, industry, media, trade unions and other civil society organisations. Whistleblowers should not only be protected by public authorities, but also honoured and actively supported.

Data on the public benefit of whistleblowing should be collected and published

Data from the United States show the relevance of whistleblowing for the recovery of public revenues (see side bar on page 6). Yet on a global scale there is little data available on the number of cases reported, the effectiveness of reporting channels and the financial benefits due to whistleblowing. This lack of data could be addressed by making more court and tribunal decisions public and by standardising whistleblowing procedures across the public sector. Given the central role of whistleblowing in detecting and preventing wrongdoing, gathering reliable statistics will greatly help decision-makers and the public to measure progress in uncovering corruption.

A proper societal and legal environment is needed

A legislative environment, ensuring freedom of expression, access to information and the existence of an independent media are critical to enable a culture of whistleblowing. Protection of journalists' sources should include information provided by whistleblowers, even if journalists might base their reports at times on erroneous information given in good faith. The growing relevance of internet tools provides whistleblowers with new channels for reporting and thereby creates a global platform which increasingly can help ensure that whistleblowing becomes and remains an important issue in the public debate. ⁶

TI's Recommendations for Whistleblowing: At a Glance

- 🌐 A single, comprehensive legal framework is most effective.
 - 🌐 Safety should be ensured for whistleblowers.
 - 🌐 Internal and external reporting should be protected.
 - 🌐 Enforcement is essential.
 - 🌐 Strong and transparent internal policies are needed in organisations.
 - 🌐 Confidential reporting must be ensured.
 - 🌐 Impartial and accountable investigations need to be carried out.
 - 🌐 Good communication and consultation with staff is needed.
 - 🌐 Public support is needed to promote whistleblowing.
 - 🌐 Data on the public benefit of whistleblowing should be collected and published.
 - 🌐 A proper societal and legal environment is needed.
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To learn more, visit: http://www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers

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- ⁴ For more on the Kenyan case, see: www.worldpress.org/Africa/1747.cfm.
- ⁵ For more on the South African case, see the Open Democracy Advice Centre in South Africa, (www.opendemocracy.org.za) and www.environmentconservation.org.za/environmental_protection_activities/libradene.php.
- ⁶ For more on the Irish case, see: www.tribune.ie/business/article/2009/may/24/whistleblower-mcerlean-is-vindicated/.
- ⁷ Relevant conventions include the UN Convention against Corruption, Article 33, the Council of Europe (CoE) Civil Law Convention on Corruption article 9 (adopted 1999), and CoE Criminal Law Convention (article 22).
- ⁸ For more on the UK legislation, see: www.opsi.gov.uk/acts/acts1998/ukpga_19980023_en_1.
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