

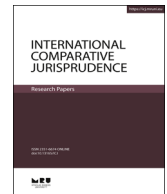
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Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia

David Schultz ^{a,*}, Khachik Harutyunyan ^{b,2}^a Hamline University, MS B-1805, 1536 Hewitt Avenue, St. Paul, MN, USA^b University of Zurich, Ramistrasse 71, CH-8006 Zurich, Switzerland

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ABSTRACT

Corruption is a persistent problem that plagues the world. It knows no borders. It is a problem facing post-communist countries as they transition to democracies and market economies, as well as established democracies and other regimes. While the causes of corruption are varied, the tools often suggested to combat corruption include expanded use of whistleblowing in terms of incentives to encourage it and laws to protect whistleblowers. This article examines the role of whistleblowing as a tool to combat corruption. It describes the law and role of whistleblowing in a comparative context, focusing on the United States, the European Union, and Armenia. The article then concludes with recommendations regarding how whistleblowing could be strengthened, especially in Armenia, as an example of a post-communist state, to be an effective tool for addressing corruption.

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Introduction

Corruption is a persistent problem that plagues the world. It knows no borders. It is a problem facing post-communist countries as they transition to democracies and market economies (Liebert, Condrey, & Goncharov, 2013), but it is also one that confronts states within North America and Western Europe, including EU members, and those in Asia and South America (Rose-Ackerman, 1999). It almost seems that the latent causes of corruption are sown into human nature, with perhaps greed, ambition, and a desire for power being the psychological forces propelling it. Yet corruption is not simply a trait of the human psyche. Instead many institutional forces, such as bad governance, lack of transparency, flawed decision-making systems, and inefficiencies and scarcities are all offered as possible reasons for why corruption persists (Rose-Ackerman, 1999).

Luo defines corruption as an “illegitimate exchange of resources involving the use or abuse of public or collective responsibility for private ends” (Luo, 2005). Transparency International defines it as the “abuse of entrusted power for private gain” (Transparency International). World Bank (1997) declares corruption to be “abuse of public office for private gain”. The World Bank also notes that the concept “covers a broad range of human actions”. For the purposes of this article, ‘corruption’ is defined as any individual, collective, or structural act or process that permits the use of public authority or

* Corresponding author.

E-mail address: dschultz@hamline.edu (D. Schultz).

¹ David Schultz is Ph.D. in Law, professor at Department of Political Science in Hamline University.

² Khachik Harutyunyan is anti-corruption expert, Master of Advanced Studies in International Organizations, University of Zurich.

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position for private gain. This definition captures the broad and many ways individuals and institutions abuse power and the public trust.

While corruption persists, so do efforts to root it out or eliminate it. A host of mechanisms and solutions to address it have included increased criminal prosecution for bribery and extortion, civil service and government pay reform, increased transparency and reporting, and improved governance (public and private) (Rose-Ackermann, 1999). But the tools often suggested to combat corruption include expanded use of whistleblowing in terms of incentives to encourage it and laws to protect whistleblowers. While whistleblowing alone is not a solution to corruption, it is one of the tools that can improve governance and create ethically and legally healthy organizations and governments.

This article examines the role of whistleblowing as a tool to combat corruption. Methodologically, it examines the law and role of whistleblowing in a comparative context, focusing on the United States, the European Union, and Armenia. The article then concludes with recommendations regarding how whistle blowing could be strengthened, especially in Armenia, as an example of a post-communist state, to be an effective tool for addressing corruption.

Whistleblowing: definition and justification

Johnson (2003, p. 3) describes whistleblowing as a form of dissent that entails four characteristics. First, it is an individual act to make information public. Second, that information is disclosed to some outside of an organization party who make it public and part of a public record. Third, the information disclosed has to do with some non-trivial wrongdoing within that organization. Finally, the person making the disclosure is a member of that organization and not a journalist or general member of the public. In short, a whistle-blower is a person who exposes wrongdoing within an organization. While Johnson's definition is good, it does not capture all aspects of what whistleblowing is in that it neglects the aspect of the practice related to reporting and correcting corruption. This is the definition of whistleblowing adopted in this article: An act of an individual within a organization who discloses information in order to report and correct corruption.

In addition to the four characteristics that Johnson presents, there are two other possible attributes regarding the whistleblower. One, that person is primarily motivated by the desire to expose wrongdoing. The emphasis on the primary motive is important for two reasons. First, it excludes whistleblowing as primarily a vengeful act or done simply for embarrassing another. Second, it excludes individuals who potentially blow the whistle simply or solely for economic gain. However, to exclude all financial gain from whistleblowing is not appropriate. One because some individuals do blow the whistle and expose wrongdoing in part because they will receive some compensation or reward for doing so. Such rewards either compensate for the ostracization and loss of job opportunities many whistleblowers confront after going public, and because such incentives, as are increasing being offered in laws in countries such as the United States, incentivize individuals to look out for illegal or unethical behavior or otherwise create the conditions under which whistleblowing becomes possible.

Two, the individual blowing the whistle does so as a last resort. The hope or goal is that organizations can police themselves. By that, under normal circumstances organizations have internal checks to detect and correct illegal and inappropriate behavior and that there are mechanisms for individuals within organizations to report wrongdoings. Whistleblowing is meant as an alternative – it is another channel to use to report wrongdoings when internal chains of command or structures preclude or make difficult the ability to otherwise report or correct inappropriate behavior.

There are several arguments given to support the need for whistleblowing. First, as noted above, some organizations simply may be closed to, unwilling, or unable to address wrongdoing. Whether it be fears of retaliation, refusal to comply with the law, or other reasons, whistleblowing may simply be the only mechanism to expose and correct wrongdoing.

A second justification is that whistleblowing is a mechanism to correct or reform organizations. Organizations, public, private or NGOs can develop pathologies and do bad things. Whistleblowing exposes bad behavior with the goal that public exposure will force change. Whether whistleblowing has succeeded in producing reforms is a matter of debate. In some cases specific acts may be corrected through exposure but measuring whether overall whistleblowing really reforms organizations is difficult to ascertain. Third, whistleblowing, perhaps most importantly, seeks to expose serious bad behavior that either the public needs to know about or which needs to be halted and corrected. Exposing bribery, illegal surveillance, misuse of organizational resources, and illegal conspiracies all are acts that should be exposed and corrected. Finally, whistleblowing may be justified as a way of promoting justice in that wrongdoers are held accountable for their actions. For all of the above reasons, whistleblowing is increasingly seen less as an aberration or an evil and more as a necessary and critical component in policing unethical and illegal behavior.

Because of the increasing recognition that whistleblowing is one part of an overall set of tools to expose corruption, many countries and international organizations are adopting legislation that legalizes or encourages such behavior. These laws generally do several things. First, they may create processes or mechanisms to enable whistleblowing, especially anonymously, such as through hotlines. Second, the laws may require organizations to promote whistleblowing. Third, the laws may create financial incentives to encourage whistleblowing. Fourth, the laws may offer shields to protect whistleblowers from retaliation or reprisals. Overall, the justification for whistleblowing is that it is one tool that can be used to expose and combat corruption.

United States

The United States is perhaps the leading innovator when it comes to whistleblowing laws. Roberta Johnson contends that the US is a major exporter when it comes to the law on whistleblowing, influencing both international agencies such as the World Bank, the Organization for Economic Cooperation and Development (OECD), and the Organization of American States, as well as domestic law in other countries and through major conferences on corruption throughout the world (Johnson, 2003). Its laws have been the subject of debate in emerging post-communist democracies such as Slovakia, Georgia, Albania, Romania, and Ukraine (Johnson, 2003, p. 116).

It would be impossible to document all of the whistleblowing laws in the United States. This article will focus mainly on national or federal laws. Whistleblowing laws should be understood as addressing three different types of corruption. The first is government corruption where private parties are seeking to defraud the government, but this type also includes situations where government officials are committing fraud through misuse of resources, bribery, and political favouritism. Here the issues include bribery, misuse of funds, improper book keeping, and more generically, fraud. A second type of law is that which takes place in the private sector or among non-governmental organizations (NGOS). Finally, whistleblowing in government as an effort to root out political abuse can be examined. This type includes situations such as Edward Snowden's release of information pointing to an illegal surveillance programme or even other reports of the US using torture to interrogate prisoners.

Another dimension to classifying whistleblower laws is to look at their purpose. Some laws legalize or mandate conditions under which whistleblowing should occur. An aspect of these laws is provisions that either incentivize whistleblowing or otherwise provide for compensation or legal protections against reprisals for those who blow the whistle. Such laws are necessary because of a culture that encourages team playing and discourages whistleblowers (Weisband & Franck, 1975). Finally, there are other laws or legal doctrines that impact whistleblowing or which affect the practice in some way. All of these types of laws and the issues that address it are important to fashioning an effective whistleblowing regime. But having said that, it is still not clear the US is as effective as it could be in making whistleblowing the tool it could be for addressing corruption.

Defrauding the Government: The False Claims Act

Kohn (2011) argues that the practice of encouraging whistleblowing in the United States goes back to the American Revolutionary War. In 1777 Congress passed a law encouraging members of the military to report to them suspected cases of prisoner abuse. However, most scholars contend that the real origins of whistleblowing laws in the United States can be traced back to the Civil War in 1863. *False Claims Amendments Act (1986)* (FCA) was adopted to address the problem of profiteers overcharging the government for supplies. The main provision of the FCA was to empower citizens who suspected abuse (realtors) to bring qui tam suits. A realtor would file a sealed complaint with a federal court outlining the evidence of fraud. The US Department of Justice would then have 60 days to join the lawsuit. Even if the government opted not to join the suit, private citizens could maintain the suit on their own. The strength of the qui tam suits resided in that realtors could recover a percentage of the overcharge or fraud if they prevailed in court.

The FCA has been subject to amendment since its original adoption. In 1943 an amendment barred the filing of complaints based upon information the government already possessed. The reason for this amendment was to address repeated or redundant complaints filed during World War II. In 1986, mostly in response to allegations and complaints being filed against defense contractors, the FCA was again amended. These amendments sought to 'strengthen and revitalize the ability of both the Government and private individuals to combat fraud' by increasing the financial incentives to whistleblow.

In addition, in 1988 amendments sought to include what is known as a 'principal architect' clause. This clause would limit the ability of parties who are the object of a qui tam suit to initiate one against another when they are the principal architect of the fraud (Calvert, 1998, p. 439). Finally, in 1992 Congress unsuccessfully sought to address questions regarding whether government employees could collect qui tam bounties. This was an issue speaking to whether public servants have a pre-existing duty to report fraud and whether they should be given extra rewards for perhaps simply doing their job.

Overall, the primary goal of the FCA has been to create incentives for private individuals to report fraud and root out corruption. Between the 1943 and 1986 amendments, complaints and rewards were somewhat sparse (Calvert, 1998, p. 438; Depoorter and DeMot, 2006), but Johnson contends that the FCA has actually been very successful in recovering a significant amount of money for the federal government (Johnson, 2003, p. 94–95). However, some argue that the FCA creates perverse incentives that encourage opportunistic behavior (Calvert, 1998, p. 439). But in general the FCA has encouraged many individuals to come forward to report fraud.

Private sector and NGO corruption: The Sarbanes Oxley Act

The Sarbanes Oxley Act of 2002 (SOX) was passed in response to significant fraud in the financial markets in the late 1990s and early 2000s involving companies such as Enron, Worldcom, Adelphi, and a host of other private sector companies (Moberly, 2012a, p. 1–3; *Sarbanes–Oxley Act, 2002*). Detailing the scope and range of fraud is beyond the scope of this

article. However, the activities included manipulating stock prices, insider trading, filing false financial reports, manipulating financial data to hide losses or manipulate stock prices, and engaging in other misuse or misappropriation of company resources for private gain. As a result of what appeared to be a near systematic pattern in fraudulent corporate behavior SOX adopted a host of measures meant to address these problems. These included requiring corporate chief executive offices (CEOs) and chief financial officers (CFOs) to testify under penalty of perjury that the financial forms they were signing were true to the best of their knowledge. There were also requirements regarding new audit procedures, limits on personal loans to corporate officials, new rules on conflicts of interest and how the financial information on subsidiaries would be reported, and a separation of audit and tax services provided by accounting firms (Moberly, 2012a, p. 1–3).

But among the new features of SOX was the creation of new whistleblowing laws. As it became clear in the US Senate hearings leading to the passage of SOX, whistleblowers such as Sherron Watkins at Enron, for example, faced problems such as retaliation when they attempted to report illegal behavior. SOX included provisions to support and in some cases incentivize whistleblowers. Prior to SOX, what few whistleblower provisions that existed applied to specific industries; SOX adopted more far-reaching rules. Johnson, for example, documented more than 40 limited-industry specific whistleblower provisions (Johnson 2003: 137–139). But SOX was the first law to enact an anti-retaliation provision providing for a nationwide right of action to employees of publicly traded companies who faced wide ranging types of retribution because they reported fraud. This provision was meant to address gaps in legal protections as a result of rules that only applied to specific industries and to fill in missing pieces as a result of a hodge-podge of state laws. Moreover, to prove retaliation, employees only needed to show that their whistleblowing was a contributing factor to the disciplinary action they faced (dismissal for example), instead of having to carry the higher burden of demonstrating that, but for their whistleblowing, they would not have faced similar treatment. This employee friendly standard made it easier for employees to prevail in retaliation suits.

In addition, employees claiming retaliation would be permitted to expedite their claims by filing a quasi-administrative complaint with the Occupational Health and Safety Administration (OSHA) which would have investigatory and enforcement powers. Employees would in addition still have the option of filing complaints in the federal courts. Finally SOX section 301 contained other rules that required companies to make it easier for employees to file, even anonymously, complaints regarding suspected fraud. All told, these provisions were meant to strengthen the ability of whistleblowers to report fraud and corruption.

But SOX went even further than this. Sox §307, for example, contained provisions that required in-house attorneys who had reasonable belief that their companies were engaging in illegal behavior to report their concerns up the corporate chain of command. In some cases, this gave lawyers the ability to report suspected abuse to the Securities and Exchange Commission. This rule, along with a similar one adopted by the [American Bar Association in the Model Rules of Professional Conduct \(2015, Rule 1.13\)](#) encouraged and in some cases mandated that lawyers take affirmative steps to ensure that their corporate clients conformed to the law, even if that meant breaking attorney–client confidentiality.

After SOX's 2002 passage Congress strengthened and built upon the whistleblowing rules in several laws. First, in 2009 an economic stimulus bill passed in the opening days of the Obama administration Congress clarified the circumstantial evidence that could be used to show retaliation ([The American Recovery and Reinvestment Act, 2009](#)). The law also declared that whistleblower protections even extended to filing reports of misconduct or fraud related to their job duties. This change was adopted in response to a 2006 Supreme Court decision in [Garcetti v. Ceballos \(2010\)](#) that the First Amendment did not protect individuals disciplined because they reported fraud as required by their job duties. Then in the 2010 Dodd–Frank law which was adopted in response to the financial meltdown and scandals that led to the economic crash of 2008, Congress clarified that the statute of limits for filing anti-retaliation claims was 180 days after the date an employee became aware of retaliation ([Dodd–Frank Act, 2010](#)). It also declared that SOX whistleblower provisions applied to privately held subsidiaries of publicly traded companies and that plaintiffs filing retaliation claims could request a jury trial in federal court. Finally Dodd–Frank in some cases provided bounties or financial incentives to whistleblowers whose complaints successfully led to a SEC investigation and imposition of a penalty sort of a *qui tam* action against private companies committing securities fraud.

SOX and its amendments significantly expanded the rights and protections for individuals blowing the whistle on private sector fraud. Yet some question how effective these rules have been. Moberly asks of SOX three questions:

First, does the law encourage employees to report misconduct? Second, does the law protect them from retaliation if they do report? Third, if they do report, are whistleblowers effective at stopping the misconduct – in other words, are whistleblower reports ‘properly assessed and, where necessary, investigated and actioned?’ (Moberly, 2012b, p. 21).

First, about whether SOX has encouraged more employees to report misconduct, the evidence is inconclusive. Data from the Ethics Resource Center (ERC), the Association of Certified Fraud Examiners, and the consulting company KPMG offer an incomplete story regarding whether employees are more likely than before SOX to report instances of suspected fraud. These studies suggest that they are perhaps somewhat more likely, but the data is incomplete and the causal links to SOX are tenuous (Moberly, 2012b, p. 24–25).

Second, the ERC found that during the post SOX period, reported percentages of reprisal rose, especially after the sub-prime meltdown in 2007. Moreover, in OSHA records on reports of reprisals, employees who filed complaints about reprisals won less than 2% of the time (Moberly, 2012b: 27–29). Improper use of the wrong evidentiary standard and a narrow

application of SOX anti-reprisal provisions explain part of this paltry percentage of victors. Finally, there is little evidence that whistleblowers were effective in halting misconduct or in getting claims of fraud properly assessed. It is always difficult to prove the negative, that is, prove deterrence or show how actions were prevented because of some event, such as a law. But proof that the SOX provisions did not work can be shown in the subprime meltdown of 2007 that there was widespread financial impropriety in many companies but little indication that companies either acted on or responded to complaints, if they existed, that fraud was occurring. That was the conclusion of Congress (Moberly, 2012b, p. 29–35).

Overall, while SOX and its amendments strengthened and expanded whistleblowing protections to address fraud in the private sector, its impact in exposing and detecting corruption is questionable.

Political corruption and national security

The third type of whistleblower laws to be examined involves instances of political corruption. What is meant by political corruption? These are situations where the illegal behavior is performed by government officials, with their primary goal or motive not being for personal financial gain. Instead, the type of illegal activity seeking to be exposed might be referred to as political crimes or other allegations of misuse of power that might violate the Constitution, federal law, or perhaps the rights of citizens. The most recent example of this type of whistleblowing might perhaps be the Wikileaks material leaked by Edward Snowden and Julian Assange documenting an extensive surveillance programme by the United States government on its citizens (Wikileaks). One might also consider as an example the information released by Mark Feld, Watergate's 'Deep Throat' as documenting illegal behavior by President Richard Nixon and others in his White House staff forty years ago.

The purpose of this type of whistleblowing is to inform the public about abuses of power or illegal activity by the government that might not otherwise be detected. This is the case because information about this activity is classified, or public officials are in a position to hide their activity by claiming, for example, that it needs to remain confidential in the interest of national security. But disclosure of this information is justified in a democracy as a way to inform citizens about violations of the law, unconstitutional behavior, or other threats to individual rights. The aim might be that blowing the whistle will lead to changes in government policy. Whistleblowing to expose political corruption is a dual-edged sword. As in the case of Snowden, some classify him as a hero, others a traitor. At what point does exposing state secrets or actions cross the line from legitimate whistleblowing to spying?

The [Intelligence Community Whistleblower Protection Act \(1998\)](#) is an example of a law that attempts to address these concerns. The ICWPA creates a procedure that allows for employees and outside contractors of some intelligence agencies to report directly to Congress regarding allegations of illegal activity. The Supreme Court in [CIA v. Sims \(1985\)](#) recognized the need for secrecy when it comes to intelligence gathering activities within the executive branch. But the ICWPA makes oversight of intelligence activities a joint function of the president and Congress. The ICPWA amended the Inspector General Act of 1978 (IGA), which had set up a process which protected government employees from reprisal when they reported to an inspector general (IG) suspicions of fraud or abuse. The ICPWA made it clear that those working with the intelligence community too would enjoy protections against reprisal. Under ICPWA, a party files a complaint with an inspector general who has fourteen days to act. If the IG finds the complaint credible it is then forwarded to an agency head who has seven days to comment before the report is sent to Congress. If the IG does not find the complaint credible a party may still go directly to Congress, so long as the agency and the IG are informed.

Concerns post 9/11 that whistleblowers who were not receiving adequate protection with the intelligence community eventually lead to the passage of the [Whistleblower Protection Enhancement Act \(2012\)](#). One impetus for its passage was the 2006 testimony of Lt. Col. Anthony Shaffer, an employee of the Defense Intelligence Agency. He reported what he believed was fraud within that agency and subsequently was retaliated against by that agency by having his security clearance revoked (Galle, 2011). The WPEA, despite initial attempts, did not in the end include enhanced protections (such as strengthening private causes of action or definitions of reprisal) for those in the intelligence community. Instead that came in 2012 when President Obama issued an executive order on October 10 (PPD-19) that extended many of the provisions of the WPEA to those in the intelligence community. Among other provisions, it called for an IG panel to review complaints of reprisals ([Presidential Policy Directive, 2012](#)). The order did not create any new rights for employees; it simply created a review process.

Taken together, it is not clear how effective the ICPWA, the WPEA, and the presidential directive have been in encouraging more employees to blow the whistle and, once they do, whether they are actually better protected against reprisal. Moreover, it is also unclear whether in general they have encouraged better review or reporting of illegal or corrupt activities within the intelligence community.

Concluding this part of the article, it should be stated that the United States has some of the most extensive whistleblower laws in the world. Its goals are to root out corruption by encouraging individuals to report suspicions of illegal behavior either to superiors or to outside parties. These provisions often provide financial incentives, anonymity, and anti-retaliatory provisions as ways to protect whistleblowers who expose corruption or other illegal behavior involving the government or non-governmental actors, including corporations. Despite this body of law, a review of the major whistleblower provisions is somewhat inconclusive regarding the extent to which these provisions have actually encouraged more individuals to blow the whistle or whether they have provided adequate protection against reprisals. Yet the review of

American law does indicate that the various whistleblower laws have facilitated and encouraged a significant amount of corruption to be exposed.

Whistleblower provisions in Europe

The development of whistleblower laws in the United States as a tool to combat corruption has influenced the adoption of similar laws across Europe. While these laws are not as advanced as in the US, the idea that individuals should be encouraged to report fraud and be protected, if they do, is taking root as an ethical if not a legal principle. This is especially the case in many former post-communist states once part of the Soviet Union and emerging democracies where corruption remains a persistent problem (Liebert et al., 2013). Arguably, the development of whistleblowing laws could facilitate the transition of these countries toward democracies. For example, according to Nations in Transit 2015 annual report produced by Freedom House, Ukraine, Moldova, and Georgia are considered as hybrid regimes, Armenia and Kyrgyzstan as semi-consolidated authoritarian regimes, while the remaining countries of former Soviet Union are considered as consolidated authoritarian regimes (Freedom House, 2015).

The importance of having in place proper effective mechanisms for whistleblower' protection cannot be undervalued. Its importance is so crucial that the [Parliamentary Assembly of Council of Europe \(2015\)](#) recommends to the Committee of Ministers that:

The Assembly invites the Committee of Ministers to: 3.1 promote further improvements for the protection of whistleblowers by launching the process of negotiating a binding legal instrument in the form of a framework convention that would be open to nonmember States and cover disclosures of wrongdoings by persons employed in the field of national security and intelligence.

In addition, G20 leaders during Seoul's Summit in 2010 identified the protection of whistleblowers as high priority areas and particularly called on G20 countries to:

[p]rotect from discriminatory and retaliatory actions whistleblowers who report in good faith suspected acts of corruption, G-20 countries will enact and implement whistleblower protection rules by the end of 2012. To that end, building upon the existing work of organizations such as the OECD and the World Bank, G-20 experts will study and summarize existing whistleblower protection legislation and enforcement mechanisms, and propose best practices on whistleblower protection legislation ([G20 Anti-corruption Action Plan, 2012](#)).

Transparency International published "International principles for whistleblower legislation" where it is suggested that concrete definitions and actions be undertaken in order to have in place effective and efficient mechanisms for whistleblower protection ([Transparency International's Secretariat, 2013](#)). It notes:

Whistleblowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threaten public health and safety, financial integrity, human rights, the environment and the rule of law, etc. The absence of effective protection can therefore pose a dilemma for whistleblowers: they are often expected to report corruption and other crimes, but doing so can expose them to retaliation (2).

The challenge of protecting whistleblowers is one faced not only in developing countries but in developed ones as EU member states too. Mr. Pieter Omtzigt from the Committee on Legal Affairs and Human Rights of Council of Europe, in 2009 conducted a fundamental study on the issue ('Protection of whistleblowers'), in his capacity as Rapporteur. There, he particularly notes:

In many European countries, because of the lack of a reporting culture with positive connotations, the whistle-blower is all too often seen as a traitor or likened to a police informer. This approach is detrimental. Society is insufficiently aware that the whistle-blower's action can prevent further wrongdoing, which can jeopardize the health, safety or life of others. Hence the societal interest in legal protection of whistle-blowers in Europe against dismissal or any form of retaliation ([Parliamentary Assembly of Council of Europe, 2009](#)).

The lack of reporting culture is massive even in Europe. According to the European Commission's Special Eurobarometer Corruption Report 2014 "74% of respondents said that they did not report corruption that they experienced or witnessed to anyone" ([European Commission, 2014](#), p. 100). This statistic is a red light: if three-fourths of EU citizens do not report corruption (citizens of countries that have vibrant democracies in place with accountable governments), then it is possible to imagine what the situation is in developing countries.

According to the same Eurobarometer report, there are several reasons for not reporting corruption. Namely, 47% of respondents thought that not reporting corruption happens because it is difficult to prove a case, 33% said that reporting would be pointless because those responsible will not be punished, while 31% mentioned that there is no protection for those who report it and 21% said that they do not know where to report it to. The report also provides other interesting results (p. 106). Twenty percent mentioned that those who report cases get into trouble with the police or other authorities,

another 20% said that everyone knows about these cases and no one reports them, 16% is of the opinion that no one wants to betray anyone and another 16% thinks that it is not worth the effort to report it.

These data show that there are two aspects which must be carefully considered in designing policy on whistleblowing. First, one needs to have effective and proper legal mechanisms and avenues for whistleblowers to freely report corruption. Second, there is a need to change perceptions of whistleblowing and whistleblowers. About the latter, research conducted by Mark Worth with the assistance of his colleagues (Transparency International) shows that in many EU member states, because of the difficulty in the translation of the word, whistleblowing has negative connotations:

To a surprising extent, the difficulty in translating the term whistleblower into other languages has led to problems in how whistleblowers are perceived publicly. In many EU countries, alternative terms such as ‘informant’, ‘denunciator’ and ‘snitch’ are still commonly used by citizens and the media alike. Journalists in some non-English-speaking countries simply use whistleblower for lack of a better alternative. They then may have to explain the term to audiences ([Transparency International's Secretariat, 2013](#), p. 19).

So this brings us to the point of realization that it is vital to come up with a proper term in other languages for whistleblowing and whistleblowers. These terms should present positive shades of meaning, sending the message that it is a right thing to do if you are sure about the facts of the case and you are not manipulating them. For example, one of the coauthors of this article, for the first time in the history of Armenia, advocated for a proper term in Armenian for whistleblowing, which was accepted and is now a part of the Concept Paper on the Anti-corruption Strategy of Armenia, soon to become full strategy. The suggested word is ‘azdazar’ which means “someone who warns people about danger”.

In 2013 among 27 EU member states only four states have advanced whistleblower protection laws, namely Luxembourg, UK, Romania, and Slovenia ([Transparency International's Secretariat, 2013](#), p. 8) (At that moment Croatia was not considered, because it became full member of the EU only in July 2013.). Bulgaria, Finland, Greece, Lithuania, Portugal, Slovakia and Spain were in worst position, in this regard ([Transparency International's Secretariat, 2013](#), p. 8).

In regard to Luxembourg, the 2011 Law on Strengthening the Means to Fight corruption made it possible for both private and public sector employees to challenge their dismissal in the Labor Court ([Transparency International's Secretariat, 2013](#), p. 61). The interesting peculiarity is that the employer should prove in court that the dismissal was not as a result of whistleblowing. Employees can report to the public prosecutor's office or to any other regulatory agency, but if they report to NGOs or the media, they do not get protection. Interestingly enough, besides legislative regulations, whistleblowing is also negatively perceived in Luxembourg, and because of language barriers the word is very difficult to translate into one of the three official languages. Whistleblowing provisions are rarely applied there.

Unlike in Luxembourg, in the United Kingdom, whistleblowers can both approach the media and continue to have protection, and like in Luxembourg the employer must prove that dismissal was grounded and not conditioned by whistleblowing. The situation of the United Kingdom is considered the best in Europe. In 1998 it adopted the Public Interest Disclosure Act, which covers employees of all sectors, except for intelligence and the armed forces ([Transparency International's Secretariat, 2013](#), p. 83). Interestingly enough, it also covers employees working abroad. In cases of retaliation the employees can claim damages and injuries. As of 2013 the highest award was 5 million British pounds. In Europe, the experience of the UK is considered the best partially because it is rooted in the long-standing English common-law principle of “no confidence in iniquity”, according to which employers cannot hide behind confidentiality clauses and prevent workers from speaking up about wrongdoing ([Transparency International's Secretariat, 2013](#), p. 84).

The best two examples of whistleblowing legislation are Romanian and British. The Romanian law is the best in Continental Europe, while UK's is the best in Europe as a whole. In 2004 Romania adopted a special law on whistleblowing and became first in this sense in Continental Europe ([Worth, 2015a,b](#), p. 50). It is considered one of the strongest laws in the world because it makes it possible to report misconduct to a variety of actors including managers, disciplinary commissions, judicial institutions, parliament, the media, and NGOs ([Worth, 2015a,b](#), p. 50). However, in Romania there is no designated government institution charged with handling whistleblowing issues, including the investigation of whistleblower disclosures and retaliation complaints ([Worth, 2015a,b](#), p. 51). During the period of 2006–2012s first half, a total of 732 reports of wrongdoing by public servants were made in Romania ([Worth, 2015a,b](#), p. 53; [Trunk and Hilken, 2014](#)). Nevertheless, “Whistleblowing is not widely practiced in Romania, where it faces socio-cultural barriers and a lack of public understanding and appreciation” ([Worth, 2015a,b](#), p. 53).

Finland can be considered as a country with a very specific and interesting experience. It is considered one of the ‘cleanest countries’ in terms of corruption, ranking third according to [Transparency International \(2013\)](#). It has neither specific laws nor channels to disclose wrongdoings ([Transparency International's Secretariat, 2013](#), p. 42). It also does not have specific means to compensate whistleblowers for retribution and there are no penalties against those who retaliate against whistleblowers. Nevertheless, public officials have limited witness protection avenues, and unjustly fired employees can sue employers in the court of law. Officials of the government must report offenses in ‘well-substantiated’ cases to the police without delay.

At the level of International Law as it applies to the European Union or the Council of Europe members, the importance of whistleblowers in the effective fight against corruption is so high that it is embodied in both international and regional hard law instruments (conventions). There are several requirements and measures aimed at protection of whistleblowers in such instruments as follows:

1. UN Convention against Corruption (UNCAC) (article, 33);
2. The Council of Europe's Criminal Law Convention against Corruption (CoE CLCC) (article 22);
3. The Council of Europe's Civil Law Convention against Corruption (CoE CivLCC) (article 9).

The UNCAC is the first universally applicable convention against corruption. The main article here which establishes the fundamentals on whistleblower protection worldwide is article 33 (Protection of reporting persons). This article stipulates:

“Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention.”

The main feature of this article is that it “covers early stages when there may well be no question of proceedings. Indeed, the ideal situation is where a whistleblower raises concerns in time so that action can be taken to prevent any offense.” Article 33 requires the whistleblower to have both ‘reasonable grounds’ and ‘good faith’. It applies to ‘any person’ who reports facts about offenses and those offenses relate to all offenses under the Convention. The article is about reports to ‘competent authorities’ and does not relate to reports to the media or anonymous leaking platforms ([Transparency International, 2013](#), p. 6–7).

The article encourages states to provide protection against ‘any unjustified treatment’ to whistleblowers ([Transparency International, 2013](#), p. 6). According to the Legislative Guide of UNCAC, the measures of protection may include psychological support, the institutional recognition of reporting, and transferring whistleblowers within the same organization or relocating them to a different one. The same Legislative Guide mentions that provision of confidential in-house advice to whistleblowers is also part of an effective protection system. It is noteworthy that the Technical Guide to UNCAC mentions compensation and civil damages as protective measures.

If UNCAC is quite comprehensive and far reaching, the CoE Criminal Law Convention on corruption contains just one article (article 22, protection of collaborators of justice and witnesses). Nevertheless this article has a mandatory nature. According to it: ‘Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: (a) those who report the criminal offenses established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities or (b) witnesses who give testimony concerning these offenses’. If this convention covers state officials, the Civil Law Convention (article 9, protection of employees) relates specifically to private sector employees. It says: “Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”

Whistleblowing in Armenia

Having discussed the experience and legislative mechanisms on the issue in US and European countries, this article examines one of the Eurasian Economic Union (EEU) member-states, in order to reveal the possibility of drawing parallels with western experiences. Armenia is the subject here. It was chosen because of it being typically a good example of EEU member. It enjoys a relatively good position under the Corruption Perception Index 2014 of Transparency International, among other member states of the Eurasian Economic Union. Armenia occupies 94 rank among 175 countries, while Russia and Kyrgyzstan share the 136th position, Belarus 119th, and Kazakhstan 126th.

The protection of whistleblowers in Armenia is not comprehensive and, the law is complicated and not well developed. The legislation divides the protection into two legal regimes: the first one regulates reporting persons who are public servants, and the second one regulates ordinary citizens ([Harutyunyan & Varuzhan, 2013](#)).

The Law on Public Service regulates issues such as conflicts of interests of high-level public officials, covering their assets and income as well as gifts and their acceptance. This law primarily was aimed at harmonizing different aspects of public service including the Law on Civil Service. The Law on Public Services, besides the issues mentioned above, regulates also conduct of public servants in relation to whistleblowing. Particularly article 22, part 1 foresees that public servants in the course of conducting their own duties must inform respective public officials of violations and any other illegal activities, including activities which relate to corruption, pertaining to public service, committed by other servants. Part 3 of the same article states that competent bodies must guarantee the security of those public servants who conscientiously inform about the activities stipulated under Part 1 of the same article.

The government adopted decision no. N1816-N (23/12/11), guaranteeing security for those public servants who report to public officials and competent bodies regarding violations and other actions (including those which relate to corruption) of other servants. This decision foresees measures that theoretically can guarantee the security of reporting persons. Those measures, inter alia, include: secrecy of data; condemnation of persecutions or retributions and of irrelevant and unlawful interference into the activities of the reporting of public servants by other servants; where necessary, relocating the reporting person to another workplace; creating conditions for fulfillment of duties without intervention by the reporting public servant; not overburdening the reporting servant with artificial orders; and undertaking any other necessary measures.

If the reported act is of a criminal nature then the public servant by the force of law automatically falls under the regime of general protection, as a member of the public ([Republic of Armenia, 2011](#)). The reporting person can receive protection only if he/she has the status of a participant in proceedings as defined by the Criminal Procedure Code.

The general protection is provided under the Criminal Procedure Code: article 98. Protection measures are granted to the participants of criminal proceedings and their relatives. The definition of participants of criminal proceedings is provided in the same code (Point 32 of Article 6), according to which participants of criminal proceedings are participants in proceedings, witnesses to a search, trial clerks, interpreters, specialists, experts, and witnesses. Point 31 of the same article defines the scope of those who are considered participants in proceedings. According to it, participants in proceedings are the prosecutor (prosecuting attorney), the investigator, the agency for inquest, as well as the injured party, the civil claimant, the legal representatives thereof, the suspect, the accused, the legitimate representatives thereof, the defense attorney, the civil defendant, and his/her representative. Under the regulations provided by the Criminal Procedure Code in force, the respective law enforcement bodies are not obliged to grant a status (for example, status of witness) to a reporting person immediately: it is totally dependent on the law enforcement bodies.

Nevertheless, if the reporting person is granted one of the statuses as described above, then the measures of protection are, as stipulated under article 98¹: (1) formal warning of the person who is expected to threaten violence or other crime against the person being protected, (2) protection of the personal information of the person being protected, (3) provision of personal security, protection of the house and other property of the person being protected, (4) providing personal protection for the person being protected and warning him about the danger, (5) using technical resources, and wiretapping telephone and other conversations, (6) ensuring the safety of the person being protected during arrival to the body conducting criminal proceedings, (7) choosing such preventive measures for the suspect that will exclude the possibility of violence or other crime against the person, being protected, (8) transfer of the person being protected to another residence, (9) replacing the identification documents or changing the appearance of the person being protected, (10) changing the place of work, service, or study of the person being protected, (11) withdrawal of specific individuals from the courtroom or holding closed-door court session, and (12) questioning the person being protected in the courtroom without publishing their identity information.

In addition, in the Concept Paper on the Fight against corruption of Armenia, adopted as a Protocol Decision of the Government of Armenia on April 10, 2014, the issue of whistleblowing received specific attention. Particularly it mentioned:

“Currently, there exist no necessary conditions in the Republic of Armenia for whistle-blowing. There exist no necessary and comprehensive legislative regulations relating to this activity. Additionally, no positive atmosphere has been created to motivate society to fight against corruption. The public campaign on intolerance against corruption-related offenses conducted by the State is also weak” ([Republic of Armenia, 2014](#)).

The issue even becomes more obvious as one needing attention when the results of the Global Corruption Barometer 2013 are taken into consideration. According to it, 63% of respondents think that ordinary citizens cannot make a difference in the fight against corruption ([Transparency International, 2013](#)). Therefore, the situation needs proper attention.

Overall, Armenian law as it relates to whistleblowing is undeveloped and incomplete in comparison to that of the United States and western Europe. Yet Armenia, unlike other EEU states, has begun the process of adopting and adapting whistleblower protection laws to combat corruption. It is too soon to tell how effective these laws will be in performing this task.

Conclusion

Corruption remains a persistent problem across the world, including in former communist states and former republics of the USSR. Whistleblowing is seen as one tool to disclose and combat this corruption. The United States has a well-developed legal regime for whistleblowing and the evidence reported in this article suggest that it has had some positive impact in uncovering and correcting corruption. In Europe, the EU, and the EEU, there have been efforts too to adopt and adapt a regime to facilitate whistleblowing, but with little and brief experience with these laws, there is so far little data indicating how effective these laws have been. So what do we learn from a comparison of whistleblowing laws in the US, Europe, and Armenia?

After reviewing the laws and practice of the abovementioned countries we can arrive at the following conclusions.

First, the whistleblowing laws have a more sophisticated shape in common law countries than in continental law countries.

Second, whistleblowing culture and practice is better developed in common law countries due to their early origination.

Third, countries in continental Europe still have underdeveloped legal mechanisms for the protection of whistleblowers and not enough avenues for persons to blow the whistle.

Fourth, the terms ‘whistleblowing’ and ‘whistleblowers’ in some jurisdiction of Continental Europe do not have analogous proper translations which could carry the incentives for people to act.

Finally, ‘whistleblowing’ as a tool for addressing corruption still needs strong commitments from political leaders in continental European and Eastern European countries in order to help address corruption in the public sector.

There are three main issues which must be dealt with in order to have a vibrant, effective and acceptable whistleblowing system in a country. The first issue is that whistleblowing must have a strong moral-constitutional foundation in a given society. People of a state should be 100% sure, that whistleblowing is the right thing to do. The second issue is the perception of whistleblowers in a society. To provide a positive portrayal of whistleblowers two conditions must be satisfied. First whistleblowers should act based only out of respect and honor of fellow citizens and not because of selfish motives such as revenge or the elimination of a candidate for career growth; and second, the media and authorities must act together to portray good whistleblowers as heroes. In this regard, it is essential that they not be forgotten after they blow the whistle.

The third issue is having in place strong and comprehensive legislation aimed at providing whistleblowers sufficient safe avenues for fearlessly blowing the whistle. In this regard it is also important to have a designated body which is in charge for providing protection to whistleblowers and handling their reports. This body should enjoy public trust and sympathy.

Interestingly enough, in the Himalayas even such a small country specifically foresees in its Constitution that “Every person shall have the duty to uphold justice and to act against corruption” (*Constitution of Bhutan, 2008*). With this decision Bhutan put itself on the very frontier of the anti-corruption fight and whistleblowing globally. It is needless to say that the situation is not the same across Eastern Europe (the former Socialist countries) and the former Soviet countries. As the abovementioned report noted, the situation in regard to whistleblowing is not very good in Continental Europe either. Perhaps this presents the opportunity for another discussion regarding whether whistleblowing should be treated as the right of citizens or a duty. Although this is an interesting topic to discuss, it was not the purpose of this article. The authors will write about this issue on another occasion if such an opportunity arises.

Nevertheless, the questions “what should be done?” and “how should the challenge be met?” remain real, especially in the countries of the former Soviet Union and in Armenia in particular. Several recommendations can be offered to address these questions. The recommendations are divided into three groups.

1st group: revisit the very moral-constitutional foundations of a state.

The problem with the societies of the former Soviet Union is the heritage and the legacy leftover from the Soviet's. Innocent people were arrested and sent to the Gulag or even sentenced to death. This occurred partially because of those who wrote ‘*anonimkas*’ (anonymous complaints), and most of the time their motivations were unscrupulous. Therefore, the very phenomenon and nature of whistleblowing has corrupted meaning in these societies. Therefore, the political leaderships of these countries need to take responsibility and revisit the moral-constitutional foundations of the state by arguing that the state and its citizens share a common interest and that the state belongs to the citizens. This will be extremely difficult because the majority of these countries (except for the Baltic countries and, partially, Ukraine and Georgia) have authoritarian regimes, where people do not have sufficient trust and who lack sufficient legitimacy.

2nd group: perception of whistleblowers.

Whistleblowers should be used as examples for further advocacy to send the message to people that these individuals are heroes. In other words, the whistleblowers should receive a positive portrayal in the media.

3rd group: legislative and institutional measures.

A specialized state body which will be in charge of handling reports of whistleblowers in regard to corruption offenses and providing them protection should be instituted. The leadership of this new body should be appointed/elected by the legislature and through a super-transparent, inclusive, and cross-society participation procedure in order to gain public trust.

The leadership of this body should enjoy immunity for the whole period of the service, and removal from the office should be possible only by a parliamentary decision.

A separate law on whistleblowing should contain a wide definition of whistleblowing and different avenues for them to blow the whistle.

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