

PROTECTION OF WHISTLEBLOWERS IN THE NIGERIAN CORPORATE ORGANISATION: A LEGAL APPROACH

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Abstract

There has been a significant upsurge in the recognition of the value of whistleblowing as a channel of unveiling information about illegal or unethical activities thus taking positive steps towards eradication of corruption. Eradication of corruption is impossible without cooperation from both internal and external sources. As a result of the grave consequences of reporting, whistleblowers will rather be silent. As such, it is important to protect whistleblowers if the desired result must be achieved with respect to corporate and government institutional compliance to regulations. Using the doctrinal research methodology, this paper examines the concept of whistleblowing as a tool for the sustenance of development in a nation with a view to finding out whether or not protection of whistleblowers is worth legislative attention. It identifies the inadequacy of the protection available to whistleblowers and recommends that legislation protecting whistleblowers should do much more than merely providing for protection; it should also provide for investigating the malpractice and eradicating it completely from the system.

Keywords: Whistleblowing, Malpractice, Corporations, Protected disclosure, Fiduciary.

1.0 Introduction

Corporations around the world develop by seeking and securing investment both from institutional investors and people. More often than not the goal of an investor is tailored towards profits either through capital gains or consistent dividends. No matter how profitable a business venture seems without reliable internal corporate governance which seeks to maximize profit and increase the lot of shareholders, investors will hardly recoup their investments.

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Whistleblowing is the exposure, by people within or from outside an organisation, of significant information on corruption and wrongdoing that they believe to be against public interest and that would not otherwise be publicly available. It is a procedural way to reinforce the transparency necessary to attract investment especially foreign investment¹. Whistleblowers are persons who disclose information on wrongdoing. Whistleblowers are mostly employees who act in the best interest of their companies at the risk of being tagged disloyal. However, whistleblowers can also be other stake holders such as customers, shareholders and or external auditors, or anyone whether having a stake in the company or not who discovers a malpractice and reports same.

Countries with legislations that encourage and protect whistleblowers seem to proclaim to the world that they are ready for transparency in corporate organisations thus attracting investment and investor confidence. Given that the notion of loyalty is central to fiduciary obligation as fiduciary or confidential relation has been defined per Bage J.C.A:²

A broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A fiduciary relationship arises whenever confidence is reposed on one side, and domination and influence result on the other the relation can be legal, social domestic or merely personal.

Also, on the concept of loyalty in fiduciary duty Lord Millet³ explained the nature of a fiduciary obligation as:

¹ Hess, D. & Dunfee, W. "Fighting Corruption: A principled approach; The C2 Principles (combating Corruption)" *Cornell Int'l Law Journal*. 33 (1981) p. 596.

² United Bank of Africa PLC v. Eye-Gymineral resources Ltd & Anor. (2009) LPELR-8382.

³ Bristol and West Building society v Mothew (1998) England and Wales Court of Appeal Civ.533 Chancery 1.

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

The questions arising from these definitions as relating to employees blowing the whistle are: (i) whether the relationship between an employee and the employer is fiduciary? (ii) If it is, does this fiduciary duty outweigh the employee's duty as a citizen of a country whose interest lies in the development of his/her nation? (iii) In whose interest is whistleblowing; the employee, management, the company or the entire country where the company is situate?

The choice a whistleblower has to make often lies between loyalty and honesty. Ultimately, arguments has been proffered on the fact that fiduciary duty imposed on an employee includes respecting the fundamental human right of the employee⁴ thus preserving the employee's means of livelihood as against firing the employee as a result of his/her disclosure of certain information. In the early 2000s, during the unprecedented collapse of major multinational corporations both in United States and Europe, there has been much ado about the monitoring of both executive and non executive directors and several legislations and codes sprang up and are still springing up in a bid to check the excesses of the

⁴ Hepple, B. "Human Rights and Employment Law" *Amicus Curiae, Journal of the society for Advanced Legal Studies*" 8 (1998) p. 21.

directors of these companies. A company even though having all the paraphernalia of a person under the law vis-a-vis its status as a corporate personality, is still incapable of running itself thus the need for directors, management and employees, who with the accurate motivation, will keep the company afloat and profitable while also ensuring that investors harvest handsomely from their investment.

As a result of a company being an artificial person, it can be liable to criminal acts done in its name thus the concept of corporate criminal liability and veil piercing in order to punish the wrong done by the company. As Lord Chancellor Edward, First Baron of Thurlow declared when faced with the challenge of convicting a corporation, “*Corporations have neither bodies to be punished, nor souls to be condemned...*”⁵ However, one of the difficulties of corporate espionage is its detection, mostly the company has become totally irredeemable before the investors and the government gets a wind of what’s going on⁶. The meltdown of the financial markets as well as corporate scandals in the United States have caused the public to distrust corporations and consequently urge the U.S Congress to pass new legislations⁷, one of which is the Dodd-Frank legislation which provides further protection to whistleblowers. However, in Nigeria, in spite of all the corporate collapse and institutional melt down due to corporate fraud, the Whistleblower legislation is still a bill yet to be enacted.

The benefits of a powerful whistleblowing mechanism and legislation can range from more ethical climate in public and private institutions to more willingness of citizens to be patriotic and disclose suspected activity inimical to the growth of the nation or company respectively. The Nigerian, perhaps African dilemma is that of foreign companies operating on our soil and encouraging

⁵ Poynder J. “Literary Extracts” (1844), vol. 1, p. 268.

⁶ Carr, I & Lewis, D. “Corruption in the Workplace: Employment Law, Whistleblower Protection and the United Nations Convention against Corruption”. Retrieved from www.ssrn.com on the 3rd October, 2016. p. 1.

⁷ Marcia, N “Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability” *Catholic University Law Review* 62 (2012) p. 1.

agents, vendors and suppliers that skirt local laws in order to maximize profit most times at the expense of quality of product, safety of employees and preservation of environmental health.⁸ This is not to avail the very citizens themselves of fraudulent activities as in most cases it is difficult for foreign investors either by law or in practice to do business without an agent or a joint-venture partner being a citizen of the country of investment interest.⁹ These agents and partners may sometimes be the perpetrators of the fraudulent activity in order to enrich their pockets by manipulating the good faith of foreign investors.¹⁰

2.0 Rationale behind Whistleblowing

Whistleblowing has over the years been recommended as a tool of corporate governance which could be effective in stemming organisational wrongdoing.¹¹ The people who are most likely to come up with information about malpractice in their respective companies are mostly employees of such companies. Thus, it is natural that such employees will want to be assured that they will not suffer retaliation as a result of their disclosure.¹² It may seem too much to ask that a whistleblower be protected, after all, the persons he is exposing pays his wages and as such his allegiance should naturally be to them. However, understanding that a company is comprised of shareholders and other stakeholders and ultimately its being a '*persona*' in law makes all the difference. Thus, the company hires and fires an employee by using management as its alter ego.

Incorporation of companies in Nigeria invariably leads to employment of Nigerians as workers by these investors, however, with influx of foreign investors comes the disadvantage of sharp practices, dumping and illegal internal practices in order to

⁸ Duhigg, D & Barboza, "In China, Human Costs are Built into an iPad" *N.Y. Times*, January 26, 2012.

⁹ S. 20 & S.54 Companies and Allied Matters Act. Cap C.20. Laws of Federation of Nigeria 2010.

¹⁰ Taylor, J. "Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?" *Louisiana Law Review* 61 (2001) 861.

¹¹ Ralph N. "A code for Professional Integrity" *N.Y Times* Jan. 15, 1971 P. 43.

¹² Carr I & Lewis D, Loc. Cit.

maximize profit at all cost. This is why it is extremely important to have eyes and ears in willing Nigerians, who in reality will only be willing to blow the whistle if the effect of such whistleblowing is abundantly pacified by effective and efficient whistleblower laws which protect them against loss of their means of livelihood and retaliation from other industrial counterparts. Inadequate whistleblower protection laws will inevitably lead to a chilling effect to blow the whistle on corporate malpractice as workers will be unwilling or reluctant to engage in whistleblowing for fear of retaliation or reprisal.¹³

In order to ensure increase in foreign investment, policy makers needs to handle whistleblowing such that all parties involved realizes that resolution of a singular disputes has a ripple effect on the confidence reposed in resolution of future disputes.¹⁴ Employees are frequently motivated by a sense of injustice and a need for vindication, and employers are often motivated by wanting to justify their employment decisions and even to send a message to the existing workforce about consequences of blowing the whistle. The parties in their willingness to prove a point may spend years in litigation and use funds defending their points in order to gain a victory at all cost and boost their egos.

Though it is desirable by some countries that whistleblowing be practiced in corporations and we can see that 'desire' in the manner in which corporations are compelled to include whistleblowing channels and they indeed though weakly insert these whistleblowing guidelines in their code of conduct or their websites in order to fulfill "all righteousness". It is however pertinent to understand that if investors must build confidence in the corporations they are investing in, desire is not enough.

¹³ Billie Pirner Grade, Report to the US Department of Energy, Authority, Responsibility and jurisdiction of the DOE, Employee concerns program to ensure employees may raise concerns without fear of reprisal. Curled from Angela Day's paper on "To mediate or Adjudicate? An alternative to resolving whistleblower disputes at the Hanford Nuclear Site" *Seattle Journal for Social Justice.*" 11:2 (2013) p. 619.

¹⁴ Ibid.

Practical policies and procedures must be implemented to help achieve this goal.¹⁵

Countries that have realized the benefits of protecting whistleblowers are reaping the benefits thereof. Effective whistleblowing has made a significant impact in many areas of such countries. For example, in the United States of America, it has been able to remove a president following the 'Deep throat incidence'. The reward of exposing malpractice is innumerable for a country like Nigeria in which the major agenda of the president seems to be elimination of corruption.

Whistleblowing has been considered by some as being the most effective of all possible methods for stopping illegal or corrupt activities within organisations.¹⁶ Whistleblowers promote corporate and government accountability by being the first line of defense against wrongdoing and as such are one of the most effective and power tools for protecting the public interest.

3.0. Historical Development of Whistleblowing Legislations

Prior to the development of various legislations protecting whistleblowers, disclosure of information by employee was a breach of contractual obligation, such employees were at risk of losing their means of livelihood and thus they were torn between choosing to be a hero or keeping their jobs. As easy as it may sound to choose the honourable act of heroism, should an employee blow the whistle on his or her superiors, such employee also faces the risk of being professionally blacklisted in the industry as the chances of future employment becomes slim due to the act of retaliation from affiliates of the superior of the whistleblower yet while not discarding a suit of breach of confidence by the company against such employee.¹⁷ The original

¹⁵ Dworking T. "Whistleblowing, MNCs and Peace" *Vanderbilt Journal of Transnational Law*. 35 (2002), p. 458.

¹⁶ Bowden P. "A comparative analysis of whistleblower legislations." *AJPAAE*, Vol. 8. No.2 (2006) p. 13. Retrieved from www.ssrn.com on the 25th September, 2016.

¹⁷ *Coco v AN Clark (Engineers) Ltd.*, (1968) 415 FSR. Ch p. 419.

arguments for whistleblowing laws were built on preventing accidents and disasters but as years rolled by its scope widened.

As much as employees may want to be patriotic and disclose unwholesome acts by directors and management of the company, several legislations may restrain them from doing same thus obtaining evidence in corruption cases may be difficult. Also, on the flip side in developed countries, advanced legislation has made it difficult to deal with employees acting corruptly at the work place. Such laws include legislations on right to privacy by the European Convention on Human Rights¹⁸, also is the statutory tort of unlawful interception of communication on a private network vis-à-vis Regulation of Investigatory Powers Act.¹⁹

In the United States, certain events which would have been averted or were in fact averted by the intervention of whistleblowers led to the movements of whistleblower protections. Examples of such happenings were the fraud perpetrated by unscrupulous contractors who sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunitions and rancid rations and ammunitions to U.S army, explosion of NASA space shuttle orbiter challenger, Watergate break-in leading to the resignation of President Nixon²⁰, these occurrences in the United States led to the Congress enacting legislations such as False claims Act of 1863 later revised in 1986 and which provides for compensation of the whistleblower from the monies recovered, Federal Inspector General Act²¹ and the Civil Service Reform Act in 1978²². In 1989, the Whistleblower Protection Act was enacted.

¹⁸ European Convention for Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14. Nov. 4, 1950.

¹⁹ The Regulation of Investigatory Powers Act 2000 (c.23), Act of the Parliament of the United Kingdom.

²⁰ Dworkin T. "The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws" *Seattle Journal for social justice*. 11:2 (2013) p. 653.

²¹ U.S. Code, Inspector General Act 1978 by the 95th Congress of the United States.

²² 5 U.S.C ch.11, Civil Service Reform Act 1978 by the 95th Congress of the United States.

Also, in the United States, the testimonies of certain persons amongst whom the most popular being Sheron Watkins, Vice-President of Enron who wrote a letter to the Chairman disclosing that the company's accounting methods were fraudulent; Collen Rowley was a member of the United States Federal Bureau of Investigation (FBI) who sent a memo to the FBI Director complaining that her local field office was disregarding her reports about the activities of potential terrorists; and Cynthia Cooper who was an employee of WorldCom, informed her board that the company had covered up losses of about USD3.8 billion through fraudulent bookkeeping.²³As a result, in 2002, the Sarbanes-Oxley Act was passed into legislation, its purpose was to combat corporate criminal fraud and to strengthen corporate accountability. In 2008, the United States Parliament also enacted the Dodd-Frank Act which had improved legislations protecting whistleblowers. Several Australian States followed suit and enacted Whistleblower Laws that were modeled after that of the United States Whistleblower Protection Act.

The equivalent of these situations in Nigeria are different aircraft crashes which are the resultant effect of technical faults which have been successfully covered up, the failed banks saga leading to successful and unsuccessful mergers, to mention but a few instances, which could have been avoided with an effective whistleblowing mechanism.

In the United Kingdom, there was no protection against employer retaliation of whistleblowing employees until the enactment of the Public Interest Disclosure Act ²⁴(PIDA) in 1998, which was an amendment to the Employment Rights Act.²⁵ Sometimes in 1994 and prior to the enactment of PIDA, an incident popularly known as "Lyme Regis canoe case", which involved the drowning of four children as a result of inadequate

²³ McKoy, D. "Whistle Blowing and the Law" retrieved from www.ssrn.com on 30th September, 2016.

²⁴ Public Interest Disclosure Act 1998 c.23 U.K.

²⁵ Ibid.

safety equipment and training at a recreational facility²⁶. Investigations after the incident revealed that an employee had been dismissed after writing to management about the safety problem, the said employee presented a copy of the letter after the incident. Also, another incident was that of a collapsed investment firm in which 18, 000 elderly investors lost their savings and taxpayers incurred a 150 million pound cost²⁷. The Public Interest Disclosure Act protects workers from detrimental treatment and victimization from the employer if disclosure is in the public interest and if the disclosure is in respect of wrongdoing.²⁸

In Nigeria, the inception of corporate legislations commenced with the Companies Act of 1922 and there has been subsequent laws which improved on the first Companies Act. However, there was no legislation protecting whistleblowers until the Investment and Securities Act was enacted.

4.0. The Dilemma of a Whistleblower

Heroism or patriotism as the case may be is a very desirable trait and indeed honourable, however with whistleblowers the consequent effect of heroism is not at all desirable as more often than not they either lose their jobs or are forced to resign. Reality is far different than an imagined outcome.²⁹ The victimization that whistleblowers encounter is far from minimal and it can originate from other trustworthy associates³⁰ who may view the whistleblower as a backstabber.

Whistleblowers are almost invariably the weaker parties in any court proceedings resulting from whistleblowing as they are often without the financial power to defend themselves as against

²⁶ Slapper, G. "Will these deaths be avenged?" *London Times*, Published on 5th March, 1996. P. 37.

²⁷ Touhig, D. "How to Protect Whistleblowers" *Sunday Times (London)*, 25th February, 1996.

²⁸ Martin B. "Whistleblowing" *Paper presentation at the 20th OSCE Economic and Environmental forum second preparatory meeting*, 24 April, 2012.

²⁹ Bowden, P. Op. Cit. p. 6.

³⁰ Demster, Q. (1997) *Whistleblowers*. ABC Books Publishers, Australia. See also, Fred Alford, C. (2001). "Whistleblowers: Broken Lives and Organisational Power." *Cornell University Press*.

the bosses who will unleash all the financial and legal prowess of the company readily available to them for their defence. The resources available to these bosses are innumerable especially for bigger listed companies while the whistleblower is extremely powerless to defend him/herself against retaliation as a result of the singular act of heroism. The interest of a whistleblower is to see malpractice corrected and being able to get on with their job³¹ rather than to incur unnecessary law suits in their bid to what they believe is right in the circumstances. The aim of whistleblowing is not to witch-hunt corporations rather it is to ensure that investments are protected and made more attractive in years to come and also to increase investor confidence in corporations.

A disadvantage of whistleblowing may be the amount of time spent on investigation which may slow management time, which should have been used on running the company, being diverted to answering queries, addressing the press and damage control, talk less of litigation fees, incessant court proceedings and lack of confidence to run the company. An understanding that sometimes management needs to take decisions that are quite unpleasant is key to solving whistleblower concerns. However, in investigating the situation, tampering with the rule of law, deprivation of fundamental human rights and fraud must not be condoned.

Regulatory bodies, being a neutral party and their interest being to protect the employee and the company, may be the 'big brother' by exploring alternative dispute resolution rather than litigation. This enables them to investigate the situation with an aim of restoring parties as much as possible to their former state and thus routing management time to business and protecting employee's job.

However, this is not an advocacy for secrecy or condoning fraudulent acts by directors or other board members but a recommendation to concentrate on salvaging the company at the cost of public scrutiny which may have the negative effect of

³¹ Vandekerckhove, W. "European Whistleblower Protection: Tiers or Tears?" A Paper Presented at Whistleblower Conference, Middlesex University, June 2009, p. 20.

discouraging investors and the eventual collapse of the company's shares in capital market as is the case of most companies. Openness and transparency may be good for governance in the public sector but even that is arguable as it has been contested that open government is not necessarily better government.

Thus, in drawing the line between salvaging the company through alternative dispute resolution mechanism and condoning of malpractice, offence levels of management can be determined by asking certain questions which could help in determining which of the doors of dispute resolution may be most effective. Examples of such questions may be whether³²:

- (i) the organisation's top management participated, condoned or was willfully ignorant of the offence.
- (ii) tolerance of the offense by middle management was pervasive throughout the organisation.
- (iii) the organisation has a history of criminal convictions or regulatory violations.
- (iv) the organisation obstructed justice or violated specific court orders.
- (v) the organisation had an effective compliance and ethics program in place.
- (vi) the organisation reported the offense before any imminent threat of disclosure of government investigation.
- (vii) the organisation fully cooperated in investigation
- (viii) the organisation demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.

Answers to the above question when answered honestly will aid authorities in determining whether the act of malpractice is enough to expose the corporation to the public for further scrutiny and eventual collapse or whether the corporation is worth salvaging. Alternative dispute resolution being an alternative to litigation may be able to address whistleblower concerns while not exposing the

³² Ward, K & Smith, L "The Federal 'Organisational' Sentencing Guidelines and the Mandate for Compliance Programs: What Civil Practitioners Should Know About Federal Criminal Law' *Oklahoma Bar Journal* (1995) p. 1725-1734.

whistleblower and the company to rigorous court process and publicity and at the same time being able to thoroughly investigate the malpractice. Alternative dispute resolution unlike adjudication can create a forum that humanizes rather than demonizes both the employer and employee, thus creating room to see other perspectives and even create conditions for rehabilitating a valuable employee back into the workplace with improved conditions for other workers and better opportunities for the company to improve compliance.³³

In investigating whistleblowing concerns, the regulatory bodies involved must possess the ability to stabilize or freeze the dispute and avoid further escalation while it is being address. The resolution of dispute resolution in a company directly affects the attitudes of employees to future dispute, the handling of such disputes either breaks or binds employee and or investor confidence. Its effect in the future may be unconnected to further disputes but the attitudes to its resolution are definitely reciprocal and based on previous occurrences. Reciprocity can be fostered by enlarging the shadow of the future or increasing the possibility and importance of future interactions.³⁴ Thus, once a concern is raised internally by a worker, the manner in which it is handled will act as a precedent to other employees who may want to raise other concerns in the future.

The goal of dispute resolution really should not be to apportion blames to create pacify the parties in order to create a bearable work environment. This is an important goal that litigation may be unable to provide. Alternative dispute resolution mechanism gives the parties a non-adversarial process of resolving disputes while preserving the rights of the parties to access adversarial channels. Judgements in litigation are most likely to focus on apportioning blame and victory rather than focusing on solving the problems. Exploring alternative dispute resolution

³³ Gold, D “Introduction: Speaking up for justice, suffering, injustice: Whistleblower protection and the need for reform” *Seattle Journal for social justice*. 11:2, (2013) p. 568.

³⁴ Axlerod, R. “The evolution of cooperation.” (2006) Basic books 2nd ed. New York, p. 129.

mechanism is likely to produce a recommendation that is accepted by the employee and implemented by the company.

5.0. Legislative Framework for Whistleblowing

Whistleblowing legislation generally is a patchwork of labour laws, constitutional law, environmental law, tort law, financial laws, law of contract and as such all existing laws should be taken into consideration such that one law does not negate the other thus creating a confusion and inability to implement.

Legislation on protection of whistleblowing should keep in focus the purpose for which it is enacted which should be; (i) Reducing fear of reprisal by a whistleblower (ii) Providing remedy if retaliation occurs (iii) Deterring future reprisals.³⁵ The purpose for which a person discloses information mostly is because they want some kind of action to be taken to remedy the situation before it gets out hand. Some whistleblowing legislations, for example, Australian states of South Australia, the Australian Capital Territory, Queensland stipulate that internal channels of whistleblowing be explored before taking such information to persons outside the organisation. The legislations however do not make such requirement mandatory. Some of the Australian legislations such as South Australian Whistleblowers Protection Act (1993) stipulate that the whistle should be blown to a person who is, in the circumstances of the case, reasonable and appropriate to make disclosure to.

The German whistleblowing legislations for private sector, though fragmented, stipulate that an employee should raise concerns internally failing which he could use external routes. There is no amalgamated whistleblower legislation in one document in Germany and as such these protections are scattered in a variety of laws such as; German Data Protection Act³⁶, the German Labour and employment Laws, the German General Act

³⁵ Dworking T & Janet P., “Near, A better Statutory Approach to Whistleblowing” *Journal of Business Ethics*. (1997) Vol. 7, p. 1.

³⁶ The Federal Data Protection Act; Bundesdatenschutzgesetz (BDSG) (2003); Federal Law Gazette 1. P. 66.

on Equal Treatment,³⁷ the German Works Council constitution, German Banking Act.³⁸ The German whistleblowing legislation however, makes internal reporting mandatory such that external reporting is only permitted where: (i) there is an immediate danger to the lives and health of people and society (ii) there are criminal actions involved (iii) not reporting would imply complicity to the wrongdoing (iv) one has good reasons to assume internal reporting would be to no avail.

Vandekerckhove, W.³⁹, in his paper, proffered a three tier theory which lines from internal reporting channel (organisational recipient- first tier) to an authorized external channel (parliamentary commissions and independent bodies such trade union- second tier) before it goes to the public (press, NGO – third tier). While, this may be commendable and actually workable where there is trust between the employees and the reporting channels and where the information being reported may have more damaging effect should it get to the public who may likely interpret such information in a way that may lead to an eventual crippling or death of the organisation involved, thereby invariably causing employees to lose their jobs and its effect being the very predicament the whistleblower hoped to prevent. It should be noted that if for any reason the employees lose faith in both the internal and external reporting channels, the three tier model will most definitely collapse.

It should also be noted that while some legislations provide for external whistleblowing channels, they are not specific on who these channels are, thus the law looks good on print but impracticable in implementation. The Romanian whistleblowing legislation,⁴⁰ though protects employees in public institutions alone, is very specific about who the internal and external whistleblowing channels were and it was specifically provided that reports can be made to; (i) the superior of the person who breached the legal provisions or norms (ii) the manager of the organisation

³⁷ German General Act on Equal Treatment (AGG) 2006.

³⁸ The German Banking Act “Kreditwesengesetz (KWG)” 1935.

³⁹ Op. Cit. n. 31.

⁴⁰ Romanian Whistleblower Law No. 571/2004.

in which malpractice occurs (iii) disciplining committees within the public sector (iv) judicial bodies (v) bodies mandated to search for and investigate conflicts of interest (vi) parliamentary commissions (vii) mass-media (viii) professional bodies, trade unions or employers' organisations (ix) NGOs.

Also, the South-African Protected Disclosure Act of 2000⁴¹ gave specifics for persons whom disclosures are to be made. It provides thus "disclosure is protected if made to certain persons namely; Legal advisor, Employer, Member of cabinet/Executive Council Province, where relevant, where the employer is a Public Sector body, to the public protector; Auditor-General, and any person prescribed in certain circumstances". The South African Public Disclosure Act enables the issues raised by a whistleblower to be addressed in a way that is devoid of public scrutiny.

While there has been a wide range of protection of whistleblowers all around the world, Nigeria seems to still be a bit complacent where this issue is considered. Presently, legislations protecting whistleblowers are fragmented and hardly encouraging to whistleblowers in terms of protection against retaliation such as blacklisting in their industry. The Freedom of Information Act of Nigeria⁴² only confers a right on a person to access or request information, which is in the custody of any public official, agency or institution. Section 1 of the Freedom of Information Act provides as follows:

Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in custody or possession of any public official, agency or institution however described, is established.

An applicant under the Act needs not demonstrate any specific interest in the information applied for.

Any person entitled to the right to information under this Act, shall have the right to institute proceedings in

⁴¹ The South African Protected Disclosure Act (No. 26 of 2000).

⁴² Freedom of Information Act, 2011.

the Court to compel any public institution to comply with the provision of this Act.

There is no doubt that this legislation aids transparency in public institution as the populace is now entitled to public records when desired. However, it is highly unlikely that issues that form whistleblower concerns are in the documents made publicly available to the public. Thus, the Act has in no way provided for and encouraged whistleblowing channels or the protection of a whistleblower.

The Investment and Securities Act of Nigeria (hereinafter referred to as ISA is inclusive of sections obligating employees to report wrongdoing. Section 306 (1) of the ISA provides as follows; “An employee of a capital market operator or public company shall have the right to disclose any information connected with the activities of his work place which tends to show one or more of the following:

- a. that a criminal offence has been, is being or likely to be committed;
- b. that a person has failed, is failing, is likely to fail or otherwise omitted to comply with any legal obligation to which he is subject;
- c. that any disclosure tending to show any matter falling within (a) or (b) above has been, is been or is likely to be deliberately concealed.

The above section is very specific on who and what should be reported. Thus any institution not in the purview of a capital market operator or public company is left out of this provision. This leaves out organizations like private companies, NGOs, religious organizations, all of which are in one way or another recognized as institutions, either via registration or mere transaction, by the Federal Republic of Nigeria.

The Act also provides for internal reporting channels failing which the Securities and Exchange Commission shall be informed to investigate the complaint thus allowing for thorough

collaboration with the company and ‘the Commission’ while the company is being delivered from untoward public scrutiny.

The ISA also provides for the protection of an employee who discloses information from any detriment from the employer. S. 306 (5) of the ISA provides that “no employer shall subject an employee to any detriment by any act or deliberate failure to act on the ground that the employee has made a disclosure in accordance with the provisions of this Act.” Any such detriment is to be reported to the Commission. The S. 306 (7) of the Act further provides that:

...upon receipt by the Commission of such complaint, the Commission shall cause the investigation to be carried out and if satisfied that the provision of this section has been contravened, the Commission shall direct the affected capital market operator or public company to reinstate the affected employee or pay compensation in accordance with subsection (9) of this section within one (1) month of such directive.

Section 306 of the ISA thus solely addresses the whistleblowing and the protection of whistleblower in capital markets and public companies. However, while the section is laudable it is not adequate. Protection of whistleblowers should not be obligatory but reinforcing. This is to say that employees would ordinarily not be willing to risk their jobs to fulfill an obligation which is not punitive. While not advocating the compulsion of whistleblowing and prescription of punishment for its non-adherence, strong recommendation is made for a protection which guards the employee from industry hostility and blacklisting.

S. 306 (9) leaves the fate of continuation of employment of the whistleblower in the hand of the employer who most likely would choose compensation instead of reinstatement. It is recommended that the whistleblowing employee should be given the choice of deciding whether to receive compensation or reinstatement.

The legislation protecting whistleblowers must be so effective that good faith is enough to annul disciplinary or administrative sanctions such that ‘not forcing a willing employee on an unwilling employer’ will become a non-existent rule in line with encouraging employees to make public interest disclosures.

Any attempt to create an all-encompassing legislative framework for whistleblowing in Nigeria should take a cue from the inadequacies of whistleblowing legislation of other countries and avoid same pitfalls. Some of the limiting factors noticed in some whistleblower legislation are⁴³:

- i. Many regulatory systems only protect employment rights to blow the whistle without retaliation, and substantive issues or underlying conflicts that spawned the complaint are either not reachable by the regulation or not meaningfully addressed.
- ii. The focus on proving faults through investigation and hearing creates posturing and defensiveness on both sides and precludes the candor necessary to find and address key issues and potential solutions.
- iii. Lack of access to support and guidance normally needed for employees to file a claim likely to receive a full and fair examination.
- iv. Insufficient confidentiality or protection of information contributes to employee and employer reluctance to engage in problem solving.
- v. The parties may perceive insufficient independence, balance, and objectivity in the process.
- vi. Employees are often resistant to investigation whistleblower claims internally and to work with regulatory agencies tasked with investigating whistleblower complaints thus the powers and training given to these agencies must adequate to suit the purpose.

⁴³ J. Brock “Filling the Holes in Whistleblower Protection systems: Lessons from the Hanford Council Experience” *Seattle Journal for Social Justice*. 11:2, (2013) pp. 591-596.

- vii. Legislation should aim predominantly at making whistleblowing attractive to employees as forces within organisations discourage employees from blowing the whistle.
- viii. Resolutions reached must not finality or stability as there must be an end to disputes and investigations in order to allow for smooth running of the organisation moving forward.

Effectiveness of whistleblowing legislation depends on its ability to allay the fears of employees for retaliation and a belief that issues raised will be addressed.

6.0 Conclusion

The paper has been able to expound the concept of whistleblowing and its advantages. It has also been able to establish that a legislative framework that protects whistleblowers from retaliation while also addressing the disclosure in a non-adversarial route may be more effective and more beneficial both to the whistleblower and the company. Most importantly, the paper seeks to emphasize the purpose of whistleblowing and thus recommends that legislations protecting a whistleblower should go further than protection of whistleblowers and ensure that all negative effects that the whistleblower seeks to avert by the disclosure are followed through.

The key to greater deterrence of illegal behavior in corporations is to increase incentive for investigating and decreasing a corporation's ability to disavow knowledge of the illegal conduct as most companies produce a scapegoat employee to take the fall for the company's action while claiming ignorance of the illegal act. It never suffices and it is always narrow if the goal of whistleblower legislation is encouragement of more whistleblowing rather than investigation of those matters.

It is therefore time for Nigeria to wake up and realize that without protection of whistleblowers and encouragement of whistleblowing both in public and private sector, the fight against corruption may be a lost battle.