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WHISTLEBLOWERS PROTECTION

*AS A TOOL FOR COMBATING
CORRUPTION*



**RASHEED TI-JO RESEARCH SERIES:
CORRUPTION**

Rasheed (Transparency International-Jordan) was established at the end of 2013, as a non-for-profit civil society organization, through a group of activists working in the field of anti-corruption. Rasheed (Transparency International-Jordan) commenced work in Amman at the beginning of April 2014, and it represents the only official contact group of Transparency International in Jordan.

Rasheed (Transparency International-Jordan) aims to reinforce the involvement of the Jordanian citizen in anti-corruption activities, protect public, private and local governance institutions against corruption, enhance the efficiency and independence of control agencies specialized in the area of anti-corruption, strengthen the integrity of the legislative and judicial authorities, and reinforce the performance of Rasheed (Transparency International-Jordan) towards achieving its mission and vision.

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Introduction

The problem of corruption is that violations are often hidden and corruption acts are silenced; so someone should not be afraid to report it in the public interest. This is the function of the whistleblower. Exposing corruption and protecting whistleblowers are important for any society, as modern experience unfortunately shows that neither public entities nor private companies can or do not want to solve their own problems. If all government agencies worked honestly and transparently, there would be no need for whistleblowers, as the system would be cleaning itself. But in the struggle for power and profits, the stakes have become so high that corruption only thrives because leaders do not want to be held accountable.

Another obstacle to the development of the institution of whistleblowers is that people do not have sufficient awareness in this area, how it works, how to protect themselves and their loved ones, do not have a sufficient understanding of what corruption is and what its manifestations are, etc. Legislative norms alone are not enough to create real changes. To do this, it is necessary to stimulate the development of new ideas in society, to influence the mentality of the people, to engage in education, to give citizens new tools and to encourage their use.

An important factor for the effective formation and effective work of the institution of whistleblowers in society is also a clear and complete system of whistleblowing, which includes: persons who report violations; bodies that register and review notifications; bodies that impose sanctions and carry out corrective measures; organs that protect the whistleblower; and bodies that encourage information and support its benefits.

What is corruption?

Corruption is one of the devastating phenomena, which causes damage to the whole world, and its impact transcends structures of the state and society as well as affects individuals as a central link of such organization. The complexity of corruption as a social phenomenon is pronounced in number of its manifestations and measures for its suppression. As a social notion, corruption is multifaceted, and thus does not have a single definition (Adamenko, 2019).

The definition of such illegal activity, therefore, varies from the broad terms like misuse of public power and moral destruction to more strict legal definitions as an act of

bribing public servant and a transfer of material resources. Thus, the analysis of international legal documents indicates the existence of different approaches to understanding corruption. Meanwhile, in the Resolution on "Practical Measures to Combat Corruption", distributed at the VIII United Nations Congress on the Prevention of Crime, corruption is defined as "*a violation of the ethical (moral), disciplinary, administrative, criminal nature that manifested itself in the unlawful use of its official position by the subject of corrupt activity*". Another UN document – Background Paper on the International Struggle Against Corruption – formulates the notion of corruption as "*the abuse of state power for profit for personal gain*" (Adamenko, 2018).

In other words, it is the use of authority by any person, who has the power to obtain illicit benefits. It is important to note that corruption is committed both in the public and private sectors. In most cases, the private sector has a significant impact on government structures and corruption schemes. In addition, the private sector, oligarchs and big business can both promote corruption and profit from it.

Corruption does not appear in society overnight. The essence of corruption is manifested in those social phenomena with which it is deeply interconnected, and these include legal nihilism and insufficient legal literacy of citizens, low social position and activity of citizens.

Meanwhile, the sources of corruption can vary from the ineffective and unfair distribution and expenditure of tangible and intangible goods to a decrease in the efficiency of state and municipal bodies, a slowdown in economic growth, a decrease in the level of trust in government, etc.

Who are whistleblowers?

According to international practice, the whistleblower is a person, who provides any information about activities that are illegal, unethical or incorrect in an organization that is private or public. It is the disclosure of information about illegal activity, which threatens or harms the interests of society, about abuse within the activity of an organization, government body or company.

The whistleblower is not a "snitch" or "mole", but the guard of the public interest, and conscious citizen, who is essential for the foundation of the early warning system.

According to the Government Accountability Project, a common legal definition of whistleblower is defined as a person, who is typically an employee, and who discloses

information either externally to the media, watchdog organizations, regulators or lawmakers, or internally to organizational hotlines or managers, and who reasonably believes the gained evidence, which may include the following (GAP, 2018, 4):

- A violation of the legislation including rules, regulations and laws;
- Gross mismanagement;
- A gross waste of funds;
- Abuse of power and authority;
- A substantial and specific danger to public health or safety.

Why is it important to report and inform about corruption acts?

There is a perception in society that corruption is total, it is everywhere, and to fight it is scary, dangerous, and, perhaps, even meaningless. But the true cost of corruption is that the corrupt person relies on the silence of ordinary people. If most people cease to be silent on corruption cases, a potential corrupt person thinks twice before taking a bribe or breaking the law. In addition, it will change stereotypes about whistleblowers, because today, society still often regards them as “snitchers” and “moles”.

Due to the concern of the whistleblowers and their acts, the crime will be stopped and the perpetrator punished: the corrupt person will be afraid of justice and thus the legal procedures will be restored and the public administration will be improved, which will not only increase the prestige and authority of the state on the international arena, but it will also lift the level of foreign investment.

The existence of strong legislation on protecting whistleblowers of corruption works in many directions at once: corrupt officials are accountable to the law, previously hidden from the tax funds come to the budget, informants are stimulated by remuneration, crime detection is growing, the state is improving its position in the corruption rating – and all this helps to reduce the corruption climate in the country.

International Experience

Not many countries in the EU have strong legislation on the protection of whistleblowers (among them, for instance, Slovenia, Ireland, and the United Kingdom). Four years ago, the European Commission negatively assessed the possibility of adopting a

whistleblower protection law across the EU. However, the overall situation in the world is not the same, and, thus, for example, the USA (where there are even special courts and CSOs dealing with it) and South Korea are vivid examples of effectively working legislation.

The laws of some particular countries (UK, Ireland, Canada, South Africa) specify that the applicant must first use the internal methods of reporting corruption before contacting the external body, the functions of which may be performed by a special state body, regulator, trade union, law enforcement agency, independent anti-corruption body, commissioner or ombudsman. Meanwhile, in Romania the message can be transmitted through an internal channel, or simultaneously both internally and externally

It also should be mentioned that there are some legislations that have specific gaps and do not cover some aspects. For instance, whistleblowers are often not protected from defamation allegations (Portugal, Czech Republic), disclosure of anonymity (Spain, Estonia, Lithuania, Argentina, China), and negative actions from accused corrupt officials in return (Poland, Slovakia, Netherlands, Brazil). Sometimes, certain categories of people are subjected to protection, whereas legal protection should extend not only to public and private sector employees, but also to interns, consultants, and contractors as well as temporary and former employees. There is also a lack of individually established national bodies to investigate whistleblowers` messages. In many countries, there is still no political motivation for the change in this area. However, this did not prevent, for example, many Finnish enterprises from independently developing internal policies and procedures for whistleblowers protection, based on the international standards.

USA

The defamation law in the USA allows citizens to file claims on behalf of the government to recover stolen funds through contract fraud. As compensation for risk and effort, whistleblowers can receive a fee of 15-25% of any funds and penalties withdrawn. As a result, the US government has been able to receive at least \$ 35 billion in fines and stolen money since 1986, and from 2007 to 2012, the number of new incidents reported by federal police increased from 482 to 1148, including positive decisions for whistleblowers increased from 50 to 223 cases.

One striking example of the work of the detection system is the 2009 incident. The US whistleblower claimed that Walgreens, the second-largest drugstore chain, illegally raised prescription drug prices for Medicaid insurance. The whistleblower pharmacist, who filed a fraud case against the government, received \$ 5 million as a reward. Another American

pharmacist in 2003 caught Johnson & Johnson at fraudulent marketing practices. The lawsuit claimed that the pharmaceutical company had promoted the drug for schizophrenia, which had not been approved by a competent government agency. The whistleblower was awarded a \$ 27.7 million reward (Kalitenko, 2019).

Meanwhile, in USA there is a widely used practice, which is based on the complete confiscation of even bona fide assets (other than those necessary for a modest life) of all family members of those, who are engaged in organized crime and do not cooperate with the investigation. Since the "common fund" is not enough for everyone (and it's not even created for this), a significant number of people involved in crimes will face a choice: risk their lives or doom their family to poverty. The critical part prefers the family – and this knocks the economic soil out from under the feet of the mafia clans.

South Korea

The 2011 South Korean law on the protection of whistleblowers is considered as the most perfect one. It is intended to protect and materially reward state and corporate whistleblowers, who report violations related to safety, health, environment, consumers protection, and fair competition. The Anti-Corruption and Civil Rights Commission, which combines the functions of the Anti-Corruption Bureau and the Ombudsman, can be informed of illegal activities. It accepts information, share verified facts with the appropriate agencies for investigation and sends the results back to the whistleblowers. It also examines allegations of reprisals against whistleblowers and can provide a wide range of protections, including protection against the cancellation of permits, licenses and contracts. In one case, the commission even demanded that the police provide physical protection for the whistleblower, including patrolling the area where he lived. Between 2002 and 2013, the Anti-Corruption and Civil Rights Commission received 28,246 reports of violations, and as a result, 220 cases were investigated, and \$ 60.3 million were returned to the budget, while \$ 6.2 million were paid to whistleblowers as rewards.

Italy

In 2011, Ciro Rinaldi, an employee of the Ministry of Economic Development, said that his colleagues were skipping work by filling out false reports about their presence in the office. Although, a code of ethics for civil servants required reporting illegal activities, Rinaldi was harassed and his report was ignored by local authorities. Then he turned to the financial police, which used hidden cameras to document the violations. 29 people became involved in

legal proceedings and were defendants in litigation, including 4 managers. A year later, in 2012, Rinaldi received a government award. After that, an active public and political discussion began in Italy around the benefits of exposures, and some time later in Milan a protection system for whistleblowers was created in order to prevent corruption and other violations (Kalitenko, 2016).

Meanwhile, in Italy the bribe giver, in case of cooperation with the investigation, is subjected to the exemption from liability not even partially or at the request of the judge and investigators, but completely and automatically. This places all responsibility on the organizer of corruption, breaking the mutual responsibility that unites him with his victims and deprives them of incentives to protect him. An unpleasant side effect for many may be the temporary loss of the notorious "stability": for example, in Italy in the first five years of the application of this principle six governments have been changed.

Japan

In Japan, former Olympus CEO Michael Woodford said the company had hidden huge investment losses for 13 years. Woodford was fired in 2011 before the company recognized the concealment of \$ 1.5 billion in damages up to 1990. Ironically, two Olympus executives, who were actively involved in the concealment, were responsible for the company's whistleblower hotline. Woodford was awarded \$ 15.4 million for his release as a result of an out-of-court settlement (Vykrivachi , 2019, 15).

What should be done?

- Creation of accessible and secure, first and foremost, external channels of information disclosure (including sanctions for breach of anonymity and confidentiality of the whistleblower, harassment, oppression and persecution by the persons mentioned by him or her);
- Protection of the rights of whistleblowers in the workplace, which should be based on the principles of preventing their persecution for active public position and participation in the trade union movement;
- Organize trainings for the authorized units or people working on the prevention of corruption regarding organizing work with the messages of whistleblowers;

- Reform the judiciary and law enforcement agencies for the real protection of whistleblowers by the state, and adopt the national legal provision on the protection of whistleblowers in the form of law instead of regulation;
- Develop in legislation effective procedural safeguards that will make existing legal norms not only declarative;
- Establish common mechanisms for protecting employees from abuse by employers, such as unjustified dismissals, short-term contracts and other violations of labor rights that weaken employees' confidence in "tomorrow";
- To establish in society a zero tolerance for corruption and behavioral change through outreach campaigns, including counteracting a culture of loyalty to the employer, when exposing outsiders is seen as a betrayal of the interests of colleagues and service;
- Attracting attention of the media to the issues of protecting whistleblowers, including spreading the opinion that the actions of the criminal can ensure the inevitability of punishment for the corrupt person;
- Increasing support of the CSOs and NGOs as well as state willingness to increase the number of whistleblowers;
- Protect rights of whistleblowers within their workspace: adverse consequences may include the imposition of a disciplinary sanction, dismissal, demotion, transfer to another job, refusal of promotion, reduction of wages, benefits, bonuses, incentive payments, etc.;
- Ensuring anonymity is a necessary aspect of the procedure for reporting corruption, when the legislative framework is not strong enough and does not provide a full guarantee against physical violence and social conviction.

What else could be done to overcome corruption?

One of the most effective anti-corruption tools is the publicity of the case and the public condemnation of the corrupt person. This is what professional anti-corruption NGOs and investigative journalists do. They may have experience in collecting and disseminating evidence of corruption, experience in disclosing and reporting on corruption cases, contacts with law enforcement agencies, centralized information on such offenses, and public position.

The transparency of the made decisions, their compliance with stringent procedures and standards, the presence of a large number of feedback loops, including confidential ones, will limit corruption institutionally and technologically.

Not fighting corruption means supporting it, considering all the devastating consequences. In this regard, a comprehensive study of the causes of corruption is important, since by identifying the causes, it is possible to eliminate all possible factors that influence the formation of corruption.

In general, liberalization, deregulation, transparent mechanisms of public administration and the gradual change of social traditions are needed to create free competitive market relations instead of corruption. The vicious social conspiracy of the oligarchs with the richest should be broken and the middle class should be strengthened. The repressive mechanisms in this chain of anti-corruption reforms occupy the last place, but they should be used for violation of the new rules (Adamenko, 2018).

It is also important to separate business from power. As long as the business is engaged in politics, there will be no possibility to defeat corruption. The oligarchs should not be in power –they have a completely different mindset, they think differently. Therefore, the main thing to do is to completely restart the state.

Freedom of association is also very important in the fight against corruption. In many countries, millions of workers belong to trade unions or their work is governed by collective agreements. Although not all trade unions exercise their authority effectively, but they are an important tool in the fight against corruption. Democratically organized trade unions can raise the issues of transparency and protection of workers in their civic activities through social dialogue and collective bargaining with employers. Moreover, the essential element in the process of eradicating corruption is also involving citizens and establishing their awareness and encouraging their active position in eliminating corruption.

The progress of nations depends on their abilities to develop right legislative institutional and functional frameworks to reinforce the principles of integrity, good governance, transparency, and accountability. Despite the importance of legislative and institutional frameworks, the real guarantee to achieve the desired progress comes through fair and equitable implementation of legislation and ensuring the effectiveness and efficiency of all concerned anti-corruption bodies. Corruption activity is a main obstacle for the law enforcement and for the development of modern societies. Therefore, eliminating

and combating this scourge require concerted efforts of all parties including the public and private sector and the NGOs (JNACS, 2013).

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