WHISTLEBLOWING

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The term "whistleblowing"[1] refers to the ethical act or action of reporting a violation or a dysfunction detected within an organization, for the purpose of avoiding wrongdoing or serious abuse. The information is said to be disclosed in the higher interest of the public or private entity concerned in order to sound an "internal alert" about an aspect of the organization whose integrity is deemed threatened. Taken by a person who is active within the entity, or even by a close partner (e.g., a subcontractor whose activities are linked to the proper functioning of the outsourcing body), this action reflects a desire to clearly inform the authorities about a current or recent, questionable situation that is considered to be illegal, immoral or contrary to the public interest, so that they can take the necessary corrective measures.

Today, however, the concept "whistleblowing" is being used in ways that reflect concerns more or less related to it. This is the case, for example, in public discourse, where the concept is sometimes used to describe alerts, be they scientifically documented or not, about the harmful consequences expected to result from a social phenomenon or that are inherent in the continued pursuit of an activity. At times, it is even used to give inordinate weight to innocuous statements aimed at raising awareness about processes implemented legitimately and with discretion, but simply without the knowledge of the general public…or the ingenuous yet fame-hungry "messenger."

Concept of whistleblowing in an organizational context

When whistleblowing organizational alert mechanisms are adopted as a tool for fostering the exercise of control within a structured entity, they must meet certain conditions if they are to acquire "legal-rational" legitimacy (Bernoux, 2006) in the eyes of the actors likely to use them.

Authorities that seek to confer relevance and credibility on such mechanisms must implement a series of convergent, mutually supporting measures, namely:

[1] "Whistleblowing" is a metaphorical term derived from the whistle that a referee uses to indicate an illegal or foul play or that a police officer blows to expose and halt a crime in a crowded street. The term appears to have been coined in the early 1970s in the United States, where it was first used and discussed at a conference organized by US civic activist Ralph Nader. It usually applies to action taken by a person active within a private or public entity in order to report an act that can be qualified as wrongdoing. The French equivalent, *dénonciation*, is a cognate of the Latin word *denonciatio*. Although it has now recovered the neutral connotations associated with its original meaning (announcement, declaration), it once had the pejorative connotation of reporting an action or a person for failing to comply with established standards: complaint, accusation, denunciation (Le Robert).

- Establishing an appropriate process for capturing disclosures that takes into account the topics concerned and the prevailing organizational culture.
- Providing for a transparent method for expeditious handling of disclosures that involves verifying the validity of allegations.
- Promptly addressing situations that are proven to be deviant, through adequate corrective measures.
- Providing unequivocal guarantees that a coherent protection system is in place for whistleblowers[2] and the people concerned by the information disclosed.

The picture that emerges from this list of measures nonetheless only partly reflects the reality of whistleblowing, also known by the term "ethics alert." Most certainly, it is an accurate portrait of the action taken by whistleblowers, who directly inform the entity that employs them about activities they believe run counter to the values, ethics or rules advocated by that entity and whose objectives they espouse to the point of rising to their defence. It must be noted, however, that a whistleblowing effect also exists when a staff member raises the alert by contacting people or organizations outside the hierarchical structure to which he or she is subject. Indeed, when people discloses "illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action" (Brown and Latimer, 2008), they are acting in the spirit of a whistleblower. Regardless of whether they disclose the information to an authority outside their entity's chain of command (e.g., an institutional service in charge of ethics: compliance office, ombudsman, controller, external auditor), to the police or directly to the public through, for example, a form of mass media, they are striving logically to achieve the same outcome as a whistleblower is.

DeGeorge's (1990) standard theory on whistleblowing has often been invoked in disputes resulting from external whistleblowing to justify this course of action. The theory sets out five justificatory criteria that shed additional light on the scope of the concept of "whistleblowing in an organizational context."

These criteria, which are part of the jurisprudence of many common law regimes, are as follows:

- The organization must be involved in situations where its products or practices are likely to cause considerable harm to the public.
- The whistleblower must have reported the identified threat to his or her superiors and concluded that any action taken by them would be ineffective.
- The whistleblower must have exhausted a reasonable number of channels within the organization.
- The whistleblower must have evidence that would convince an impartial observer of the actual existence of the threat.
- The whistleblower must believe in good faith that disclosing the problem will prevent it at reasonable cost.

[2] The term "whistleblower" has a neutral etymological history, a bit like the corresponding German word *Hinweisgeber*. The French term *dénonciateur*, on the other hand, is still trying to free itself of the pejorative connotations it acquired in the last century.

Different histories

Regardless of the political or legal system that governs their activities, public office holders have long been required to bring information to the attention of competent authorities with the power to impose sanctions or corrective measures. However, it was not until the early 2000s that this rule of conduct made an unexpected and spectacular entry into private-law organizations as a tool for managing transparency and integrity within these bodies.

Public sector

The history of whistleblowing (in the sense of internal disclosure) in the governments of democratic systems, which are "genetically" programmed to value transparency and accountability as a means of earning the ongoing trust of the population, can be traced back to the inclusion in public law of the requirement that office holders always act in compliance with the law and public ethics. As a corollary to the tenets of the rule of law, public office holders, like citizens for that matter, theoretically have the power[3] to denounce any departure from legal standards governing public action.[4]

However, adherence to these standards must be encouraged, rather than discouraged, by the discourse of administrative authorities (elected or appointed), as well as by appropriate guidance.

Disciplined public management through inclusive administrative law

The paradigm that "the administration looks after the administration" (Bergeron, 1969) has had a determining impact in public bodies that have adopted a system of inclusive administrative law aimed literally at management by law. In this model, which took root in continental Europe, bodies entrusted with legislative and government administrative control functions initially limited the transmission of sensitive information, by agents, on lapses, poor functioning and even corruption, strictly to the logic of hierarchy. They acted in this way for the sake of consistency with the principle of hierarchical authority, a principle that is valued by the public sector bureaucratic system in order to, among other things, shield it from undue pressure.

On the other hand, parliaments and governments have relied on procedural financial and administrative controls to oversee day-to-day activities, before or after the fact. Moreover, in accordance with the principle of specialized public action, they have entrusted responsibility for monitoring the legality, conformity and even advisability of certain actions, such as resource optimization, to public entities outside their operational services (controllers, auditors, statutory auditors, etc.).

In this legal administrative framework, entities devoted to observation-based control, which are usually entrusted with sweeping monitoring, investigation, review and sanctioning powers for the purpose of detecting, investigating and even perhaps punishing the contravention of prescribed

[3] And are even obliged to do so by legal rules, like the one whereby French civil servants are required to "report wrongdoing that comes to their attention in the course of their activities" (art. 40 of France's code of penal procedure) (our translation).

[4] First and foremost, irregularities relating to public service inputs: quality of resources used, acquisition and mobilization methods, appropriateness of use, and quality of services rendered.

rules, can generally rely only on the meticulous examination (a posteriori audit) of actions or material recorded and on the professional flair of their agents in order to successfully fulfil their mission.

Context of public management requiring ethics regulations

However, the so-called Anglo-Saxon legal tradition, which for many years subjected public administration solely to common law, has recognized what would now be called the "managerial" utility of encouraging the transmission of factual information to alert authorities about anomalies or wrongdoing that might affect the smooth running of public affairs.

In fact, the institutional history of Great Britain tends to identify the 13th century as marking the beginning of the development of the positive perception, which still prevails today, that whistleblowing contributes to the effective administration of a nation's affairs. This view can be traced back to the adoption of the *qui tam* principle,[5] whereby the King could authorize referral, on his behalf, to the Court and various other tribunals as they were established, of cases involving non-compliance with royal provisions that affected society. The goal was to ensure that free subjects, all of whom were thus recognized as actors responsible for life in society, were prepared to act in the name and (but not exclusive) interest of the Crown.

Legal innovations related to the practice of whistleblowing as a tool for defending collective interests appeared on the other side of the Atlantic in the 19th century.[6] When certain suppliers of the Union Army engaged in wrongdoing during the American Civil War, the United States Congress passed the *False Claims Act* (also known as the *Lincoln Law*) to empower criminal investigations through whistleblowing, given that it could not count on an administration of justice system equipped to take charge of legal prosecutions. The legal procedure that could now be followed by citizens, some of whom were in close contact with government agents, was applied in the name of the federal government or the government of the state or locality that had adopted similar legislation, provided the procedure was applied on the basis of direct knowledge of fraud targeting public authorities.

After being reinforced by the *Lloyd-La Follette Act* in 1912, the *False Claims Act* was rendered practically ineffective during the Second World War. In fact, it was not until 1986, after several years of criticism levelled mainly at the various branches of the defence industry, that it became easier and more lucrative for citizens to use the provisions of the Act to denounce wrongdoing. Indeed, 15% to 35% of any amounts recovered under this legislation could be remitted to the whistleblower by the Court. In addition, the amendments made to the original Act in 1986 finally provided for the protection of whistleblowers who were "demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" on account of the "laudable" civic action they took under the Act.

Since that time, the United States has stood out as a leader among nations governed by common law[7] with respect to the confidence it places in whistleblowing as a means of controlling the

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[5] Qui tam: abbreviation of the Latin expression "Qui tam pro domino rege quam pro sic ipso in hoc parte sequitur," which British legal experts have translated as: "Who sues on behalf of the King as well as for himself."

[6] When the United States was founded, the new government adopted almost all of the existing British legislation, including many laws that were enforced by the so-called qui tam procedure.

[7] Measures have been implemented in many countries in this regard: the *Whistleblowers Protection Act* in Australia (1994), the *Public Interest Disclosure Act* in the United Kingdom (1999), the *Protected Disclosures Act* in New Zealand (2001) and the *Public Servants Disclosure Protection Act* in Canada (2007), introduced after a number of unsuccessful attempts.

internal and external risks and pressures that might affect the integrity of publicly regulated administrative and financial processes. Witness, for example, the creation of the National Whistleblower Center in 1988, the enactment of the *Sarbanes-Oxley Act* (SOX) in 2002 and the recent updating of the *Whistleblower Protection Act* of 2007.

Private sector

Except in a few rare businesses where internal disclosure mechanisms have been adopted over the years, whistleblowing in the private sector was not institutionalized in corporate law until 2002.[8]

The adoption of the *Sarbanes-Oxley Act* (SOX) by Congress in the wake of the spectacular financial scandals sparked by fraudulent practices at Enron and WorldCom, hatched at the same time as similar practices at Nortel, was the epicentre of an upheaval in corporate practices that some have qualified as “righteous” and whose shock waves continue to affect the cultural values and legal doctrines of numerous countries.

In fact, US companies (including their deterritorialized subsidiaries) and foreign companies listed on US stock exchanges have since been required to introduce a mechanism allowing employees to exercise a whistleblowing right in regard to the companies’ financial practices. They also had to adopt measures to protect confidentiality in cases where whistleblowers make disclosures to the companies’ audit committee. In fact, such companies are now required to set up audit committees or to modernize the mission of existing ones.

A tool at the service of auditing

These new corporate-level whistleblowing provisions, enacted unilaterally by the United States, have been rapidly incorporated into the official international terminology of International Financial Reporting Standards (IFRS), which national auditing governance structures are committed to observe.

The introduction of a reliable mechanism for disclosing departures in conduct from recognized standards has thus become the main tool deemed capable of effectively guaranteeing[9] the circulation of useful information (prevention and correction) on sensitive issues. However, even though such disclosures are made by loyal and responsible individuals (e.g., employees, contract workers, etc.) who share the values and ethical principles promulgated by the organization, the substance of the disclosures is limited to facts or circumstantial suspicions concerning “cases of fraud, irregularity or deliberate mismanagement on the part of an internal person or group”[10] (our translation).

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[8] In fact, this situation has been frequently criticized by employees because of the reprisals often taken against whistleblowers, who have no protection, or by competitor businesses worried about protecting the confidentiality of their business management methods applied on the same markets.

[9] This channel soon proved to be the most effective one (accounting for nearly 50% of offences punished in the United States in 2009) for focusing the action of bodies in charge of performing financial audits of unorthodox, and even deviant, dynamics or practices, which, in the past, had usually gone unnoticed.

[10] *Grand dictionnaire terminologique* of the Office québécois de la langue française.

This organizational alert system, which is designed exclusively to defend the interests of corporate organizations, provides for the adoption of appropriate mechanisms based on a genuine organizational information management policy,[11] a measure that was lacking or deficient in the past. In accordance with accounting standards and procedures, corporate authorities are thus required not only to accept statements of values and codes of ethics but to set up dedicated mechanisms and authorities – ethics committees, confidential disclosure channels, compulsory training, etc. – and to report annually on audits of their operation, so as to provide employees with a permanent means of informing their employer as expeditiously as possible if they believe the employer's interests are adversely affected or threatened.

In this context, in an effort to neutralize any ethical dilemmas that might arise when, for example, corporate interests and the general interest of society diverge, whistleblowing is presented[12] to staff members as an act of loyalty on the part of the employee. In addition, it is described as a means to give the organization a chance to preserve its image, before the events are made public, and to avoid – provided the whistleblowing is strictly internal and the irregularities are disclosed in time and lead to corrective measures – the criminal investigations and prosecutions that such irregularities could entail. Presented in this way, internal whistleblowing is often viewed as a new component of a company's quality policy.

Whistleblowing: a practice whose scope is being broadened?

Owing to the quest for a warranted civic connotation, free of the concepts of slander and base denunciation, the semantic field of the word "whistleblowing" seems to be becoming broader in the public sphere.

Increasingly, demands are being heard to expand the licit character of whistleblowing that targets objective facts learned first-hand (or through indiscretion) or facts that have been "scientifically" established (or logically deduced from scientific knowledge), and to provide an appropriate protection regime for the people, known as "early warners,"[13] who disclose such information.

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[11] For example, the Risk Management and Governance Board of the Canadian Institute of Chartered Accountants proposed the first guidelines in this regard in 2005 under Multilateral Instrument 52-110, adopted in 2004, on the modernization of audit committees. This instrument prescribes, among other things, the establishment of procedures for "the confidential, anonymous submission by employees … of concerns regarding questionable accounting or auditing matters."

[12] Despite the warnings of several analysts, including Jubb (1999), Davis (2003) and Kline (2006), on the management of whistleblowing by businesses.

[13] François Chateauraynaud, who first proposed the French neologism "lanceur d'alerte" (translated here as "early warner") with Didier Torny in 1999, has attempted to explain this concept, which is typical of a kind of sociological epistemology that claims to successfully separate "facts" from "emotions or values" in the public sphere. In 2008, Chateauraynaud asserted, for example, that "The concept of 'early warner' refers to any entity, person, group or institution that takes on an early warning role in an effort to ensure that a danger or risk is recognized as serious, often contrary to prevailing opinion....In contrast to the whistleblower model, the "early warner" is described as someone…who detects early or premonitory signs without necessarily having an interpretation or a pre-defined framework for describing them. In contrast with the image of blowing the whistle or of action being taken to halt a process by a person having the power and the authority to do, the "early warner" model has the advantage of framing the problem at hand in terms of a path or even a career that only gradually becomes public" (our translation).

In this context, the warners, who may be natural or legal persons and are usually not affiliated with the entity targeted, see themselves as being motivated by palliative or preventive concerns to disclose threats or outcomes that are expected to be harmful and that are related not only to government action but to private-sector activities or procedures whose objectives or external effects are deemed undesirable. Invoking the objective arguments of scientific review, which are rarely philosophical or ideological, the early warner takes action in order to inform public opinion directly and, no doubt through that opinion, the authorities who have the power to act. The early warner's discourse usually focuses on an established fact or its probable effects, which are believed to be detrimental to the legitimate interests of citizens (individuals, corporate bodies) and often the general interest of society and even mankind.

Somewhat inevitably, this topic has become a key issue in the realm of applied public ethics, which, it should be mentioned, is not the prerogative of public office holders. Nonetheless, when it is a matter of protecting early warners, the entities concerned by their disclosures and even the aspirations of a community with regard to its future economic, social and cultural development, it also becomes a matter of democracy on the ground, of the tension between individual rights and collective obligations. Therefore, in old or emerging societies based on the rule of law, there is a sometimes passionate search for a way to reconcile two opposing needs: on the one hand, the need to protect people having the social courage to defend the collective interest against a threat they feel is significant, and on the other, the need to prevent abuse of the whistleblowing process in a social and technological context that is favourable to "revelations" of all kinds.

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