

## Whistleblowing and corruption - Legislation on whistleblowing in Albania

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### Abstract

The same concept on whistleblowing is described differently in different countries, carrying negative, neutral or positive connotations. Main objective of this research paper is to offer a comprehensive view on international instruments on whistleblower protection and their influence on the drafting of the new Albanian Whistleblower Protection Law.

A significant amount of knowledge about hidden forms of wrongdoing is based on the reports of whistleblowers, which means that whistleblowing plays a vital role in providing information that would otherwise have remained behind closed doors in a cloud of secrecy.

People who reveal corruption from inside their organization are often faced with disbelief, anger and opposition; they are considered traitors who gave away internal secrets to the outside world.

It is extremely difficult to break the walls of silence and to come forward with information knowing that such an action will seriously damage one's reputation, collegiality, friendships and the trust of others. This is why whistleblowing is so remarkable: it discloses information not only about misconduct, but also about the strong ties and the solidarity between the parties that are directly or indirectly involved. Whistleblowers may have their personal motives, but they also have a lot to lose. They will need to overcome their fears, accept the consequences of their actions and be ready to face opposition, threats and exclusion. Their decisions are influenced by all sorts of situational factors as well as by emotions, daily experiences and personal contacts.

Over the last twenty years, criminological research on whistleblowing has focused on the experiences, motivation and decision-making processes preceding the decision to reveal wrongdoings, as well as on the impact of the negative consequences and the ineffectiveness of the response to the allegations of whistleblowers.

The whistleblowers criminological aspects and the relation between whistleblowing and his importance to prevent and fight the corruption is another issue elaborate in this paper.

This research paper also aims to give some advice on how we can overcome challenges and obstacles during the Albanian whistleblower law implementation in practice.

Research methodology used in this paper consists on a comparison of several international instruments and reports on whistleblower protection.

**Keywords:** whistleblowing, corruption, international legislation, criminological aspects.

### Introduction

There are many competing definitions of whistleblowing in the social sciences. The term itself is attributed to Ralph Nader, who defined a whistleblower as a person to whom 'the public interest overrides the interest of the organization which he serves' and, as a result, this person publically 'blows the whistle' on corrupt activity, fraud

and harm (Dussuyer, Mumford and Sullivan, 2011, 431).

The most widely used definition in criminology reads as follows: 'The options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance' (Calland and Dehn, 2004, cited in Stephenson and Levi, 2012, 5).

The same concept is described differently in different countries, carrying negative, neutral or positive connotations. For instance, in English, the word 'informant' means someone who is involved in illegal activities and uses disclosure to obtain benefits; in Dutch, the *klokkerluider* (or 'bell-ringer') is often perceived as a victim (Transparency International); in French, *lanceur d'alerte* and *donneur d'alerte* ('someone who alerts the public to wrongdoing'), are neutral terms, but the word *denonciateur* carries negative connotations (Stephenson and Levi, 2012, 9). In Albanian, "signaller/flagman" (someone who alerts an act or alleged corrupted practice).

'Whistleblowing' has become associated with a variety of stereotypes and images, ranging from moral courage and heroism to psychological instability, naivety and troublemaking (Vandekerckhove, 2006). Some authors therefore suggest to 'minimize the use of the term whistleblowing and use instead the term "public interest disclosure"' (Dussuyer, Mumford and Sullivan 2011, 433).

Over the last twenty years, criminological research on whistleblowing has focused on the experiences, motivation and decision-making processes preceding the decision to reveal wrongdoings, as well as on the impact of the negative consequences and the ineffectiveness of the response to the allegations of whistleblowers (Brown, 2008; Stansbury & Bart, 2009).

The conclusion of all the studies is that the decision-making and disclosure process by whistleblowers is a complex psychological and organizational affair. Whistleblowing is integral to the fight against corruption and the way whistleblowing is regulated and handled shows commitment to integrity in government and public administration (Dussuyer, Mumford and Sullivan, 2011). The results of an empirical study carried out by Ruiz-Palomino & Martinez-Canas (2013) showed that ethical culture is associated with organizational citizenship behavior (cited in Hasan M. Aleassa, Ziad M. Zurigat 2014).

Transparency International has recently drawn up a comparison between 27 member countries of the EU. Four countries were mentioned as 'more advanced' in creating legal frameworks for whistleblowing protection: Luxembourg, Romania, Slovenia and the UK. However, there is almost no criminological research on the effects, consequences and public opinion on these legislations. According to Transparency International, 'The European experience shows that while many government officials and agencies have promised to strengthen whistleblowers rights, few have actually done so' (Transparency International, 2013, 13).

The societal perception of whistleblowers remains a 'weak point'. In France, the Netherlands and other countries, whistleblowers are still losing their jobs after their disclosures, even though there are protection schemes available. In Portugal, on the other hand, where there is almost no legal protection, whistleblowers are considered to be heroes (ibid.16). A tendency to present whistleblowers in a positive light is also seen in the mainstream media (ibid.).

## 1. Comparison of several international instruments on whistleblower protection against measures of retaliation

Most instruments and reports state that whistleblowers should be granted appropriate protection against measures of retaliation. (Recommendation CM/Rec (2014)7 *on the protection of whistleblowers*; Resolution 1729 *Protection of Whistleblowers* (29 April 2010); G20 Compendium of best practices and guiding principles for legislation on the protection of whistleblowers 2011, 31; OECD, *Whistleblower protection: encouraging reporting*, July 2012, 13-14; OECD, *Principles for Integrity in Public Procurement* (2009), explanation to principle 7, 39.).

Recommendation 2014/7 mentions that the term 'retaliation' reflects the causal relationship that, for protection to be granted, must exist between reported or disclosed information and the sanction which has been imposed on the individual reporting or disclosing the information

(Recommendation CM/Rec, 2014, 7). However, neither the Recommendation nor one of the other instruments and reports have adopted a specific definition for retaliation which grants states a broad margin of discretion in determining which measures it may include. Still, the OECD Whistleblower Report 2012 states in this regard that in order to provide broad protection to whistleblowers, it is essential that all possible retaliatory actions are properly and clearly defined. States can realize this by listing all possible retaliatory actions or by establishing a broad definition of retaliation. (OECD, *Whistleblower protection: encouraging reporting*, 2012,9-10). However, no specific definition of retaliatory acts is given in the examined international instruments and reports and neither does one of them enumerate all possible retaliation actions.

Still, most instruments do contain a non-limitative list of retaliatory actions against which states have to provide protection. (See for instance Recommendation CM/Rec, 2014 *on the protection of whistleblowers* (30 April 2014), principle 21 and G20 Compendium of best practices and guiding principles for legislation on the protection of whistleblowers 2011, p. 31).

Common examples are (punitive or discriminatory) actions which negatively affect the employment position of the whistleblower, such as unfair dismissal or harassment. In addition, the G20 Compendium of Best Practices also includes actions which do not necessarily directly affect the employment status of the whistleblower, such as threats and stigmatisation, under retaliation. (Furthermore, protection should also be granted to employees who are mistaken for whistleblowers by the employers. G20 Compendium of best practices and guiding principles for legislation on the protection of whistleblowers 2011, p. 31.) Furthermore, the explanatory memorandum of Recommendation 2014/7 explicitly extends the required protection against retaliation to cases where retaliation is recommended, threatened or attempted by the whistleblowers' employer. This is because these actions can discourage the whistleblower from properly reporting the issue as well as others who are aware of the problem. (Recommendation CM/Rec (2014) *on the protection of whistleblowers* (30 April 2014), principle 21; Recommendation CM/Rec (2014) *on the protection of whistleblowers* (30 April 2014), explanatory memorandum, point 80). Only Resolution 2010/1729 refers, in accordance with Recommendation 2014/7, to 'retaliation of any

form' but does not mention if this includes threats of retaliation as well.

The explanatory memorandum of Recommendation 2014/7 also states that protection should be afforded against indirect retaliation, which, for instance, includes actions taken against a whistleblower's family member. (Recommendation CM/Rec (2014)7 *on the protection of whistleblowers* (30 April 2014), principle 21; Recommendation CM/Rec (2014)7 *on the protection of whistleblowers* (30 April 2014), explanatory memorandum, point 84). The OECD Whistleblower Report 2012 (p. 13-14) also refers to indirect disciplinary actions, but does not further elaborate on its meaning. It can be concluded that various types of actions can fall under the broad scope of 'retaliatory acts' providing a broad protection of whistleblowers.

In contrast to the above, the UNCAC (United Nations Convention against Corruption) does not refer to acts of retaliation, but to unjustified treatment, such as loss of employment as a result of reporting information on wrongdoings (UNCAC, New York 3 October 2003, 2349 UNTS 4, Technical Guide, p. 108-109). The UNCAC Technical guide also states that measures to protect reporting persons against unfair dismissal are subject to national labour laws. This means that if domestic law allows employers to dismiss their employees without reason, the obligation to provide protection to whistleblowers might require an exception.) The same goes for the Civil Law Convention on Corruption which refers to unjustified sanctions (Art. 9, Civil Law Convention on Corruption, Strasbourg 4 November 1999, *ETS No. 17* and its explanatory memorandum, point 66, 69-70).

The OECD Recommendation 2009 and OECD *Guidelines for Multinational Enterprises* (2011) refer to protection of individuals who report certain wrongdoings against discriminatory and disciplinary actions, but they do not explain what acts can be considered as such. It is noteworthy that these two instruments do not refer to 'unjustified' disciplinary actions, which could mean that all disciplinary actions, justified and unjustified, taken against a whistleblower after reporting a certain matter would be prohibited. However, considering that the aim of the prohibition of disciplinary sanctions is to protect whistleblowers for reporting a particular wrongdoing, a reasonable interpretation would lead to the conclusion that only disciplinary actions taken 'because of the reporting' are prohibited.

Hence considering that the above described types of actions need to be taken against persons who have reported wrongdoings, they do not substantially differ from retaliatory actions which are taken because of the reporting of wrongdoings.

## 2. Corruption, whistleblowing and secrecy

Corruption has always been a feature of human behaviour. Social scientists have shown that in many societies, corruption is embedded in social relationships and constitutes a determinant factor in the distribution of status and power (Oliver de Sardan, 1999). In certain periods of history, corruption may even be considered unavoidable, 'normal' or simply a 'way of life' (Simis, 1982; Ledeneva, 1998; Siegel, 2005). Traditions, cultural codes and existing relationships and networks must always be taken into account in the analysis of corruption in a particular society.

Corruption manifests itself in many ways and has a profound impact on the governing

of a society. It undermines the rule of law, weakens private and public institutions and jeopardizes principles of justice, democracy and economy.

Most authors conclude that it is extremely difficult to expose corruption and misconduct, be it in the public or the private sector. A significant amount of knowledge about hidden forms of wrongdoing is based on the reports of whistleblowers, which means that whistleblowing plays a vital role in providing information that would otherwise have remained behind closed doors in a cloud of secrecy. In earlier times, the functionality of secrecy was highly appreciated and any violation or disclosure of a secret was seen as betrayal, but in our times secrecy is considered an obstacle to risk avoidance and the disclosure of secrets is considered to be a manifestation of good citizenship. It is encouraged and in some countries even rewarded by the authorities (Siegel, 2011).

It is extremely difficult to break the walls of silence and to come forward with information knowing that such an action will seriously damage one's reputation, collegiality, friendships and the trust of others. This is why whistleblowing is so remarkable: it discloses information not only about misconduct, but also about the strong ties and the solidarity between the parties that are directly or indirectly involved (Siegel, 2011). Whistleblowers may have their personal motives, but they also have a lot to lose. They will need to overcome their fears, accept the consequences of their actions and be ready to face opposition, threats and exclusion. Their decisions are influenced by all sorts of situational factors as well as by emotions, daily experiences and personal contacts.

Nowadays it looks as if Pandora's Box has been opened and all kinds of sins have emerged. The relevant question for social science research is what exactly happened to make all these persons speak up? Why them and why now? How do society's institutions react to these revelations?

More in general, what is happening in our late modern society, where secrets seem to be a thing of the past? Various theories have been proposed to answer these questions. One possible explanation for this wave of revelations can be found in increasing governmental control and successful compliance by various public and private institutions. This explanation has been challenged by criminologists who argue that stricter control can only lead to even more secrecy and more sophisticated communication between the persons involved. Another possible explanation is that although secrecy used to be functional in times of trouble, dictatorships and wars, as a symbol of political or religious protest to gain the underground support of a significant part of the population, today the word 'secret' has become synonymous with 'illegal' or 'criminal'. Rather than being considered an offender, people prefer to be viewed as 'victims of the system', of late modernity with its impersonal, unstable relationships, mobility and risks (Siegel, 2011, 107).

Under dictatorial regimes, distrust is a daily experience: denouncing relatives and close friends who voice their dissatisfaction with the system is encouraged by the authorities. Revealing such secrets is considered a betrayal by the public, but very often the betrayer himself remains anonymous, through various mechanisms of denunciation.

Secrets have always been considered mysterious or supernatural. In more recent times they were associated with a form of protest, an expression of rebellion and a free mind. In our times, given the growing demand for transparency, 'secret' is now synonymous

with 'illegal'. As a result, individuals are willing to reveal secrets so as not to be viewed as offenders but rather as 'victims of the system'. The reaction to their revelations is ambivalent: on the one hand, the offenders/victims are rewarded by the authorities, which encourage them to collaborate, while, on the other hand, whistleblowers are distrusted and publicly criticized. Their revelations are often purely instrumental: to get benefits, to improve one's reputation, to become famous, etc.

It is not an absolute given that the state is interested in knowing every secret or that the development towards 'a society without secrets' is even possible. Life without secrets is boring, and boredom can lead to unexpected actions, including crimes. Secrets provide an extra dimension to our life, a space for free thought and action outside of government control or censorship.

Regardless of the technology designed to make our society more transparent, life without secrets

will always be impossible and new ways to guard secrets will be found, because many of us need secrets to belong and to feel special (Secrecy, Betrayal and Crime, Dina Siegel, 2011, 119).

### 3. Albanian Whistleblower Protection Law

Fight against corruption remains one of the major challenges for the Albanian EU integration process. Obligations deriving from the accession of Albania to international conventions against corruption dictate the need to establish mechanisms for protection of whistleblowers. Protection of whistleblowers is a tool to protect employees who show high integrity at their workplace, also serving as means to control state activity in its fight against corruption. In this regard, it was necessary to draft a legal framework that would initiate and develop this form of cooperation with the purpose of condemning corruption cases. The purpose of the law "On whistleblowing and whistleblowers' protection" in Albania; (Law no. 60, date 02.06.2016) is prevention and fight against corruption in the public and private sector as well as protection of individuals that signal actions or alleged corruption practices in their work place.

Whistleblowers need support in order to overcome the consequences of retaliatory actions arising from the discovery and reporting of corruption actions and practices within the organization. Law "On cooperation of the public in fight against corruption" (Law nr. 9850, dated 3.4.2006), although provides some rules for the promotion of public participation in reporting corruption, it does not provide effective protection for whistleblowers and it is not effectively implemented in practice.

The mechanism of signaling, according to the draft law on whistleblowers' protection is built on two pillars: the first pillar is forecasting a new legal procedure to investigate signaling in connection to an alleged corruptive act or practice; the second pillar is sanctioning safety measures for whistleblowers in each organization, from direct or indirect vindictive actions, or threats of discriminatory, disciplinary or another nature that unfairly harm legitimate interests resulting from signaling. *The first pillar: The examination of signaling*

One of the innovations of the law on whistleblowers' protection is the legal obligation to establish a specialized unit that would uphold responsibility, as a certain and special body within the public authority or private entity.

Notifications of actions or alleged corruption practices can be performed via internal signaling to the responsible unit of the organization, or via outer signaling to the High Inspectorate of Declaration and Audit of Assets and Conflict of Interest (HIDAACI). In the spirit of this law, the responsible unit or HIDAACI will begin to investigate the alert after fulfillment of two conditions: first, signaling should be done in good faith; and secondly, a warning alarm should be deposited in a written form and in accordance with the content of the law on whistleblowers' protection.

The draft law stipulates that in any case signaling is voluntary. This means that nothing in this law prevents the whistleblower to signal in accordance with this law, to notify/speak to the prosecution/police, or disclose the case based on information he possesses.

*The second pillar: Protection from retaliation*

One of the novelties of this law is forecasting whistleblowers' protection from retaliatory actions of the organization. At first, whistleblower presents the application for protection from these acts to the responsible unit. If the responsible unit does not take action immediately, the request is submitted to HIDAACI which further continues with the procedure provided by the draft review, claiming an act of revenge. Acts of revenge can be, without limitation: dismissal; suspension from work or from one or more tasks; transfer within or outside the organization; demotion; wage and/or financial incentive cuts; loss of status and privileges; lack of promotion; deprivation of the right to participate in trainings; negative ratings; other forms of punishment related to work. Mechanisms available for whistleblowers' protection from retaliation are such that the act of revenge is considered invalid and the employees (in this case, whistleblowers) can be placed in another structure of the organization to save themselves from a hostile environment, by order of HIDAACI. However, the invalidity of the act of revenge enshrined in the draft law is always connected with ultimate whistleblowers' protection offered by this law. Thus, if the results of the investigation show that an act of revenge was carried out against whistleblower by the public authority, HIDAACI will be a competent authority under applicable law to order the public authority to take all necessary measures to repair the damage. In this sense, the competent authority sanctions the superior as well as the same body of public administration which is empowered by law to revoke an act or revise and correct the illegal activity, as is the act of revenge by the provisions of this law. If results of the investigation show that an act of revenge was carried out against whistleblowers in a private entity, HIDAACI shall take all necessary measures to ensure that the private entity will repair the damage. If the competent authority or private entity does not take the measures required by HIDAACI, under this paragraph, any interested person has the right to address the issue to the court. The involvement of the court is an added tool in the protection process, presenting the latest string of effective measures provided to protect whistleblowers.

## Conclusions

Corruption is a disease that has struck the Albanian society. Corruption and poverty perpetuate each other. Whistleblowing is integral to the fight against corruption and the way it is regulated and handled shows the commitment to integrity in government and public administration.

Law "On whistleblowers' protection" in Albania" proposes a new method of

addressing corruption practises not only in the public sector but also in the private sector and deliniates the competences and functions of the mechanisms that will ensure the implementation of the legislation.

It is time to overcome fear and to denounce corruption. This courage should be supported in every moment by the authorities and society as the only way to succeed in preventing and combating corruption.

## References

- Brown, A. (ed.) (2008). *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organizations*, Australia: The Australian National University E Press.
- Dussuyer, I., S. Mumford and G. Sullivan. (2011). Reporting corrupt practices in the public interest: innovative approaches to whistleblowing, in: Graycar, A. and R. Smith (eds.) *Handbook of Global Research and Practice in Corruption*, Cheltenham, UK, Northampton, MA, USA: Edward Elga, 2011.
- Ledeneva, A., (1998). *Russia's Economy of Favours. Blat, Networking and Informal Exchange*, Cambridge: Cambridge University Press.
- Oliver de Sardan, J., 1999, A Moral Economy of Corruption in Africa?, in: *The Journal of Modern African Studies*, vol. 37, no. 1.
- Siegel, D. (2011). Secrecy, Betrayal and Crime, *Utrecht Law Review*, Volume 7, Issue 3 (October) 2011).
- Simis, K, (1982). *USSR: The Corrupted Society*, New York: Simon and Schuster.
- Stansbury, J. and V. Bart (2009). Whistle-blowing among young employees: a life-course perspective, in: *Journal of Business Ethics*, vol. 85.
- Stephenson, P. and M. Levi (2012). *The Protection of Whistleblowers. A study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest*, Strasbourg: Council of Europe, CDCJ(2012) 9FIN.
- Vandekerkhove, W. (2006). *Whistleblowing and Organizational Social Responsibility: A Global Assessment*, Ashgate Publishing Company.
- Law no. 60, dated 02.06.2016, in the Republic of Albania "On whistleblowing and whistleblowers' protection".
- Law no. 9850, dated 3.4.2006 "On cooperation of the public in fight against corruption".
- Recommendation CM/Rec (2014)7 *on the protection of whistleblowers* (30 April 2014).
- Report on whistleblowing, comparison of international instruments, Utrecht University, 2014.
- Resolution 1729 *Protection of Whistleblowers* (29 April 2010).
- Quentin Reed, Technical paper facilitating and protecting complaints of alleged official corruption and malpractice in Albania: the current system and recommendations for improvements, PACA, June 2012.
- G20 Compendium of best practices and guiding principles for legislation on the protection of whistleblowers 2011; OECD, Whistleblower protection: encouraging reporting, July 2012.
- United Nations Convention against Corruption, New York 3 October 2003, 2349 UNTS 41.
- Civil Law Convention on Corruption, Strasbourg 4 November 1999.
- OECD, *Principles for Integrity in Public Procurement* (2009).
- OECD *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).
- OECD, *Guidelines for Multinational Enterprises Recommendations for responsible business conduct in a global context* (2011).
- Transparency International, <https://www.transparency.org/>.