



Challenges in the Protection of Whistle-blowers: International experience

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“FOR MOST WHISTLE-BLOWERS LIFE IS HELL, A TRAUMATIC EXPERIENCE”

(even in countries with good protection laws and administrative arrangements such as the UK and the US)

ONCE YOU HAVE BLOWN THE WHISTLE, FROM THEN ON YOU ARE ONLY THAT:
A WHISTLE-BLOWER

Your life will go in circles around that, with little space for other things: Family, personal life, professional expectations will evaporate

POLICY CONCEPTUAL DIFFICULTIES AND DISPUTES

- **Conceptually difficult:** loaded with cultural prejudice and negative connotations (e.g. Victor Kemperer's "Maria Denunziata", the Pavel Morozov's story and the self-policing society, the *panopticism* of Michel Foucault)
- **Politically risky:** whistleblowing may create significantly serious political problems to those in high places
- **Operationally complex:** risk of creating fake protections
- **Controversial** in many countries ("*supporting transgressors*", "*resistance of societies to stare at their own indignities*")

But protection policies are necessary for creating high standard democracies

- Whistleblowing protection is to be understood as a democratic accountability mechanism, with strong intervention of the civil society (Anna Myers)
- *"Il faut beaucoup d'indisciplinés pour faire un peuple libre"* (Georges Bernanos, as quoted by Florence Hartmann)
- Whistleblowing as a human right: a natural consequence of the right to know and to free speech
- Retrieve the debate between the "legal validity" of the legal positivism movement and the "moral and political values" (as formulated by Gustav Radbruch, 1946: "Statutory Lawlessness and Supra-statutory Law"): **extreme injustice is no law.**

Cultural controversies-1

Florence Hartmann:

Europe: 30 % favour the revelation of 'state secrets' (vaguely defined)

United States: 50 % are in favour

"We shouldn't tell what our soldiers were doing (in Irak)"

"Don't ask don't tell"

In most EU countries "negative perceptions have prevented whistle-blowers from being recognised as corruption- and crime-fighters, and from being congratulated, or even honoured, for taking risks to help the common good" (TI, 2013, p 15).

Cultural controversies-2

- Are to be protected as whistle-blowers only those who alert of risks?
- Are they a last resort risk management mechanism to be activated when controls fail?
- Are also to be protected those whistle-blowers who disclose wrongdoings or corruption by public authorities? Or these latter are simple “political militants” (Francis Chateauraynaud) ?
- Ralph Nader (the American lawyer inventor of the word whistle-blower) used to say that, when democratic controls are no longer viable whistle-blowers become the last defence of ordinary citizens against the ignoring of their rights and interests by public institutions.
- Whistle-blowers are an alternative to silence and submission: a new form of citizenship (*citoyenneté*) to balance and counteract the *raison d'état*.

Cultural controversies-3

- When are we justified in letting our contemporaries know what we know?
- From a cultural viewpoint: Is it conceptually and practically more fitting to push for transparency and freedom of access to information accompanied by freedom of expression?
- They are ordinary people, but not everyone can be a whistle-blower (because the price to pay is too high): are there professional whistle-blowers (i.e. journalists) to be used as a personal risk minimizer mechanism?
- But often the whistle-blower is the source of an issue which was hidden from public view (e.g. Mark Fell, Irène Frachon, Véronique Vasseur, etc.)

Cultural controversies-4: Mainstream motives of whistle-blowers

A testimony La Santé Prison in Paris (Dr. Véronique Vasseur)

"You cannot work and see the things I saw and not speak out," said Dr. Vasseur, who seems completely overwhelmed by the attention she is getting. "If I said nothing I would be an accomplice to all this, and that I cannot tolerate." (Quoted from The New York Times: January 28, 2000)

"The afterlife of the whistle-blower" (Andrew Smith):

"They spoke out because they felt they had to" (Quoted from The Guardian, 22 November 2014)

Accepted International (Intergovernmental) Definitions

- ❖ A whistle-blower is a concerned individual who discloses wrongdoings that place fellow human beings at risk or represent mismanagement or corruption both in public and private sectors

Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010), adopted on 29 April 2010

- ❖ Any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector

Recommendation CM/Rec (2014)7, adopted by the CoE Committee of Ministers on 30 April 2014

Other International Drivers

At the international level, it is assumed that protecting whistle-blowers shows commitment in fighting corruption by national governments (“to lead example” as the G20 puts it)

Paradoxically, this demand is still little followed by many countries

Nevertheless, it is becoming an international standard:

- ❖ UNCAC
- ❖ Council of Europe Civil and Penal Conventions
- ❖ European Court of Human Rights: Hallmark rulings: *Heinisch v. Germany* and *Guja v. Moldova*
- ❖ Regional initiatives: Inter-American and African conventions against Corruption and the Asia-Pacific initiative against corruption
- ❖ The OAS has even adopted in 2013 a template law on Protection of Whistle-blowers

The OECD and the G20

- OECD publishes since 2003 a Governance Outlook, which includes whistle-blowing measures on conflicts of interest
- Under OECD proposal the G20 Seoul Summit in November 2010 adopted an action plan against corruption, in whose point 7 purports the protection of whistle-blowers.
- It also puts forward 6 principles for legislation in the protection of whistle-blowers

6 G20 Principles

1. Clear legislation and an effective institutional framework (comprehensive and stand-alone legislation)
2. Precise definition of the scope of the protected disclosures and of the persons afforded protection under the law
3. Legislation ensures robust and comprehensive protection
4. Clear definition of encouragement (e.g. monetised rewards?), procedures and the prescribed channels for facilitating the reporting of suspected acts of corruption
5. A facility is entrusted to receive and investigate complaints on retaliation, discrimination or improper investigation of signals
6. legislation is accompanied and supported by awareness-raising, communication, training and periodic evaluation of the effectiveness of the framework of protection

Contextualisation-1

- Can whistle-blowers' protections work in an unprepared environment?
- An environment is unprepared if, whatever the good will of managers, the administrative system as such is not able to guarantee actual and effective protection.
- But, bad laws on whistleblowing protection are counterproductive, they are like "cardboard shields" (Tom Devine): anyone relying on them is sure to die professionally. But, are out there metal shields to be found?
- In an unprepared environment the personal price of exposing wrongdoing can be devastating for the whistle-blower
- Most whistle-blowers are patriots: they know that blind obedience, as history shows, cause more damage than well-tempered disobedience
- Are we seeking to build martyrs and heroes? Whistle-blowers are not saints, but they may be a moment of the human conscience (Bernard Henry-Levy)

Contextualisation-2

The CoE Recommendation of 2014 warns us that:

- “the national normative, institutional and judicial framework including, as appropriate, collective labour agreements, should be designed and developed to facilitate public interest reports and disclosures by establishing rules to protect the rights and interests of whistle-blowers”
- But the Recommendation does not include directly (though it does it indirectly) disclosure of corruption cases among those to be protected.
- The Recommendation urges member states to devise protection (only) of those alerting on risks on “**at least violations of Law and human rights, public health and environment**”

Contextualisation-3:

What needs to be done to prepare the national governance and administrative context?

- Civil Service Professionalism/ non politicisation, including of its managers
- Sound PIFC
- Working external audit
- Independent judiciary
- Respected Ombudsman
- Parliament exercising effective control over the executive
- Administrative culture (and mechanisms) of openness and transparency
- An active civil society (perhaps the most important condition)

Real World Attempts to contextualise whistleblowing protection-1

- Laws in Australia, the UK and the USA (seemingly working reasonably well), but needing an overhauling in the opinion of many
- Romania: a good, failed law since 2004, without a prepared context
- Alert Commissions in France: (very recent laws): based on the idea of social vs. individual whistle-blowers as more adapted to the French cultural tradition

Real World Attempts to contextualise whistleblowing protection-2

In France, the idea is to establish collegial mechanisms to accompany the whistle-blower in order to provide him/her with relief of the burden of having to face the post-alert situation (for example in Law of 16 April 2013 on protection of whistleblowing in health and environment matters)

In the US we find a similar approach, based on an idea that “ideally whistle blowers should always form a small team, because when you’re a whistle-blower, the system dismisses you as a fanatic. But if you have three or four people, what you are saying becomes a point of view”

(the *Heroic Imagination Project* of Prof Philip Zimbardo, quoted in the Guardian 22 Nov 2014)

Ratings for EU countries (TI, 2013)

Advanced	Partial		No /very limited protection
Luxembourg Romania Slovenia UK	Austria Belgium Cyprus Czech Republic Denmark Estonia France Germany	Hungary Ireland Italy Latvia Malta Netherlands Poland Sweden	Bulgaria Finland Greece Lithuania Portugal Slovakia Spain

Conclusions

- We still are at an early stage in developing whistle blowing protection mechanisms, which are still unreliable (whistle-blowers should not rely on existing mechanisms, even if they are in “advanced” countries)
- We might develop sounder protection mechanisms provided they are based and are consequence of two fundamental rights: the right to know and the right to free speech
- We have not found yet a conceptual construction to make the “moral values” to prevail over the “legal positivism” in practical ethical terms, as for many this would represent a “relativisation” of the rule of law
- A practical approach to minimise risks, would seek to promote collective whistleblowing rather than promoting the lone heroic individual, even if this latter deserves to be protected too