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WHISTLE-BLOWERS AS FACILITATORS OF DECENT WORK

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Abstract
Labour law protection of whistleblowers has recently been avocated across European countries. A number of European Union member states have adopted special laws regarding whistleblowers` protection, but this protection still stays incomplete and fragmented in scope. Last year the European Commission proposed a new law in order to strengthen whistleblowing - the Whistleblowing Directive. This paper aims to determine the key elements of whistleblowers` protection at the workplace, taking into account European Union principles and the concept of decent work. The concept of decent work has been clearly expressed as a core objective of the International Labour Organization (2008). Dignity is associated with the principles of self-respect, autonomy and freedom that are the core values of the contemporary whistleblowers protection framework. This paper deals with theoretical issues of dignity, particularly the autonomy of individuals reporting wrongdoings at work, in terms of whistleblowers` protection standards, thereby addressing the link between the dignity of individuals and the duty of loyalty to employers *versus* the duty of loyalty to the society.

Keywords: *whistleblower protection, dignity at work, the principle of autonomy, EU standards, duty of loyalty.*

INTRODUCTION

In recent years, a number of countries across the European Union have adopted a special law regarding whistle-blowers` protection. Still, their protection stays incomplete and fragmented in scope. The main issue was the unclearness how to balance between two confronted interests: the interest of protecting employers` right to privacy of property information and employees` right to freedom of expression. In essence, the problem could be considered on the basis of protection of the individual moral duty to loyalty to the employer and the duty of loyalty to society.
This article is meant to be a brief sketch to the Europen Union policy and legislation in whistle-blowing protection at the workplace. Introducing the European Union legal framework regarding whistle-blowing, probably the most intriguing issue concerns theoretical views of justification of the duty to loyalty to society. In what follows, first the notion of the whistle-blowers will be introduced, followed by European Union policies in the realm of whistle-blowing. The main focus will be to highlight the theoretical and political grounding of the whistle-blowing in regregard

of the concept of decent work. The concept of whistle-blowers` protection will be addressed as part of a wider, "decent work agenda" and in the context of sustainable development.

THE NOTION OF WHISTLE-BLOWING

The legal concept of whistle-blowing protection is closely associated with ethical and political values of the society. The legal protection of the whistle-blowers is based on the idea of protection of ethical principles of individuals where the principle of universality of social interests stays above the principle of the particularity. Ethical dilemmas of universality and particularity are confronted when we address issues of whistle-blowers` legal protections.

The use of the notion is relatively new. Historically, the term has been used to point to criminal activities where police officers blow in their whistles to alert their colleagues and citizens when they saw a crime (Bolsin at al 2011, 278). Now the whistle-blower can be any person who reports a crime or other illegal activities to the public putting the broader public interest above any particular interest of individuals. There are many definitions of the whistle-blowing and whistle-blowers depending on the fact whether the wider or narrower approach is being considered. Schultz and Harutyunyan (2015) describe whistle-blowing as an act of an individual who within of the organization discloses information and corrects corruption. Miceli et al. (2008) defined whistle-blowing as "reporting by an employee the illegal, immoral or illegitimate practices that are under the control of the employer to the person or organization that may be able to effect action." However, in modern legal theory, legislation and case-law there are several views of whistle-blowing. According to the jurisprudence of the European Court of Human Rights, whistle-blowing is considered through the right to freedom of expression, but in jurisprudence and case-law of the United States of America, whistle-blowing is viewed as an instrument to fight corruption (Vuković, Kovačević, Radović 2018, 110).In practice, whistle-blowing is closely linked with the professional malpractice and represents a mechanism for solving issues in the workplace (Vuković, Kovačević, Radović 2018, 110).

The prevailing theoretical concept of whistle-blowing is based on the following characteristics: 1. an act of an individual, often the member of a labour organization, i.e. an employee; 2.the object of the action is information that has to do with some serious wrongdoings noticed in the organization; 3.the aim is to report or reduce corruption and fraud and to prevent mistakes leading to disasters as well as to prevent or report human rights violations; 4. the intent of the person who reports wrongdoings could not be financial gain or benefit or intended in order to discredit some person in the organization. It means that WB should be conducted according to the legal doctrine of good faith. For instance, France recently adopted the Sapin II Act on transparency, tackling corruption and modernization of business life, which regulates whistleblowing programs aiming at ensuring whistleblowers` protection. The Sapin II Act defines whistleblowers as individuals disclosing or reporting, *in good faith*, a crime, an offense, a violation of an international commitment, a law or regulation infringement, a threat or an important prejudice to the general interest he or she became aware of. Good faith in this context should be

considered as an "injection of moral principles into the relationship between parties" rather than the relationship where the parties are aware of the economic elements of the contract needed to have reasonable expectations (Feinman 2014, 528). But there is a significant difference in terms of the application of good faith doctrine in the concept of whistle-blowing, rising by the fact that the morality of an action has been measured on the individual level of the person involved not as a part of mutual interaction between parties engaged in the obligation.

However, on the one side, injection of moral principles into the concept of whistle-blowing could be addressed through the good faith doctrine but, on the other, as a part of the concept of human dignity, particularly through the expression of the principles of self-respect, autonomy, and freedom. In the Oxford Encyclopedic English Dictionary, dignity is defined as "the state of being worthy of honor or respect." Andorno (2014) emphasizes the difference between inherent human dignity and moral dignity. The former has been considered as the foundational value for exercising basic human rights where „rights derive from human dignity," and the latter is related to the behavior of the person which is changeable (Andorno 2014, 45). Inherent human dignity is linked to the principle of equity and non-discrimination in human rights discourse, but in legal theory, it has a broader meaning. Dignity is also discussed in the context of individual autonomy and self-determination (O'Mahony 2012, 565). Hence, the dignity of human beings includes the right to autonomy and self-determination, i.e.all human beings are capable and entitled to make their own choices, make decisions and create a future by themselves. However, personal autonomy is not unlimited and is subject to restrictions and limitations. Hence, the constitutions of modern states often limited personal autonomy to protect the dignity of other human beings or to protect a greater good.

The right to protection of whistle-blowers appears to be an expression of human dignity, particularly the autonomy of the individual. The right is derived from the right to freedom of expression that is the prevailing view in European case-law. It is limited by setting the conditions for whistle-blowers` protection in terms of individual intention that ought to be in good faith giving the preference to public interest among the particular interest of an employer. The main goal is to fight against corruption and other illegal activities in the workplace. Disclosing information about wrongdoings at the workplace could be internal to the employer or external to the state administrative body or directly to the public.

EUROPEAN LEGAL FRAMEWORK OF WHISTLE-BLOWERS PROTECTION

Whistle-blowing is an important anti-corruption instrument. A lack of effective protection of whistle-blowers raises concern across the European countries in terms of its negative impact on exercising the right to freedom of expression. Article 10 of the European Convention on Human Rights (1950) says that „Everyone has the right to freedom of expression." This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". The mechanism for European whistle-blowers` protection that has dominantly been used is Article 10 of the European

Convention on Human Rights where the European Court of Human Rights plays a crucial role in recognizing the protection for those who disclose wrongdoings in labour organization.

The case that has been extensively cited regarding the whistle-blower's protection under Article 10 of the European Convention on Human Rights (1950) is *Heinisch v. Germany*. Mrs. Heinisch had been dismissed as a nurse in Germany after disclosing mistreatment of elderly patients in a state-operated nursing home (Guyer and Peterson 2013, 11). She spent seven years exhausting the German legal system—where she found no relief from retaliation (Guyer and Peterson 2013, 11). The European Court of Human Rights unanimously concluded that there had been a violation of Article 10. The Court considered the necessity of balance between the need to protect the employer's reputation and rights, on the one hand, and the need to protect the applicant's right to freedom of expression, on the other. The Court ruled that Mrs. Heinisch`s right to freedom of expression has been violated and that her right to report wrongdoings at work is a matter of general interest.

Nevertheless, the development of whistle-blowers protection legislation in Europe is a relatively slow process. The reason is the difference in the regime of employment termination in Europe compared with the regime in the United States of America (Guyer and Peterson 2013, 7). In European countries, if an employer wants to terminate the employment contract, he must have a real and serious cause applying to all dismissal procedures defined by the law. Conversely, in the United States of America, the contract could be terminated for any reason or without any reason. Hence, in European countries, special laws regarding the whistle-blower's protection have not been adopted until recently when the situation has been changed. The main reason was the view that disclosing information about wrongdoings at the workplace could not be a good cause for the termination of the employment contract defined by labour legislation. However, this is a correct conclusion if we speak about internal whistle-blowing, but there are some issues needed to be addressed about external whistle-blowing. Whistleblowing requires the whistleblower to provide evidence supporting his allegations, but under the laws of many European countries, an employee is obligated to never externally disclose such information(Guyer and Peterson 2013, 8). Unauthorized disclosure of the employer's proprietary information has been considered as serious misconduct and represents a good cause to terminate the employment contract (Guyer and Peterson 2013, 8). This had a vast influence on the stakeholders in the European counties to slowly move forward in protecting whistle-blowers. Also, unions and civil society organizations have an important role in advocating the whistle-blower's protection changing the perception in the society about people who dare to report illegal or immoral activities in the organization.

During the last couple of years, several European Union member states adopted special laws about whistle-blowing in the workplace protecting the person who in good faith reports wrongdoings. Nevertheless, the protection still stays incomplete and fragmented in scope where according to the Report of Transparency International, Luxembourg, Romania, Slovenia, and the United Kingdom were the only European Union members that have created comprehensive or almost comprehensive whistleblower protection (Popescu 2015, 138). For instance, in

Germany where the issue regarding whistle-blowing protection has been raised in case *Heinisch v. Germany*, the adoption of a special law of whistle-blowing has been rejected several times. Whistleblowers could only be protected by some provisions of the Employment Protection Act from unfair dismissal on the grounds of „social injustice." (BluePrint for Free Speach 2018, 1). But when the labour courts decide about reporting the wrongdoings at the workplace, they have ruled against whistleblowers favoring the duty of loyalty to the employer protecting the right to privacy instead of employees right to freedom of expression (BluePrint for Free Speach 2018, 1). In France under the Sapin II Act (2016, entered into force in 2017), an anti-corruption law modeled on the US Foreign Corrupt Practices (1977) and the UK Bribery Act (2010), there are some protection provisions for the whistleblowers but with limitations. The notion of the whistleblower is defined by law as „a natural person who reports or reveals, without personal interest and in good faith, a crime or offence, a serious and clear violation of an international commitment, a law or a regulation, or a threat or a serious harm to the public interest, of which the individual has personally gained knowledge". A person is not protected as a whistleblower if they do not meet the legal conditions mentioned in the Sapin II Act (2016): 1. the National security; 2. medical confidentiality; and/or 3. lawyer-client privilege. The information about wrongdoings needs to report first internally to the employer or a person designated by the employer. If it has been unsuccessful, the information could be addressed to a law enforcement authority, administrative authority or professional association (OECD 2017, 8). Only in case of imminent danger or where there is a risk of irreversible damage, the disclosure can be made directly to these organizations (OECD 2017, 8). As a last resort, and failing a response by the above-mentioned organizations within three months, the report may be made public (OECD 2017, 8).

An important step forward in the European Union law has been made by the Draft of the European Union Whistle-blowers Directive, i.e. The Directive on the protection of persons reporting on breaches of Union law that was introduced to the public in April 2018. It was justified by the lack of effective whistle-blowers` protection across the Europe Union member states where the right to freedom of expression and freedom of the media, enshrined in Article 11 of the EU Charter of Fundamental Right has been seriously endangered. Moreover, the lack of effective whistleblower protection also impaired the enforcement of EU law (The Draft of the European Union Whistle-blowers Directive 2018). The ultimate reason for the proposal was the prevention of corruption, malpractice or negligence in both public and private organizations. The Draft lays down common minimum standards for the protection of persons reporting breaches of the European Union law. It applies to all workers, engaged in all forms of labour relations, standard and non-standard employment, self-employed workers, volunteers, and unpaid trainees as well (The Draft of the European Union Whistle-blowers Directive 2018, article 2). A whistle-blower is a person who reports the branches,i.e.actual or potential unlawful activities or abuse of law relating to the Union acts. The branches could be qualified as actual unlawful activities or reasonable suspicions about potential activities which have not yet materialized. Member States are obligated to establish internal channels and procedures for reporting branches. Also, Member States need to

establish the external reporting channels and designate the authorities competent to receive and handle reports. The Draft introduces three-stages of disclosure, i.e. internal, external to the competent administrative authority and disclosure directly to the public. The Draft favors the (mandatory) internal disclosure as a first stage of reporting the branches that is the subject of longstanding scholarly debate about the legal concept of whistle-blowing. It could be morally and legally justified on the grounds of applying to the concept of loyalty to the employer and protection of his economic interests, as well as keeping his reputation safe. Balancing the confronted principles, loyalty to the employer, on the one side, and loyalty to the society, on the other side, is the basis of the Europe Union whistle-blowers protection framework. The protection of confidentiality of personal data and protection from any form of retaliation conducted by the employer are core standards of the Proposal.

THE DUTY OF LOYALTY TO EMPLOYER *VERSUS* THE DUTY OF LOYALTY TO SOCIETY IN TERMS OF DECENT WORK

The moral basis of the standard relation between employee and employer is the duty of loyalty to the employer protecting his economic interests and his property. Disclosing confidential information about property or business in most European countries has been considered as a violation of employment contract and good cause for the dismissal. The adoption of the whistle-blowing protection standards protects the duty of loyalty to society and morality of principle of the individual (Ejaz and Jawad 2016, 2994) neglecting the duty of loyalty to the employer in order to protect the greater good: the welfare of the state and society. Considering the fact that whistle-blowing, as an anti-corruption instrument, is closely linked with the professional malpractice and represents a mechanism for solving issues in the workplace (Vuković, Kovačević, Radović 2018, 110), it could be addressed theoretically in the context of the concept of decent work.

Decent work is a notion originally advocated by the International Labour Organization in a report published in 1999. The term has been used to emphasize the importance of not only the economic goals of the world development expressed in the obligation of „creation of jobs“ but also as construction that ought to include a social component of world development expressed in the “creation of jobs of acceptable quality“. According to the International Labour Organization, the decent work involves “opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, *freedom for people to express their concerns*, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.“The notion of decent work is based on four components: employment, social security, workers rights, and social dialogue. The first two refer to opportunities, remuneration, and work conditions while last two point out the social relations of workers, particularly freedom of association, non-discrimination at work and the importance of exercising the right to express their opinions regarding work-related issues (Ghai 2008, 114).

Applying the standards regarding decent work in a context of strengthening the social dimension of globalization, the European Commission adopted in 2006 an

Act entitled „*Promoting decent work for all*" as the European Union contribution to the implementation of the decent work agenda in the world. The Act stresses the promotion of job creation as a clear economic activity but through improved governance and social dialogue, and by identifying decent work deficits with better cooperation between stakeholders and by reducing the corruption. A few years later, in 2011, the Commission adopted an act entitled „*Increasing the impact of EU development policy: an agenda for change*" stressing the fight against poverty in the context of sustainable development with reference to human rights and democracy in terms of inclusive and sustainable growth. Inclusive and sustainable development presupposes the promotion of decent work and corporate social responsibility at national and international level avoiding the violation of basic human rights. According to this document, the European Union plays a key role in helping member states and candidates to achieve the standard of good governance. The European Union action in this field is fighting against corruption as well. So, the document stresses that „the EU should help its partner countries tackle corruption through governance programmes that support advocacy, awareness-raising and reporting corruption."

The decent work agenda introduced by the International Labour Organization and followed by the European Union activities represents a framework for whistle-blowers` protection. The core objectives of the concept are the promotion of basic social rights of employees in terms of economic competitiveness in order to achieve social justice for all. The duty of loyalty to society is a key component of the concept of whistle-blowers` protection. It begins with respect to the individual principles, i.e. to the person who discloses wrongdoings at work and finishes with respect for principles of more universal, social. But there are also certain universal values, such as solidarity and justice that trump particular economic interests of employer and economic interests of the world. So, preventing and reporting wrongdoings in order to fight against corruption and other illegal activities is in interests of both sides, employee, and employer and in the interest of the world and human development as well. However, in order to achieve the standard of decent work in the era of globalization, employers started to adopt strategies and programmes that included social goals in their management plans. They became part of a new concept of corporate social responsibility. In that sense, employers are responsible not only to their individual interests in order to make a profit but also to universal interests of the whole society. The society`s interests are reflected in the protection of public health, environmental protection, and the fight against corruption, as well as in the interest to perform business activities respecting basic human rights and freedoms. In addition, universally accepted values such as social justice and dignity of human beings are incorporated in the concept of social corporate responsibility.

The concept of decent work that includes social corporal responsibility promotes whistle-blowing at the workplace aiming to fight corruption and other illegal activities. Accepting to implement policy principles of a decent work agenda, employers simultaneously agree to respect the employee's moral obligations to society. The moral duty of loyalty to society gets its legal form in whistle-blowing protection standards. It could be considered as a part of employer policy of social

corporate responsibility accepting to internally implement whistle-blowing provisions regarding wrongdoings in order to report corruption and other illegal activities that seriously endangered the work process.

CONCLUSION

Whistle-blowing is widely recognized as an important anti-corruption instrument. The comprehensive legislation of whistle-blowers` protection at the workplace is adopted in the United States of America as a part of a legal culture that has its root in an accepted model of employment termination, that is dismissal without a good cause. In opposition to the United States, in European countries, the employer can terminate employment only with a legally defined cause. For a very long time, it was the main reason for not adopting special provisions of whistle-blowers` protection. Nevertheless, in most European countries, disclosing information about employers` property to the public has been considered as a serious violation of employment contracts and a good cause for dismissal. It had a great influence on European policymakers to change their views regarding whistle-blowers` protection and to slowly move forward to the adoption of legislation in this field.

An important milestone was when the European Union introduced the Draft of Whistle-blowers Directive. The Draft recognizes three-stages of whistle-blowing: internal, external to the competent authority and whistle-blowing directly to the public. The employee first has an obligation to internally report wrongdoings. It could be inferred that the Draft accepting mandatory internal whistle-blowing protects the duty to loyalty to the employer successfully balancing between confronted interests of parties. But if internal reporting is not successful, the issue can be addressed to the public. The moral duty of loyalty to the society will be protected through exercising the right of freedom of expression. From the standpoint of legal theory pertaining to labor relations, favoring the duty of loyalty to society instead of the duty of loyalty to the employer can be justified by the application of the concept of decent work and corporate social responsibility.

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