

WHISTLEBLOWING IN GHANA: A CONCEPTUAL ANALYSIS

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ABSTRACT

This paper appraised the Ghana Whistleblower Act, 2006 (Act 720) in the context of Ghana's cultural milieu. It examined the duties of workers and directors, the reasons for blowing the whistle, the protection of whistleblowers and the strengths and weaknesses of the Act. The study was a desk research that was conducted in the qualitative mode. Documents were selected using purposive sampling. The data analysis technique used was analytical induction. The paper found that the Whistleblower Act has many weaknesses. These include limiting whistleblowing to only six areas, failure to protect workers who refuse to obey unlawful orders from management, and failure to protect individuals perceived as whistleblowers or as assisting whistleblowers. Other weaknesses are failure to allow anonymous disclosures, giving investigative powers to many persons and agencies and limiting the reward for whistleblowers to only the arrest and conviction of accused persons or the recovery of money. The Act is also silent on the person who must provide the burden of proof for wrongdoing. In the paper's view, people must see whistleblowing as an important aspect of corporate governance because it promotes probity, accountability, open governance, and respect for human rights, especially freedom of speech. Whistleblowing acts as a police force for many people in the effort to reduce rampant fraud, waste, and abuse. It is also an asset in any good corporate governance system that requires conservation of corporate resources. The paper's major contributions are the broader view it gives to the nature of whistleblowing, the theoretical arguments advanced concerning defects in the Ghana Whistleblower Act, and the useful lessons it offers on whistleblowing for managers and policymakers.

Keywords

Whistleblowing, wrongdoing, employers, workers, Ghana.

Introduction

Business owners sometimes entrust the governance of their businesses into the hands of other people. In fulfilling that role, business owners expect these people to be stalwart corporate citizens who would discharge their duties with care and diligence. Consistent with this view, corporate stakeholders expect managers to be above reproach in their conduct. Corporate stakeholders also expect managers not to act in ways that would compel workers to talk about wrongdoings at the workplace.

Despite this optimism, a number of wrongdoings in corporate governance have been emerging at the workplace (Colley, Doyle, Logan, & Stettinius, 2003). These include misconduct for material gain, conflict of interest, improper or unprofessional behaviour, defective administration, waste or mismanagement of resources, perverting justice or accountability, and personnel or workplace grievances (Brown, 2008). The rest are self-dealing, information manipulation, anticompetitive

behaviour, cheating partners in the value chain of the firm, unfair labour practices, maintaining poor working conditions, environmental degradation, and corruption (Hill, Jones, & Schilling, 2014).

These wrongdoings are signposts of the failures of corporate governance. They create tension among workers and other members of the public. In the case of workers, they may wish to report wrongdoing at the workplace. However, they are afraid to speak out because they fear losing their jobs (Premeaux & Bedeian, 2003). In addition, these workers may not know what to do because of their feelings of loyalty to their co-workers or employers.

To resolve these problems, many countries around the world are trying to encourage individuals to expose workplace practices that are wasteful, fraudulent, or harmful to the public safety by blowing the whistle. They are developing whistleblowing laws to enable workers to disclose information about illegal, dangerous, and unethical practices at the workplace.

In Ghana, whistleblowing is in its early years. There are no scholarly writings on it. Thus, there is the need to examine how Ghana's unique culture may influence the whistleblowing process. This paper examines whistleblowing at the workplace. Specifically, the focus is on the duties of workers and directors, the nature of whistleblowing, and reasons for blowing the whistle. It also looks at the protection of whistleblowers. The paper introduces a number of theoretical arguments concerning some defects in the Ghana Whistleblower Act, 2006 (Act 720). It also offers useful lessons on whistleblowing for managers and policymakers.

Duties of Workers and Directors

Workers owe both moral and legal duties to the employer (Arnold, Beauchamp & Bowie, 2012). As part of their moral duties, workers must respect the property of the business. They must also abide by the contract of employment. In addition, they must operate within the bounds of the procedural rules of the business.

The biggest question concerning whistleblowing is about the legal duties of the worker to the employer. According to Pillay, Dorasamy, and Vranic (2012), Randels (2001), and Uys (2008), workers owe a duty of loyalty to the company. The Contract Act, 1960 (Act 25) of Ghana also states that workers must be loyal and act in the best interest of the employer. In addition, the Labour Act, 2003 (Act 651) of Ghana requires workers to obey lawful orders and act with care and skill in the discharge of their duties. Lewis (2011) is also of the view that workers must obey lawful and reasonable orders, adapt to new methods, and render faithful service to the employer.

Duska (1997) and Vandekerckhove (2006) hold contrary views that a worker owes a duty of loyalty to the company. Duska (1997) explains that the worker owes a duty of loyalty to the members of the company but not the company itself because the company is not a person but an institution. In addition, Duska explains that the duty of loyalty is not absolute. It is also not a prima facie duty. Thus, workers must not accept blindly the cause of the employer. As Vandekerckhove (2006) explains, the worker does not owe any loyalty to the company if corporate behaviour differs from corporate mission, goals, and values. Moreover, in the view of Vandekerckhove and Commers (2004), the duty of loyalty to the employer must not override other duties of the worker such as protecting the public from harm, loyalty to family, workgroup, profession, consumers of the employer's products or services, or to society in general. Workers therefore have higher duties to disobey the employer to expose wrongdoing at work when the employer acts in wrong ways.

One of the mechanisms that exist to align the interests of stakeholders and managers is the board of directors. Section 179 (1) of the Companies Code, 1963 (Act 179) of Ghana requires directors to direct and administer the affairs of the company. Section 203 of the Code also charges directors to act with due care and diligence in managing the affairs of the company. It also requires directors to avoid conflict of interest and duty. Directors must also not make secret profits or take bribes. In addition, they must keep proper accounts and act in the best interest of the company. Colley, Doyle, Logan, and Stettinius (2003) share the same views. They assert that the role of a director is a fiduciary role, which has elements of trust, integrity, and competence. In addition, ColleyDoyle, Logan, and Stettinius assert that other duties of directors include duties of loyalty, fair dealing, care, supervision, and non-entrenchment. Similarly, Bondzi-Simpson (2009) points out that directors must consider the interest of workers, members, and creditors when determining what is in the best interest of the company. According to Lorsch and Clarke (2008), it is the duty of the board of directors to exercise strong oversight and see that managers perform their tasks in the best interest of shareholders and stakeholders.

Nature of Whistleblowing

Some people argue that whistleblowing takes place when the information becomes public (Davis, 2003; Jubb, 1999; Weiss, 1994). Other people disagree and consider whistleblowing as an internal way of reporting wrongdoing at work (Callahan & Collins, 1992; Dandekar, 1991; Vandekerckhove & Commers, 2004). According to Miceli and Near (1985), whistleblowing occurs when a current or former worker either circumvents the prescribed internal channels of communication or resorts to an external agency, which could include the media. Applied to a business, it means that former or current workers of a business reveal secret information that the business does not want disclosed to others.

This paper broadens the view of whistleblowing. This broader view is in line with the provisions in sections 3 (1) and 12 of the Whistleblower Act, 2006 (Act 720) of Ghana. The paper looks at whistleblowing as part of the corporate governance system: a means to promote accountability by allowing any person to report information about misconduct while at the same time protecting the whistleblower from all forms of sanctions. It recognises that whistleblowing applies to the internal and external disclosures about all organisations, both private and public. In addition, it recognises that whistleblowers can make disclosures to higher-ranking officers in the organisation or outside it and the media.

Motivations for Whistleblowing

There are many reasons for blowing the whistle or keeping silent. For example, workers may blow the whistle when they disagree with their superiors or other co-workers (Glazer & Glazer, 1999; Miceli, Near, & Dworkin, 2008). They may also speak out because they want to shed light on negligence or abuse, alert to a risk, or play the "blame game" by assigning responsibility to a risk (Kesselheim, Studdert, & Mello, 2010).

Workers who are loyal to the organisation are likely to blow the whistle as long as it is advantageous to the employer (Lewis, 2011; Mesmer-Magnus & Viswesvaran, 2005; Vandekerckhove & Commers, 2004). Similarly, workers can blow the whistle when the disclosure of the information is in the public interest. Therefore, workers can blow the whistle if corporate officers engage in corrupt, illegal, fraudulent, or harmful activity including the improper or unauthorised use of public funds, abuse of power, maladministration, and any other misbehaviour or malpractice (Ghana Whistleblower Act,

2006; Vinten, 1994). However, people keep silent because they believe it is not their duty to report the observed violation or because they are not sure if a violation occurred and/or how they should report it (Nitsch, Baetz, & Hughes, 2005).

Cultural, ethical, and religious factors also influence the decision of workers to blow the whistle (Brown, 2008; Chiu, 2002; Ergeneli, 2005; Kesselheim, Studdert, & Mello, 2010; Pillay, Dorasamy, & Vranic, 2012; Thomas & Miller, 2005; Zhang, Chiu, & Wei, 2009b). For example, workers who come from cultural backgrounds where corporate interest overrides individual interest are likely to blow the whistle. In addition, individuals with strong ethical standards will blow the whistle if they consider their actions as ethical. Again, people report corporate wrongdoing because they consider it as a moral duty to bring criminals to justice. However, a study in the United States by Rothwell and Baldwin (2007) showed that police officers in the State of Georgia were likely to blow the whistle if a friendship or team climate existed between the officers and their supervisors.

As King (1999) posits, bureaucratic structures in the communication channel, lack of trust between superiors and subordinates, and unclear and closed channels for disclosing unethical behaviour would force workers to blow the whistle to outside bodies. Failure to pursue internal whistleblowing policies and rules may also force workers to blow the whistle to external bodies (Mesmer-Magnus & Viswesvaran, 2005; Van Es & Smit, 2003; Vandekerckhove & Commers, 2004). Workers may also report unethical behaviour to external agencies because they want to exercise their rights of freedom of speech and the right to dissent (Jubb, 1999; Vinten, 1994), or because the organisation has weak legal or internal control systems (Pillay, Near, & Dworkin, 2012) that do not allow for the prosecution of wrongdoers or the detection of fraud and irregularity.

Workers who had observed alleged wrongdoing and had convincing evidence of wrongdoing (Miceli & Near, 1985) would blow the whistle. In addition, workers who fear that the discovery of the wrongdoing later may result in legal consequences for them (Kesselheim, Studdert, & Mello, 2010) would blow the whistle. However, individuals that fear reprisals or harsh punishment from violators or their employers (Nitsch, Baetz, & Hughes, 2005; Pillay, Near, & Dworkin, 2012) and fear of media coverage (Hwang, Staley, Chen, & Lan, 2008) are not likely to report corporate misdeeds.

The decision to blow the whistle also depends on the type and severity of the wrongdoing (Brown, 2008; Lewis, 2011; Miceli & Near, 1985; Miceli, Near, & Dworkin, 2008; Near & Miceli, 2004; Pillay, Near, & Dworkin, 2012). According to Miceli and Near (1985), people were more likely to blow the whistle if the wrongdoing is serious, if it directly affected them, or if the business appeared to be dependent on the wrongdoing and threatened retaliation. Lewis (2011) also notes that the reporting of wrongdoing to external bodies may be indicative of the seriousness of the crime and the failure of management to deal with it. In addition, the study by Pillay, Near, & Dworkin, (2012) in South Africa showed that public service workers are likely to blow the whistle if the degree to which the wrongdoing threatens the company and society is severe. Calland and Dehn (2004) also observed that workers report wrongdoing that threatens others.

In Ghana, workers can blow the whistle for six reasons (Ghana Whistleblower Act, 2006, s. 1). For example, workers may blow the whistle when they reasonably believe that the employer's act results in or is likely to result in the loss, misappropriation, or mismanagement of public funds. Workers may also blow the whistle when they reasonably believe that the employer breaks the law,

or is about to break the law, or is likely to break the law. In addition, workers may blow the whistle when they reasonably believe that the acts of the employer relate to the unfair administration of justice, waste, or mismanagement of public resources, and degrading of the environment. Finally, workers may blow the whistle when they reasonably believe that the acts of the employer either endanger or is likely to endanger the health and safety of individuals or a community.

From Ghana's point of view then, whistleblowing is more an ethical issue. It means that something is wrong and someone wishes to see it set right for the benefit of the business. Thus, the act might not be criminal; it could be that there is inefficiency or to prevent potential harm to others.

Protection of Whistleblowers in Ghana

In the absence of a specific law or contract, the employer may hire, fire, demote, or promote a worker. The employer can also transfer workers or make them redundant against their will. The employer can do these things at will, with or without reasons (Ghana Labour Act 2003, Act 651). However, the Labour Act, 2003 (Act 651) prevents the employer from engaging in unfair labour practices such as discrimination, intimidation, dismissal or threat of dismissal, and unfair termination of appointment.

The Whistleblower Act, 2006 (Act 720) of Ghana prohibits the employer from subjecting the worker who raises an alarm about wrongdoing at work to an occupational detriment. Thus, the employer cannot dismiss, demote, suspend, or harass the worker. In addition, the employer cannot declare the whistleblower redundant. Besides, an employer cannot transfer whistleblowers against their will. Again, the employer cannot intimidate whistleblowers, or fail to promote them, or discriminate against them. Whistleblowers that are victimised can sue for damages or seek another relief at the High Court. Terms of contracts that prevent workers from reporting wrongdoing at the workplace or seeking redress at the court for victimisation are also void.

Whistleblowers (including members of their families) are also entitled to Police protection where the lives and properties the whistleblowers and the members of their families are in danger. Further, the whistleblower is not liable to civil and criminal action when the whistleblower discloses wrongdoing. Whistleblower protection is limited, however, to individuals who disclose their concerns in good faith, without malice, and to the appropriate authorities and agencies listed in section 3 (1) of Act 720.

Weaknesses in the Ghana Whistleblower Act

The Ghana Whistleblower Act does not address many issues. First, it does not protect workers who refuse to obey unlawful orders from management. Second, it does not give protection to individuals perceived as whistleblowers (even if mistaken) or as assisting whistleblowers. In addition, the law does not address the rights of individuals who are about to make disclosures. Third, the Act does not allow anonymous disclosures. Sections 4(2) (a), 4(2) (e), 10(3) (b), and 13(2) (a) require whistleblowers to disclose their names and addresses when making disclosures.

A fourth weakness of the law is that Section 3 of the Act gives investigative powers to many persons and agencies. The law allows as many as 18 persons or institutions to receive and investigate complaints and then submit a report to the Attorney-General for action. Section 3 of the Whistleblower Act therefore conflates with the laws establishing Ghana's Economic and Organised Crimes Office and the Commission on Human Rights and Administrative Justice. In addition, the

Whistleblower Act is not clear on the type of action the Attorney-General should take under section 11(a) of the Act.

In the fifth place, some organisations, especially the foreign ones, may not be subject to the laws of Ghana. Where this occurs, accused persons in those organisations may claim immunity from lawsuits filed in Ghanaian courts. Is it possible to waive immunity from prosecution of international employees?

The sixth issue that Act 720 fails to address is proof of the violation of rights. The law is silent on the person who must provide the burden of proof for wrongdoing. Is it the accused person or the whistleblower that made a prima facie case?

In the seventh place, it appears from sections 23 and 24 of Act 720 that the reward for whistleblowers covers only the arrest and conviction of accused persons, or the recovery of money. In the case of arrest and conviction, the law does not give the quantum of reward to whistleblowers. What is the fate of the whistleblower when the Attorney-General rejects the reports and recommendations?

Finally, section 9 of Act 720 gives powers to the Courts to order accused persons and organisations to make their documents accessible to investigators to enable them do their work. However, some documents contain classified secrets in the interest of national defence or foreign policy. Other records contain trade secrets, medical and other personnel information. In addition, some records contain privileged or confidential financial information. Will the disclosure of military and intelligence secrets not threaten the security of the country? Will the disclosure of medical and other personnel information not clearly amount to unwarranted invasion of personal privacy and therefore a violation of the person's human rights under Ghana's Constitution?

Managerial Relevance of Whistleblowing

Whistleblowing signals serious deficiencies in the organisational structure of the business. For example, reporting corporate misconduct to outsiders signals a break in the internal channels of communication. It also shows the inability of management to resolve conflict as it arises. In addition, it shows that the whistleblower has no faith in management in addressing issues affecting the business.

Managers can encourage the use of internal channels to blow the whistle by giving sufficient information to workers about the use of these channels. For example, managers can post at the workplace rules on the rights and duties of workers for disclosing wrongdoing at the workplace. Managers must also assure workers that they will not be victimised if they use internal channels to report wrongdoing. In addition, managers must restructure their businesses to facilitate the disclosure of wrongdoing. They should implement whistleblowing procedures by opening up communication channels in the organisation so that nobody prevents bad news from filtering through to the top.

Workers who blow the whistle expect managers to act positively with regard to the disclosures. Managers must therefore develop response plans for dealing with whistleblowing. However, a harsh response from managers in order to silence the whistleblower and discourage others from blowing the whistle might raise questions about the moral integrity of managers. The harsh reaction by managers may also compel whistleblowers to defend themselves in order to retain their dignity and

integrity. As Davis (2003) advises, managers must avoid the tragedy of whistleblowing. Managers can achieve this by promoting a corporate climate where the reporting of wrongdoing is encouraged as part of the normal way of doing business.

Whistleblowing affects the interpersonal relations between the whistleblowers, co-workers and the accused. Some might become enemies; others might avoid the whistleblower in order not to become tainted. Moreover, the accused has to spend a lot of time in damage control and explanations of what happened. Furthermore, whistleblowers move from being loyal workers to disloyal workers. They become people who feel that management has betrayed them. This means that they do not trust the management. It also means that they do not recognise the authority of management (Davis, 2003). Glazer & Glazer (1989) suggest that whistleblowers should try to rebuild their lives through finding another job, pursuing a new career, or opening a private practice. Advocacy groups must also lobby for whistleblower rights, and provide moral and financial support to whistleblowers in need.

Many people who observe wrongdoing at the workplace may not report it because of fear of retribution, divided loyalty, family and cultural values, and communication barriers. Governments, acting through their agencies responsible for civic education, and corporate executives should facilitate whistleblowing. They should train the citizenry and workers on the provisions of whistleblower laws. In addition, individuals who are aware of whistleblower laws should be willing to act so that public opinion can be mobilised and governments and corporations held to account for their actions.

Managers and policymakers must facilitate disclosures as non-confrontational processes of resolving conflict. They should make public, on a regular basis, reviews of disclosures and successful outcomes of actions taken. In addition, there should be a regular review of whistleblower laws to make sure that they are working as expected. A strong legislation gives the people the right to speak out. It ensures the investigation of allegations. It also outlaws harsh retaliation that whistleblowers may face.

Protection for whistleblowers is limited to individuals who make disclosures according to specifically defined procedures, or whose disclosures are not false and malicious. However, the law must allow whistleblowers to make disclosures on wrongdoing anywhere, anytime, and to any audience unless barred by another law. In addition, the law must protect whistleblowers whose disclosures are in good faith even if the disclosures did not measure up to the level of protected disclosures. Further, the law should not allow for the threat of criminal and civil sanctions. In case of false reports, workers should face internal disciplinary actions according to the policies and procedures of the organisation. In the case of non-workers, alternate dispute resolution is a better option.

Ghana's Whistleblower Act does not protect workers who refuse to obey unlawful orders from management. However, this provision is basic to stop management from taking action against workers who refuse to carry out unlawful orders. It is also important to prevent the need for whistleblowing. In addition, the law must ban any harassment. This may include giving poor performance reviews, reassigning workers to less meaningful work, blacklisting workers to make it difficult for them to find employment, and isolation and accusations by co-workers. Other forms of harassment that the law should ban are providing intolerable working conditions and smear

campaigns to discredit whistleblowers. Furthermore, the law should cover everyone who challenges betrayal of the corporate mission or public trust, regardless of formal status or complaint.

Ghana's Whistleblower Act limits disclosure to six areas. Disclosure must be broader in scope. It should apply to such issues as the contravention of any workplace policy, neglect in the performance of official duty, undue delay in taking action or taking action that results in waste of public funds. It must also cover many forms of business crimes that might not lead to loss, mismanagement, or misappropriation of public funds within the meaning of "economic crime" in the law. Examples of such crimes include bribery of public officers and foreign officials to facilitate business, improper donations to political campaigns to win government favour, and the making of false statements in financial reports. Others are unlawful trading of publicly held shares, illegal price fixing agreements by rival businesses, bankruptcy frauds, disparagement of reputation, infringement of trade agreements, and worker theft.

What is the reward for a whistleblower whose disclosure leads to the arrest but non-conviction of a wrongdoer (section 23, Act 720)? Reward to whistleblowers must cover all possible losses. It should place whistleblowers back in their former positions. This may mean relocation, medical bills for consequences of physical and mental pain suffered because of the disclosure, and compensation in lieu of earnings or future earnings. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the whistleblower. It could also include legal fees of lawyers and associated costs of litigation. The law must also provide for interim reward to whistleblowers because of the financial problems they may face while awaiting the outcome of the investigation and trial.

Whistleblowing may expose matters of significant public interest that are highly embarrassing for government. In order to promote true accountability and protect freedom of speech, the law must allow whistleblowers to request that their identity should remain confidential as far as possible. However, persons who receive disclosures must make it clear to whistleblowers that confidentiality is not absolute. Whistleblowers must understand that action taken because of their reports may lead to the revealing of their identity, either by inference or in court proceedings. On the other hand, persons who receive disclosures must avoid anonymity because it can make investigations very difficult. Where possible, whistleblowers must be encouraged to disclose their identity. This will facilitate the process of getting further disclosures or providing feedback to whistleblowers. However, persons who receive disclosures should not ignore anonymity reports. They should investigate them in the same manner as any other report. In addition, persons who victimise whistleblowers must bear personal responsibility for their actions. Again, Ministers of State and other government officials must be required to take remedial action on wrongdoings when they come to their notice.

Whistleblowers require realistic burdens of proof. The law must provide a reverse onus. Once whistleblowers have shown that there was wrongdoing or victimisation, the burden must shift to the accused person to show by clear and convincing evidence that the allegation was false or there were legitimate reasons for taking the action against the whistleblower. Whistleblowers must be bystanders once they made the disclosures. They should not become witnesses who would testify about the wrongdoing they have exposed.

Conclusion and Recommendation

This paper shows that people blow the whistle for many reasons. They want to protect the interest of the public. They also want to promote probity, accountability, open governance, respect for human rights, and a more open corporate culture. Whistleblowing therefore allows workers to have individual responsibility and moral autonomy at work. It also allows employers to control workers. Again, it makes both employers and workers liable for ethics at work. The Whistleblower Act of Ghana is therefore a step forward in reporting misconduct at work and protecting whistleblowers. However, it is important to address the weaknesses in the law before whistleblowers can dare to make disclosures.

From a policy perspective as well as the preservation of a free and democratic society, there must be strong legal protection and corporate culture to give whistleblowers the right to speak. This, however, must take into account worker loyalty and the discretion of managers in resolving workplace disputes. Managers who want to promote whistleblowing must protect whistleblowers. On the other hand, managers that do not encourage whistleblowing may reconsider that policy. In addition, there must be greater awareness among the people and a willingness to act so that public opinion can be mobilised and the government and organisations held to account for their actions.

Loopholes that prevent people from making disclosures compromise whistleblower protection rules. Seamless coverage is vital so that the law extends free expression rights to any relevant witness, regardless of audience, misconduct, or context. Again, extensive coverage is vital to protect whistleblowers against any harassment that could have a chilling effect on them.

The issue of oversight is also very important. Ghana's system suffers from weak oversight and enforcement. An independent body, not the Attorney-General, is essential in building trust in the system.

In view of the challenges facing global businesses and developing countries, can workers of foreign businesses operating in Ghana have the courage to blow the whistle about misconduct? Do Ghanaians also have the courage to report wrongdoing in compliance with donor requirements?

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