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Why whistleblowing should be properly legislated?

POLICY BRIEF



APRIL, 2015

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This project is funded by the European Union

This project is funded by the European Union. This Policy brief has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of Transparency International Armenia and can in no way be taken to reflect the views of the European Union. Starting from January 2015, this project is co-funded by the Open Society Foundations-Armenia.

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Summary

The corruption can be tackled only by joint forces of state authorities, civil society and public at large. In order that citizens feel safe and protected to report about corruption they must be provided with effective guarantees. According to both international and local specialists Armenian legislation fails in this regard, while at the same time Armenia has international commitments to adopt such and install that guarantees.

Why it is important?

The nature of corruption offenses is latent i.e. present but not visible. Therefore, Whistleblowers play an essential role in exposing corruption¹ as well in both national and global efforts to fight corruption.²

The Parliamentary Assembly of Council of Europe (PACE) adopted special recommendation on “Protection of Whistleblowers”, where it particularly noted:

“The Parliamentary Assembly, referring to its [Resolution 1729 \(2010\)](#) on the protection of “whistle-blowers”, stresses the importance of whistle-blowing as a tool to **increase accountability and strengthen the fight against corruption and mismanagement.**”³

Moreover, the issue is considered so important that PACE even recommends to consider opportunity for drafting a framework convention on the protection of whistleblowers.⁴

Who should be considered as whistleblower and what should be considered as whistleblowing?

¹ International principles for whistleblower legislation: Best practices for laws to protect whistleblowers and support whistleblowing in the public interest. Transparency International Secretariat. Berlin, 2013. Page 2

² Whistleblowing in Europe: Legal protections for whistleblowers in the EU. Transparency International Secretariat. Berlin, 2013. Page 6

³ Recommendation 1916. Parliamentary Assembly of Council of Europe. Strasbourg, 2010.

⁴ Ibid

Transparency International Secretariat in 2013 composed International principles for whistleblower legislation. Of course these aren't mandatory definitions, but they are encompassing and cover more people. The broad definition of whistleblowing is:

“**Whistleblowing** is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation;⁵ miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorized use of public funds or property; gross waste or mismanagement; conflict of interest;⁶and acts to cover up of any of these.”

The broad definition of whistleblower is:

“A **whistleblower** is any public- or private sector employee or worker who discloses information covered in [a]bove and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees.”⁷

What is the international legal framework on whistleblowing relevant for Armenia?

Armenia has a strong international framework requiring from her to have effective and appropriate whistleblower's protection system in place. Particularly United Nations against Corruption (UNCAC) and Council of Europe's Criminal Law Convention against Corruption, provide necessary framework for the national parliament to legislate the issue.

Particularly, article 33 of UNCAC is the special article regarding protection of whistleblowers, which states:

“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 offences established in accordance with this Convention.”⁸

Armenia hasn't made any reservations to this article and as a country with monist system (ratified treaties become part of domestic legal system) it is obliged to consider incorporating appropriate measures for providing protection to whistleblowers against unjustified treatment.

Besides, the same Convention foresees:

⁵ Including fraudulent financial disclosures made by government agencies/officials and publicly traded corporations.

⁶ Could also include human rights violations if warranted or appropriate within a national context.

⁷ International principles for whistleblower legislation: Best practices for laws to protect whistleblowers and support whistleblowing in the public interest. Transparency International Secretariat. Berlin, 2013. Pages 4-5

⁸ Article 33, UNCAC

“Each State Party **shall consider encouraging** its nationals and other persons with a habitual residence in its territory **to report to the national investigating and prosecuting authorities the commission of an offence** established in accordance with this Convention.”⁹

Nevertheless, Armenia is also part to another instrument too: it is Council of Europe’s Criminal Law Convention against Corruption. Article 22 of which stipulates:

“Each Party **shall adopt** such measures as may be necessary to provide **effective and appropriate** protection for: a those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities”.

What kind of other commitments Armenia has also?

It must be mentioned that protection of whistleblowers is also part of recommendations intended for Armenia under Istanbul’s Anti-corruption Action Plan of OECD. During the 3rd monitoring round, in regard to Armenia’s commitments, the monitoring team concluded:

“The monitoring team concluded that the reporting obligations and whistleblowers’s protection **did not function in Armenia** because of the lack of trust of citizens in the fight against corruption, in law enforcement bodies and the fear that the reporter of corruption may be pursued for false reporting or defamation.”¹⁰

Based on this, the monitoring team made a new specific recommendation for Armenia, which reads as:

“**Adopt** legislation and practical mechanism for the protection of whistleblowers”.¹¹

What is the current legal framework in Armenia?

The protection of whistleblowers in Armenia is divided into two legal regimes: one regulating reporting persons who are public servants, and another which regulates ordinary citizens.¹²

Article 22 of RA Law on Public Service stipulates 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 1). Part 3 of the same article stipulates that competent bodies must guarantee security of those public servants who conscientiously informed about the activities stipulated under Part 1 of the same article. In addition, the government’s decision no. N 1816-N (23/12/11) regulates the order of guaranteeing security for those public servants who report to public officials and competent bodies regarding violations and

⁹ UNCAC, article 39, part 2

¹⁰ OECD Anti-Corruption Network for Eastern Europe and Central Asia. Third Round of Monitoring. Armenia. Monitoring Report. Page 54. Available at: <http://www.oecd.org/daf/anti-bribery/Armenia-Round-3-Monitoring-Report-ENG.pdf>

¹¹ Ibid, page 55

¹² Here and after please see “Enforcement of Anti-corruption Laws: Armenia UNCAC Civil Society Review 2013”. Transparency International Armenia and the UNCAC Coalition. Authors Khachik Harutyunyan and Varuzhan Hokyanyan. Pages 9-10

other actions (including those which relate to corruption) of other servants. According to this decision, measures to guarantee security include secrecy of data; condemnation of persecutions or retributions and of irrelevant and unlawful interference into the activities of the reporting public servants by other servants; where necessary, relocating the reporting person to another workplace; creating conditions for fulfilment 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 criminal nature then the public servant falls under the regime of general protection, as a member of the public.¹³ The reporting person can receive any protection if he/she has a status of a participant in proceedings as defined by the Criminal Procedure Code.

The general protection is provided in the Criminal Procedure Code. According to Article 98, protection measures are being granted to the participants of criminal proceedings (քրեական դատավարությանը մասնակցող անձինք) 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 (դատավարության մասնակիցներ), 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 as 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 defence 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. However, if the reporting person is granted one of the statuses as described above, then the measures of protection are, as stipulated under article 98: 1) formal warning of the person who is expected to be threatening 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 house and other property of the person being protected, 4) providing personal protection of 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 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 the person being protected to other residence, 9) Replacing the identification documents or changing the appearance of the person being protected, 10) Changing the place of work, service and study of the person being protected, 11) Withdrawal of specific individuals from the courtroom or holding closed-door court session, 12) Questioning the person being protected in the courtroom without publishing the identity information.

In addition, the Concept Paper on the Fight against corruption of Armenia, adopted as Protocol Decision of the Government of Armenia on April 10, 2014 is mentioned:

“Currently, there exist no necessary conditions in the Republic of Armenia for whistle-blowing¹⁴. There exist no necessary and comprehensive legislative regulations relating to

¹³ Points 9, 6, 3 (3) of the government Decision N 1816-N

¹⁴ Whistle-blowing is the identification of corruption-related phenomena or offences by private persons for the benefit of the public. It is one of the most important means to ensure the participation of the public in the fight against corruption and to raise the effectiveness of this fight. Whistleblower must reasonably believe that the fact identified by him/her is, in its essence, a negative phenomenon and realise that it is done for the protection of public interest.

this activity. Besides, there is no positive atmosphere formulated that would motivate the society to fight against corruption. The campaign on intolerance against corruption-related offence conducted by the State in the public is also weak.”¹⁵

What can be done to address the issue?

As was mentioned in previous sections, both domestic and international experts and specialists point out that the legislative framework is not comprehensive. The issue may be risen whether adoption of specific legislation will change the situation, taken into consideration the problems in culture of Armenia. The answer is that it will not bring immediate effects. However, the adoption of specific legislative piece can be necessary for 2 reasons:

1. Firstly, it will provide necessary protections for those small number of people who are reporting corruption;
2. Secondly, it may have snowball effect, i.e. when people see that person “Y” reported corruption and received necessary protection, they will also be encouraged to report, because trust will be built.

Sure, in Armenia can be observed that on many occasions well-drafted legislative acts are not properly enforced, but for avoiding that there can be legislative solutions such as criminal sanctions for harassing whistleblower or other actions or inactions which brought negative consequences for them.

We suggest the following 3 steps for developing special and only for whistleblowers dedicated legislation:

1. Research of the best practice in the sector of whistleblowing, especially the International principles for whistleblower legislation developed by Transparency International Secretariat and practice of United Kingdom and Luxembourg.
2. To visit these countries with study trips in order to understand the peculiarities of implementation
3. To draft a comprehensive legislation which will cover both public and private sectors’ whistleblowers, providing with effective institutional structures for protection by designating one special body responsible for dealing with whistleblowers.

The legislation should be drafted in parallel with making necessary alterations and amendments in Civil Code, Labor Code, Criminal Procedure Code and Criminal Code, in order to provide both mechanisms for proper functioning and sanctioning.

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¹⁵ Section 3, part 2.

