## Whistleblowing: Time for international Switzerland to meet the global standard

Since the Enron case in 2001, the importance of whistleblowing for protection of the public and prevention of corruption has been increasingly recognized. Subsequently, many governments have taken steps to protect employees from retaliation. In the United States, the Sarbanes-Oxley Act was promulgated in 2002 to increase accountability and encourage whistleblowing. A number of other countries have introduced similar legislation. In April 2019 the European Union adopted a directive to reinforce the protection of whistleblowers. Member states have now until the end of 2021 to adapt their laws. Switzerland, however, stands embarrassingly behind writes Yasmine Motarjemi, who, as a former Nestlé manager, recently won a court case against her former employer for bullying and psychological harassment when she tried to blow the whistle internally on food safety failures. Swiss law, however, still does not enable any form of sanctions to be taken against companies breaking the law.

Switzerland may be small, but it's a diplomatically and economically crucial country. It is home to numerous multinational corporations, from banks to food, pharmaceutical or chemical companies, many of which rank in the Fortune Global 500. It also hosts key international organizations, notably the UN agencies as well as non-governmental organizations ranging from the International Football Federation (FIFA) (*See FIFA's Shame corruption article)* to the international Union for Conservation of Nature (IUCN), the YMCA and the Aga Khan Foundation. The decisions and policies adopted by these Swiss-registered organizations obviously have global implications.

Yet, Switzerland is still way behind many advanced nations in protecting whistleblowers and bullied employees. Its first motion to protect whistleblowers was put forward in 2003. Since 2008, a draft law has been winding its way through the various consultative processes of the Swiss legislature. However, in a surprisingly reverse trend following years of debate, Swiss legislators opted last March to bury the proposed draft law leaving outspoken proponents of public accountabliity without any form of real protection.

So far, there is no new initiative in sight since Swiss legislation's imposing of professional or business secrecy on employees, which hinders them from speaking out. They are prohibited from disclosing information they acquire in their workplace, including eventual misdeeds of their employers, whether corruption, the deliberate mishandling of data or office abuse. Citizens reporting such suspicions risk judicial measures, including penal sanctions.

Swiss-based managers, however, often have global overviews of their organization's operations. They are in the best position to warn of corruption or administrative malfunctions across the world. Yet they often fall under the jurisdiction of restrictive Swiss labour law and judiciary system, which on numerous occasions have proven dysfunctional or shockingly lax — to the advantage of employers rather than the public interest.

# Silencing employees through bullying and harassment

This lack of any specific law for the protection of whistleblowers is not restricted to Switzerland. Several other supposedly advanced countries have labour laws that tolerate psychological mistreatment of employees. Even in Switzerland, the abuse of employees is not infrequent in the workplace. Official statistics estimate that seven per cent or more of employees are subjected to "mobbing", a form of persistent and insidious bullying and psychological harassment that is exercised over a long period. It is aimed at isolating and breaking victims. This has occurred not only in private companies but also certain UN agencies and NGOs. As the law stands, however, even unfair dismissal is facilitated by lax legislation.

This absence of criminal law against employer abuse, or any other type of sanction, promotes an oppressive workplace culture which deters people from speaking out and compels them to silence. Employees who have moral values are torn between their own guilt and the need to maintain a job, sometimes very well paid leading to a promising career. This often encourages cognitive dissonance, whereby they feel obliged to justify the misdeeds they observe and sometimes even defend them. Over time, such employees develop a certain mental blindness whereby the unethical practices they observe become the norm. A sort of "that's the way it is" approach. ***(Editorial note:*** *Swiss law also inhibits journalists from criticizing companies or responsible*

*individuals if their corruption, which may be well cited abroad, does not actually occur in Switzerland itself. Global Geneva was recently obliged to delete the name of a Swiss banker involved with the Panama papers whose name and activities can be found in numerous official court documents in Brazil and elsewhere).*

Following my own whistleblowing at Nestlé, which led to my dismissal, I was contacted by a former colleague, who wrote: "*We all know it but we keep quiet because we have a family to feed and a retirement to ensure*." A few months after I joined the company and was reporting management deficiencies, my administrative assistant gave me, as a gift, a sculpture of the three wise monkeys, symbolizing: "*see no evil, hear no evil, speak no evil*".

From the serious corporate point of view, such a climate of fear created by intimidation or psychological harassment cannot represent an optimal form of risk management. Far more effective would be for management to be made aware of any potential issue, so that it can assess the potential risks and, if necessary, take appropriate action. Other features of organizational culture such as nepotism, misleading policies, lies and generally deceitful behaviour can exacerbate the situation and compromise management.

# Weaknesses of the regulatory system

The Swiss Code of Obligations, however, does not even provide an embryonic law for the protection of employees against harassment; it is so sketchy that even the judicial system has difficulty in interpreting it. As a result, victims are sometimes confronted with baffling if not arbitrary court rulings. Nor does the law foresee any form of sanction if violated. No need to say that a law which can be violated with impunity is little more than powerless.

In one recent case, a victim of psychological harassment filed a lawsuit against her employer. The Swiss court of first instance found that the employee had indeed been mistreated, but then arbitrarily rejected her lawsuit on the grounds that it had not lasted long enough. She was dismissed only after five months and three weeks of harassment; according to the court, she should have endured the mistreatment for at least six months! Later, the Cantonal Court of Appeal invalidated the six months argument, but again rejected her claims on the grounds that she was not the only employee to be mistreated; given that she earned a high salary, it decreed, she should have accepted the abuse.

The case then went to the Federal Court, which overruled previous court arguments. Nevertheless, it again rejected the lawsuit, but this time on the grounds that, in their view, the abuse and ill-treatment were not sufficiently severe to deserve being brought to court. Such strikingly whimsical changes in reasoning from one court to another is either indicative of a serious dysfunction of justice, or of ambiguities in the law.

Unfortunately, such bizarre rulings are not exceptional. However, for a country such as Switzerland, whose administration and many other public services work nearly to perfection, such weakness is surprising. Nor does it not bode well for other countries who look to Switzerland as a model for rule of law and democracy.

Even in cases where victims succeed in proving their cases with the misdeeds of their employer recognized as such, there is no punishment for those responsible. In January 2020, in a landmark ruling with a harshly-worded judgement regarding my own case, the Swiss Court of Appeal of the Canton of Vaud condemned Nestlé's management for blatantly violating Swiss labour law. It confirmed that Nestlé top management had subjected me to long and severe harassment, causing much suffering and destroying my career. It also concluded the Nestlé top management had conducted a sham investigation into the abuse. ***(Editorial note:** As with our experience with certain Swiss companies faced with uncomfortable issues of public interest, Nestlé tends to deal with such matters by refusing to comment or simply ignoring journalist queries).*

Nevertheless, the court did nothing to discipline the Vevey-based company. No investigation was made of the food safety management practices of Nestlé, the primary cause of my conflict with the company and the reason that led to my dismissal. The slow legal process and its huge costs are also deterrents. They leave employees with little realistic option other than to accept out-of-court settlements. It's a situation that helps companies engage in cover-ups. Sometimes, as my own experience clearly showed, the judicial system supports and encourages such agreements, which lead to little real remedy or compensation.

# Until whistleblowing is protected: A need for sanctions

As the world's leading football organization, FIFA has undergone repeated incidents of alleged international corruption. (Photo: FIFA)

In many countries, companies of a certain size must now legally establish their own internal whistleblowing systems. After the Enron case, which not only caused the company's bankruptcy but the *de facto* dissolution of Arthur Andersen, one of the world's five largest audit firms, lead to the New York Stock Exchange requiring all multinationals to develop such forms of internal oversight. Since 2005 Nestlé has had such a system, at least on paper. In its Code of Business Conduct, it encourages employees to report any wrongdoing and promises them a fair examination of their complaints. From 2006 to 2010, I reported failures in food safety management and retaliation against my person to all levels of Nestlé management. To no avail: Nestlé failed to examine any of my concerns.

Pending a global whistleblowing protection system, it is possible to overcome the threats posed if countries fail to protect employees. The lack of such a national system, or its acceptance of a dysfunctional form of operation, should be viewed as a weakness in the regulatory control system. This should prompt governments to place trade embargoes on those countries which fail to assume their responsibilities. A precedent for this exists. Some years ago, the EU embargoed the importation of food products from cholera-affected countries on the grounds that their control systems did not inspire confidence; their regulatory authorities were not considered competent enough to oversee and ensure the safety of their food production.

Another option is to allow employees of multinational companies or organizations to seek justice by filing a lawsuit in any country where the entity in question is operational and where the law provides better protection for employees. Well above risk management, freedom of expression and respect for dignity stand out as fundamental human rights. But the protection of employees against all forms of violence is also a matter of public health and basic humanity.

*Yasmine Motarjemi is a former senior scientist at World Health Organization. Head hunted by the Management of Nestlé in Vevey Switzerland, in the year 2000 she was appointed as Assistant Vice President, in charge of Food Safety globally, (See* https://www.global-geneva.com/nestle-whistleblower-letter-to-company-ceo-ulf-mark-schneider/