

# Problems of implementation of whistleblower institution in Ukraine

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## *Abstract*

*The article deals with the study of problems regarding prevention of corruption. Based on the studies of national and foreign research papers, the authors proved that such problems became the most urgent themes of modern scientific researches. The origin of the concept of “corruption” was analyzed; it has been stated that different approaches to the definition of corruption are based on legal or normative aspects, and those based on social aspects are different from those based on the understanding of the public service and social interests. It has been proved that one of the most effective tools for combating corruption in the world is using whistleblowers. The main problems of whistleblowers implementation in Ukraine were studied. It has been noted that Ukrainian society ambiguously perceives the whistleblowers institution. Rejecting of corruption whistleblowers by the society negatively affects the effectiveness of preventing this phenomenon. The authors have analyzed social and political problems concerning creation of anti-corruption court in Ukraine and its possible positive influence on the effective process of combating corruption.*

**Keywords:** *prevention of corruption, national and foreign experience, whistleblowers institution, social and legal protection of whistleblowers.*

**JEL Classification:** K14, K42

## **1. Introduction**

The problems concerning combating corruption has become the most relevant topics of current studies. As Robert Williams noted “a stream of publications about corruption now turned into a raging torrent”.<sup>4</sup> The most important tasks of legal science are to study this phenomenon, the history of its origin, the analysis of the structural elements for combating, preventing and forecasting as to this phenomenon. The experience of countries that have success in the sphere of combating corruption can be useful to overcome this phenomenon in Ukraine.

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<sup>4</sup> Williams, R., *Explaining corruption*. Northampton, MA: Edward Elgar, 2000.

Corruption not only leads to economic losses, causing the decrease in quality of life, but also has a negative effect on the efficiency of the state authorities, decreasing the efficiency of public management, worsening the geopolitical situation of the country or even destroying the state as a sovereign unit. The high degree of latency of corruption, its internal tendency to modify, the “mimicry” concerning the changing social, economic, political and other conditions in society and the state considerably complicate the combat against it as a phenomenon that take place in many life aspects of modern Ukraine and its citizens. It is proved empirically that countries with high levels of corruption have low GDP per capita, and vice versa accordingly.<sup>5</sup>

To answer the question of what the term “corruption” means is very difficult because, as some researchers note, “corruption is easier to recognize than to define”.<sup>6</sup>

Some scholars even believe that to give a clear definition of corruption, which would be generally accepted, is impossible in principle. Among the reasons for this they call the cultural diversity of different societies. For example, the fact which is perceived as a small bribe in one society, is allowed and even expected in the other one according to the business practices of that culture. In addition, there is no clearly defined range of actions that are recognized as corruption for all legal systems (“the concept of appropriateness”).<sup>7</sup>

When studying the definition for term “corruption”, we should apply to the etymology and semantics of it. Researchers have identified several variants for the origin of the term “corruption”. Some of them believe that this term originates from the combination of the Latin words “correi” (several participants of obliging relations in regard to one subject) and “rumpere” (to break, deface, cancel). As a result, the autonomous term “corrumpere” was formed, which includes participation in the activities of several individuals whose purpose is “to pull back” the normal course of the trial or the process concerning the management of public affairs.<sup>8</sup>

The Henry Black Law Dictionary defines corruption as „an act that is committed with the intent to provide some benefits that are incompatible with duties of an official person and rights of others; acts of an official person who

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<sup>5</sup> Montinola, G. R., Jackman, R. W., *Sources of corruption: A cross-country study*, „British Journal of Political Science” 32 (2001): 147-170.

<sup>6</sup> Люїс, Ф. (Luis, F.), *Світове явище (the World Phenomenon)*, Кур’єр ЮНЕСКО (корупція) [Courier of UNESCO (corruption)], August 1996: 5.

<sup>7</sup> Холмс, Л. (Holmes, L.), *Корупція та криза в пост-комуністичних державах (Corruption and Crisis in the Post-Communist States)*, Корупція у сучасній політиці / міжнародна конференція, Велика Британія, 14-16 листоп. 1996 (Corruption in Contemporary Politics / International Conference, UK, November 14-16. 1996) p., 7.

<sup>8</sup> Колодкин, Л. М. (Kolodkin, L.M.), “Коррупция и деонтологические меры борьбы с продажностью (“Бусидо” в Японии) (Corruption and Deontological Measures as to Combating Against Corruptibility (“Bushido” in Japan)).” *Коррупция в России: состояние и проблемы / мат. науч.-практ. конф. (26-27 марта 1996 г.)*. Москва: Московский институт МВД России, 1996 (Corruption in Russia: state and problems / mat. scientific-practical conf. (March 26-27, 1996). Moscow: Moscow Institute of the Ministry of Internal Affairs of Russia): 86.

improperly uses his/her position or status to obtain any advantage for himself/herself or another person for purposes that contradict the duties and rights of others”.<sup>9</sup>

The national (Ukrainian) anti-corruption legislation defines corruption as using the authority granted to him/her or related opportunities by a person in order to obtain unlawful benefit or adopting of such benefit or adopting of a promise/offer of such a benefit for himself/herself or others or respectively a promise/offer or providing unlawful benefit to a person specified in Article 3 of this Law, or at his/her request doing actions mentioned above addressing to another individual or legal entity to persuade an official person to unlawful use of authority granted to him/her or related opportunities.<sup>10</sup>

Corruption can be classified into two main groups: the “political” and “corporate”. Based on the common understanding, the political corruption involves participation of public officials (both government officials and local authorities) in corrupt actions. Political corruption takes place when members of the state power use the authority given to them for personal benefit.

Formal definitions of political corruption differ among jurisdictions. For example, certain political fund-raising activities are legally sanctioned in some communities while prohibited in others. Not all governments are related to the misconduct of political corruption.

Abuses of official authority or position for reasons other than private gain are not political corruption. Examples include police brutality or unethical subjugation of political opponents. Although improper and committed by government actors, such conduct is not motivated by direct private gain. Thus, it falls outside the scope of political corruption.

Conversely, examples of other misconduct clearly falling within the scope of political corruption include: extortion; nepotism; embezzlement; bribery; cronyism; extortion; graft, and patronage. In all such backdrops, undue private enrichment results from the corruption at issue. Often, political corruption facilitates criminal enterprise such as money laundering, white slavery, or drug trafficking.<sup>11</sup>

Corruption is also defined as the use of power, status of a post as well as its authority and the related opportunities for personal or group interests.

The peculiarity of such understanding of corruption is stipulated by the fact that:

1) together with using the power, corruption includes using authority of a post and related opportunities;

2) satisfaction of interests of third persons by means of misuse of official

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<sup>9</sup> *Основы борьбы с организованной преступностью (Fundamentals for the fight against organized criminality)* / под ред. В. С. Овчинского, В. Е. Эминова, Н. П. Яблокова. Москва: ИНФРА-М, 1996 (by ed. V.S. Ovchinsky, V.E. Eminova, N.P. Yablokova. Moscow: INFRA-M, 1996), 14.

<sup>10</sup> Закон України «Про запобігання корупції» (*The Law of Ukraine «On Prevention of Corruption»*). Відомості Верховної Ради України. 2014. № 49. Ст. 2056 (Information from the Verkhovna Rada of Ukraine. 2014. No. 49. Art. 2056).

<sup>11</sup> Corruption and Whistleblowers, <http://www.whistleblowingprotection.org/?q=node/41>, consulted on 1.05.2019.

powers, authority of state bodies and other opportunities which are given to official due to his/her post, constitutes corruption only when such interests are of group.

The definition of corruption given by Lambsdorff clearly resembles that one fixed in the national (Ukrainian) anti-corruption legislation – the misuse of public power for private benefit, for example, bribing of public officials, kickbacks in public procurement, or embezzlement of public funds.<sup>12</sup>

When studying the phenomenon of anti-corruption policy worldwide, Sarah O'Byrne concluded that some of these typologies distinguish between definitions that center on legal/rule-breaking aspects and those more based on social perceptions, while others distinguish between public office versus public interest centered definitions. Still more classify definitions depending on the explicit type of corruption; they refer to e.g. nepotism, bribery, grand corruption etc. Across all the definitions however, it is clear that over time, especially in recent years, the understanding of the term has very much moved away from the big picture idea of corruption, that is the idea that corruption speaks to the concept of a general overall decay in society, dating from classical times through to Machiavelli, and towards a more individualistic conception of the term.<sup>13</sup>

Corruption can be defined both as a social phenomenon (as a whole and taking into account particular aspects – political, economic, historical, cultural, moral, etc.) and as a sociological, criminological, legal category. It is worth quoting the words of Dr. Edwin C. Cierpial Jr, who compared the corrupt official with internal terrorist, who can destroy the whole image of the organization by one misconduct.<sup>14</sup>

The legal meaning of corruption cannot be narrowed to a certain individual illegal act. The attempts to understand corruption as an individual offence are inherently wrong and legally unfounded. Corruption is not an independent type of crime; it appears in many types of criminal behavior.

## 2. World experience of using whistleblowers

In Ukraine, political corruption has unfortunately acquired such scale that it is difficult to determine the corruptness level of officials.

The international experience demonstrates high efficiency of using whistleblowers when combating corruption.

The history of using whistleblowers in combating criminality originates from extreme antiquity. For example, the treatise on the art of war, published in China in 400 B.C. says that “the knowledge cannot be obtained in advance from

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<sup>12</sup> Lambsdorff, J. G., *The methodology of the 2005 Corruption Perceptions Index*, [http://www.icgg.org/downloads/CPI\\_Methodology.pdf](http://www.icgg.org/downloads/CPI_Methodology.pdf), consulted on 1.05.2019.

<sup>13</sup> O'Byrne, Sarah, *There is Nothing More Important Than Corruption: the Rise and Implementation of a New Development Idea / A dissertation submitted to Johns Hopkins University in conformity with the requirements for the degree of Doctor of Philosophy*. Baltimore, Maryland, 2012, 59.

<sup>14</sup> Cierpial, Edwin C. Jr., *A Study on Military Corruption and Corruption Perception Level (a Focus on the Empirical Analysis of 8th U. S. Army Soldiers)*: a dissertation for the degree of doctor of philosophy; department of public administration graduate school of Soongsil University, 2006, 32.

the gods and demons, can not be gained through reasoning and calculations. The knowledge about the state of the enemy can be obtained only from the people». <sup>15</sup>

Encouraging employees to report wrongdoing (“or blow the whistle”), and protecting them when they do, is an important part of corruption prevention in both the public and private sectors. Employees are usually the first to recognize wrongdoing in the workplace, so empowering them to speak up without fear of reprisal can help authorities both detect and deter violations. <sup>16</sup>

The term “whistleblower” can mean different things depending on the situation and individuals involved. For the purposes of this study, whistleblower is defined as a law enforcement agent who reports the wrongdoing of another employee to the supervisor, other member in the organization, or a member of an outside organization to stop the illegal or immoral practices and prevent more wrongdoing from occurring. <sup>17</sup>

When studying the international experience of using whistleblowers in combating corruption, we noticed the research carried out by Edwin C. Cierpial Jr. This scholar studies the problems of combating corruption in the US Army. Among many tools to combat corruption in the US Army, he mentions the Whistle Blowers Act.

The third-tier tool in the fighting of corruption is contained in AR 600-20 Army Command Policy, dated 1 February 2006. This tool is covered in Chapter 5 para. 5–12, the Military Whistleblower Protection Act. This section protects a Soldier that wants to report fraud, waste, abuse, or corruption. The act states the following:

Department of the Army personnel are prohibited from taking acts of reprisal against any Soldier for filing a complaint of unlawful discrimination or sexual harassment (see DOD Directive 7050.6).

a. No person will restrict a member of the Armed Services from making a protected communication with a member of Congress; an Inspector General; a member of a US Department of Defense (hereinafter – DOD) audit, inspection, investigation or law enforcement organization; or any other person or organization (including any person in the chain of command) designated under this regulation or other administrative procedures to receive such communication.

b. Soldiers will be free from reprisal for making or preparing a protected communication.

c. No employee or Soldier may take or threaten to take an unfavorable personnel action, or to withhold or threaten to withhold a favorable personnel

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<sup>15</sup> Нечипоренко, О. (Nechiporenko, O.), *Сунь-Цзы: “Шпион – сокровище для государства” (Sun-Tzu: “Spy is a Treasure for the State”)*, „Служба безопасности: новости разведки и контрразведки” („Security Service: intelligence and counterintelligence news”), 4 (1993): 12.

<sup>16</sup> Whistleblower Protection, <http://www.oecd.org/corruption/whistleblower-protection.htm>, consulted on 1.05.2019.

<sup>17</sup> Scowcroft, Kristen, *Does the Code of Silence Relate to Whether Federal Employees File Whistleblower Grievances?* / A Dissertation Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Management in Organizational Leadership; University of Phoenix, 2014, 116.

action, in reprisal against any Soldier for making or preparing a protected communication.

d. The chain of command will ensure complainants are protected from reprisal or retaliation for filing equal opportunity complaints. Should Soldiers be threatened with such an act, or should an act of reprisal occur, they must report these circumstances to the DOD Inspector General. If the allegation of reprisal is made known to any agency authorized in this regulation to receive complaints, the agency should refer the complaint to the DOD Inspector General. It is strongly encouraged to simultaneously report such threats or acts of reprisal to the appropriate chain of command. The DOD IG Hotline phone number is 1(800) 424-9098 or DSN 664-8799; the DOD IG Hotline e-mail address is hotline@dodig.osd.mil - either may be used to report threats or acts of reprisal. Personnel calling from outside the continental United States may dial (703) 604-8569; or, mail a letter to Department of Defense Inspector General, ATTN: Defense Hotline, 1900 Defense Pentagon, Washington, DC 20301-1900 (U. S. Army AR 600-20, 2006, p. 49).<sup>18</sup>

In our opinion, it is very positive to study the experience of combating corruption in Romania. As Sabina Schnell notes in her research, Romania represents a critical case for the potentials and limits of externally-driven adoption of TAC policies: it is a high-corruption country that has enacted a spate of transparency and anti-corruption policies in the last decades, while being exposed to an unprecedented degree of international influence through the EU accession process.<sup>19</sup>

Our study confirms the thought that international influence or support of transparency and anti-corruption policy indeed plays an important role in the development of rights and opportunities. But ultimately, acceptance, implementation and sustainability of policies over time depends on internal stimuluses both decision makers and civil society.<sup>20</sup>

The present situation in Ukraine is not an exception. On its way into the European area, the country is trying to bring the national legislation into accord with the best international practices. During the last three years Ukraine established a number of anti-corruption bodies: the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU), the National Agency for Prevention of Corruption (hereinafter – NAPC). The national anti-corruption legislation has also been significantly updated. When analyzing the Romanian experience of combating corruption, we can draw some parallels between this country and Ukraine. The introduction of assets declaration for public servants was also critically perceived.

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<sup>18</sup> Cierpial, Edwin C. Jr., *op. cit.*, 2006, p. 27-28.

<sup>19</sup> Schnell, Sabina, *International Policy Diffusion and Domestic Policy-Making: the Case of Two Transparency and Anticorruption Policies in Romania* / B.A. in International Economics and Business; Academy of Economic Science. Bucharest, Romania, 1999, 201.

<sup>20</sup> *Idem*, p. 204.

As it was in Romania in 2002, the general opinion in Ukraine in 2016 is that the free access to the declarations of officials will help thieves to commit thefts.<sup>21</sup>

The Law of Ukraine “On Prevention of Corruption”<sup>22</sup> was adopted by the Parliament of Ukraine in 2014. This Law defines the legal and organizational basis of the system for preventing corruption in Ukraine, the content and the application of preventive anti-corruption mechanisms, rules to eliminate the consequences of corruption. This Law defines collaboration with persons who in good faith report about possible facts of corrupt or corruption-related offenses and other violations of this Law (whistleblowers) as one of the mechanisms for combating corruption. NAPC is responsible for organization of activity of whistleblowers. In addition, this Agency is responsible for taking measures as to their legal and other protection, prosecution of persons who are guilty of violation of rights of whistleblowers due to their activity.

The experience of foreign countries shows that people are ready to assist law enforcement agencies in combating criminality under the condition of providing protection to their life, health and property.<sup>23</sup> It was repeatedly said in the domestic media that people are afraid of informing the law enforcement agencies on the facts which could help in the investigation of crimes because of solicitude as to their lives and health.

The important aspect of encouraging persons to expose corruption is motivation. Modern theories of motivation are based on two main concepts: “needs”<sup>24</sup> and “reward”<sup>25</sup>. The doctor and psychologist Abraham Maslow once identified five main motives in human behavior. The first of them is to satisfy the basic needs: “breathing, thirst, hunger, heat”. When the immediate threat to life is removed, the person seeks for “safety” (self-preservation).

The next motivational stages are “contact and involvement”, “prestige, status, recognition”. The highest motive in Maslow pyramid is “self-realization”, that is the focus of the individual on personal realization in the defined sphere. Perhaps the desire for self-realization is not inherent to all equally, but that this is undoubtedly an important factor.

The above system of motives may be underlying when considering the problem of finding effective ways of involving individuals in exposing corruption.

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<sup>21</sup> *Idem*, p. 205.

<sup>22</sup> Закон України «Про запобігання корупції» (*The Law of Ukraine «On Prevention of Corruption»*). Відомості Верховної Ради України. 2014. № 49. Ст. 2056 (Information from the Verkhovna Rada of Ukraine. 2014. No. 49. Art. 2056).

<sup>23</sup> Тарасенко, В. Є., Тарасенко Р. В. (Tarasenko, V. Ye., Tarasenko R. V.), *Інститут конфіденційного співробітництва в оперативно-розшуковому праві (Confidential Cooperation in Operative and Search Law)*. Луганськ: РВВ ЛДУВС (Lugansk: RVV LSUVS), 2009, 42-43, 56.

<sup>24</sup> Маслоу, А. Г. (Maslow, A. G.), *Мотивація и личность (Motivation and Personality)*. Санкт-Петербург: Евразия (St. Petersburg: Eurasia), 1999.

<sup>25</sup> *Motivation and work behavior* / compiled by M. Richard Steers, Lyman W. Porter. 5th ed. 1994; Vroom, V., Yetton P. *Leadership and Decision Making*. Pittsburgh: University of Pittsburgh Press, 1973.

While solving various issues by individual, particular types of his/her behavior are somehow rewarded.

As the results of our research testify, one of the important issues to promote the combat against corruption is the motivation for such activities. According to our data, 75 (29%) persons were led to participating in exposing corruption by the motive of remuneration, 81 (31%) – by the motive of obtaining privileges prescribed by law. Thus, the vast majority (60%) of whistleblowers wants to get some profit for their help.

The practice of effective management testifies that the most effective motivation is achieved only if the performers believe that their efforts must enable them to achieve their goal and lead to obtaining particularly valuable rewards. Conversely, motivation weakens, if the probability of success or reward value is estimated low.

Taking into account all mentioned above, we can summarize that motivation is the process of such orientation of motivating stimuluses of an individual, when a person seeks to achieve a certain goal. It is proved by the science of management that everybody has a certain motivational structure that in a particular situation leads to well-defined actions. It is widely acknowledged that that only unmet needs spur on a person to act without external coercion.

Despite the positive experience of combating corruption in the USA, the researchers of problems in combating corruption come to the disappointing conclusion in certain areas: “If no implementation of change occurs to realign the perceptions Soldiers hold, then the current corruption perception culture will grow; thereby, ensuring the destruction of the Army Institution from within instead of being defeated by an external enemy. If ethical individuals are leaving before they can take leadership positions or careerists are leaving because they are tired of fighting the corrupt, then I project a collapse of the all-volunteer force is inevitable. A major concern is that if the number of corrupt individuals continues to grow and one day out numbers the standard-bearers, a dark change will occur. Fix this problem now”.<sup>26</sup>

It can be convincingly stated that in majority of the most developed countries, the admissibility of using information received from whistleblowers as evidence is recognized by law as an objective necessity. The long-term practice of using such intelligent possibilities by police and special services of different countries while combatting both political and common-crime criminality testifies that the first place is fairly occupied by the intelligence method (that is the help of whistleblowers) even taking into account the effectiveness of modern electronic intelligence.

It is important to emphasize that there is also the problem concerning the compliance of the institution of whistleblowers to the fundamental principles and norms of ethics and morality. This problem remains relevant and is in the focus of

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<sup>26</sup> Cierpial, Edwin C. Jr., *op. cit.*, 2006, p. 192.



attention of scholars. After all, the principles of morality contradict such means of achieving the goal as a lie, deception, betrayal, etc.

### 3. Problems of social and legal protection of whistleblowers

The Constitution of Ukraine has determined that a person, his/her life and health, honor and dignity, inviolability and security are recognized as the highest social value in Ukraine (Article 3 of the Constitution of Ukraine). Human rights and freedoms and their guarantees determine the content and the orientation of the state. It is the main responsibility of the state to assert and guarantee the human rights and freedoms. The state is responsible to a person for its activities.<sup>27</sup> The quoted norm of direct effect from the Constitution of Ukraine directly concerns those who provide assistance to authorized agents in combating corruption.

Taking into account that the acting legislation does not establish a clear concept of the social and legal protection of whistleblowers, it is not possible to determine what guarantees and compensations are included in this concept. This issue requires to consolidate the concept of social and legal protection in law, understanding it as a set of measures guaranteed by the legislation of Ukraine that provide compensation for moral and physical expenses, by providing privileges or material payments to citizens in connection with their participation in prevention of corruption. We believe that measures of social and legal protection should apply to all persons who perform socially useful functions, and promote the prevention and investigation of corruption cases by real and active actions, as well as provide other operationally valuable information, regardless of the form of their cooperation (public or secret). Moreover, the fact of providing such assistance is a sufficient reason for the extension of the whole complex of social and legal guarantees stipulated by the current legislation.

It should be noted that the legal protection of confidential persons at all times was of a reduced character, which led to the violation of social rights and guarantees of persons who provided assistance in combating criminality.

The experience of foreign countries regarding the release from criminal responsibility for persons who assist the law enforcement agencies should not be underestimated. For example, in Hungary, agents involved in secret cooperation on the basis of materials for prosecution constitute the majority of all agents. In the US Drug Enforcement Administration more than 50 % of agents collaborate in exchange for release them from punishment or for mitigation of punishment.<sup>28</sup>

Thus, the practice of the countries of the world in the field of combatting corruption shows that cooperation with whistleblowers and ensuring their protection is one of the important aspects of the anti-corruption policy of any law-

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<sup>27</sup> Конституція України (*The Constitution of Ukraine*). Відомості Верховної Ради України (Information from the Verkhovna Rada of Ukraine), 1996. № 30. Ст. 141.

<sup>28</sup> Брусницин, Л. В. (Brusnitsin, L.V.), *О порядке применения мер безопасности к лицам, содействующим уголовному правосудию (On the Application of Security Measures to Persons Promoting Criminal Justice)*, „Государство и право” („State and law”), 2, 1997: 92-97.

governed state. Ukraine consistently fulfills GRECO's requirements as to adopting clear rules for public servants to inform about suspicions of committing corrupt acts and to protect the persons who fairly inform about such cases (protection of whistleblowers) from the negative consequences.

Article 53 of the Law of Ukraine "On Prevention of Corruption" provided the state protection for persons who provide assistance in preventing and combating corruption. The first part of Article 53 establishes the concept of "a whistleblower" in a certain way. In Other Words, that is a person who provides assistance in preventing and combating corruption (the whistleblower), who having a reasonable belief that the information is reliable, informs about the violation of the requirements of this Law by another person.

In addition, the Law mentioned above provides for the legal protection of whistleblowers. So, individuals who provide assistance in preventing and combating corruption are protected by the state. In the event of a threat to the life, dwelling, health and property of persons providing assistance in preventing and combating corruption, or their relatives, in connection with the reported violation of the requirements of the Law of Ukraine «On Prevention of Corruption», law enforcement authorities may apply to them legal, organizational and technical and other measures aimed at protecting against unlawful actions provided by the Law of Ukraine "On Providing Safety of Persons Involved in Criminal Proceedings".<sup>29</sup>

The Law "On Providing Safety of Persons Involved in Criminal Proceedings" provides such security measures:

- personal protection, protection of dwelling and property;
- granting of special means for personal protection and notifying about danger;
- use of technical means for control and listening of telephone and other negotiations, visual observation;
- replacement of documents and change of appearance;
- change of place of work or study;
- resettlement to another place of residence;
- placement in a preschool educational institution or an institution of social protection agencies;
- ensuring the confidentiality of personal data;
- closed trial.

However, in our opinion, under today's conditions, the application of such security measures is somewhat complicated or impossible for Ukrainian anti-corruption bodies. First of all, this is due to the lack of adequate financial support. If, for example, in the Russian Federation, the Program of Protection for Victims, Witnesses and Other Participants in Criminal Proceedings for 2009-2013, approved by the Government of the Russian Federation on October 2, 2009, No. 792,

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<sup>29</sup> Закон України «Про забезпечення безпеки осіб, які беруть участь у кримінальному судочинстві» (*The Law of Ukraine "On providing Safety of Persons Involved in Criminal Proceedings"*), Відомості Верховної Ради України (Information from the Verkhovna Rada of Ukraine), 1994. № 11. Ст.51.

provided costs in the amount of 20.7 million RUB for 2010<sup>30</sup> for the provision of protection for victims, witnesses and other participants in criminal proceedings, but in Ukraine, the expenditures for these measures are not provided for at all.

The witness protection measures are known to be rather expensive. Every year, huge amounts of money are spent on them all over the world. In 2003, the US spent \$ 59,700,000, Australia – \$ 1,000,000 in 2006 for these needs.<sup>31</sup> Currently, it is necessary to clearly identify the concrete measure of protection, the criteria for choosing measures of protection (the degree of threat, the nature of crime, the significance for a criminal case, etc.) at the legislative level of decision-makers.<sup>32</sup>

However, these measures do not cover the entire set of ways to ensure reliable legal protection of each whistleblower from possible criminal attacks on him personally and do not compensate for possible moral loss, restriction of his rights and legitimate interests, which are not completely eliminated even with the use of security measures if they happen.

The implementation of the protection issues in such situations depends largely on the value of the whistleblower, his authority in the environment, the conditions and circumstances of the reveal.

In addition to security measures, the law provides limitations arising from the labor relations of whistleblowers. A person or a member of his/her family can not be dismissed or compelled to be dismissed, brought to a disciplinary liability, or subjected to other negative measures of influence by the director or employer (transfer, attestation, change of working conditions, refusal to provide promotion, reduction of salary, etc.) or the threat of such measures of influence in connection with informing about violation of the requirements of the Anticorruption Law by another person.

The information about the whistleblower can be disclosed only with his consent, except in cases established by law.

As it was mentioned above, the NAPC, as well as other state bodies, authorities of the Autonomous Republic of Crimea, and local self-government bodies are responsible for organizing the institution of whistleblowers. These authorities shall provide conditions for their employees to be able to inform about the violation of the requirements of the Anticorruption Law by another person, in

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<sup>30</sup> Баландин, Д. А. (Balandin, D. A.), *Некоторые проблемы и направления совершенствования правового регулирования финансового обеспечения оперативно-розыскной деятельности УИС (Some problems and directions for improving the legal regulation of financial support for intelligence in the Criminal and Executive System)*, „Вестник Владимирского юридического института” („Bulletin of the Vladimir Law Institute”), 1 (2010): 9.

<sup>31</sup> Australia, Australian Federal Police, *Witness Protection: Annual Report 2005-06*. Canberra: Team Leader Publications, 2006, 9; United States of America, Department of Justice, Office of the Inspector General, Audit Division, *United States Marshals Service: Administration of the Witness Protection Security Program: Executive Summary*. Washington, 2005, 1.

<sup>32</sup> Гусев, В. А. (Gusev, V. A.), *Возмещение ущерба, причиненного лицом, оказывающим конфиденциальное содействие оперативным подразделениям органов внутренних дел (Compensation for damage caused by a person who provides confidential assistance to intelligence units of internal affairs bodies)*, „Полицейское право” („Police law”) 2 (2007): 146-149; Тарасенко, В. С., Тарасенко Р. В. (Tarasenko, V. Ye., Tarasenko R.V.), *op. cit.*, 2009, 114.

particular through special telephone lines, official websites, electronic means of communication. In this regard, it should be noted that the system of such informing through the NAPC website does not meet the requirements of Part 5 of Article 53 of the Law of Ukraine “On Prevention of Corruption”. Besides, it is stated in the Law that informing of violation of the requirements of this Law may be carried out by the employee of the relevant body without the authorship (anonymously). However, the form of such informing that is established on the NAPC website<sup>33</sup> provides the mandatory indication of the name and surname of the person who informs about corruption.

The requirements for anonymous reporting in regard to the violation of the requirements of the Law of Ukraine “On Prevention of Corruption” and the procedure for their consideration are determined by this Law.

An anonymous report regarding the violation of the requirements of the Anticorruption Law is subjected to consideration, if the information contained therein relates to a concrete person, contains actual data that could be verified.

The anonymous report regarding the violation of the requirements of this Law is subjected to verification within the maximum of fifteen days from the date of its receipt. If it is not possible to check the information contained in the report within the specified period, the head of the relevant body or his deputy shall extend the time limit for consideration of the report to thirty days from the date of its receipt.

In case if the information contained in the report regarding the violation of the requirements of the Anticorruption Law is confirmed, the head of the relevant body shall take measures to stop the violation found, to eliminate its consequences and bring the perpetrators to disciplinary liability. In cases of revealing signs of a criminal or an administrative offense, the head of the relevant body shall inform the specially authorized subjects in the field of combating corruption. The NAPC constantly monitors the implementation of the law in the field of whistleblowers protection, conducts annual and reviews of state policy in this field.

In case of revealing corruption or corruption-related offenses or receiving information about such offenses by employees of relevant state bodies, the authorities of the Autonomous Republic of Crimea, local self-government bodies, legal entities of public law, and their structural divisions, the officials of state bodies, the authorities of the Autonomous Republic of Crimea, officials of local self-government bodies, legal entities of public law, their structural subdivisions are obliged to take measures to stop such offense within their competence and immediately report about it in writing to a specially authorized subject in the field of combating corruption.

In our opinion, the rules of the Law of Ukraine “On Prevention of Corruption” mentioned above are quite progressive, correspond to European practice, and according to some experts, even are ahead of the legislation of the leading European countries to some extent.

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<sup>33</sup> Повідомити про корупційне правопорушення (To Inform about Corrupt Offense), <https://nazk.gov.ua/report-corruption>, consulted on 1.05.2019.

However, with considerable theoretical and practical experience of confidential cooperation, we dare to assert that the execution of the law may fail. For example, there are constant attempts of political elites to make adjustments to anti-corruption legislation as well as the political processes that are taking place in Ukraine today. The above mentioned facts are confirmed by constant reports in the mass media, and it directly follows from the report of the NAPC Chairman N. Korchak.<sup>34</sup>

In some mass media, speeches of politicians and leaders of a number of parties and movements, there are still calls for the search of secret officers of police and security services, their names, places of residence, etc.<sup>35</sup>

In this regard, in the current conditions, the special attention should be paid to their protection of whistleblowers from being reviled. It should be noted that the protection of whistleblowers in intelligence practice of foreign countries is of great importance. This fact testifies about the relevance of foreign experience study and the expediency for its use in practice in order to protect persons who provide assistance to law enforcement agencies in the field of combatting corruption.

In addition, one more example should be presented when sometimes the political processes change the vector of development and the current legislation. So, after the Revolution of Dignity in Ukraine, the Law “On the Power Clearance” was adopted.<sup>36</sup> The purpose of this Law is to determine the legal and organizational principles for the power clearance (lustration) to protect and consolidate democratic values, the rule of law and human rights in Ukraine. The law provides the prohibition to hold posts in government bodies for the persons who were regular employees or secret agents in the State Security Committee (SSC) of the USSR, the SSC of the Ukrainian SSR, the SSC of other former Soviet republics, the Main Intelligence Department of the Ministry of Defense of the USSR, and graduated from higher educational institutions of the SSC of the USSR (except technical specialties). It would seem that the law is necessary, but in our opinion, it's not all that simple. The political instability in our country can lead to the fact that after some time such a ban could be imposed on whistleblowers who collaborated with the NAPC. No one can guarantee the reverse, even international partners of Ukraine, because their influence is also limited.

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<sup>34</sup> Відкрите звернення Голови НАЗК Наталії Корчак до НАБУ, ГПУ, Національної поліції, РНБО, державних органів, громадськості (Natalia Korchak, Head of the National Agency for Prevention of Corruption, opened the appeal to the National Anti-Corruption Bureau of Ukraine, Prosecutor General's Office of Ukraine, National Police, National Security and Defense Council, state authorities, and the public), <https://nazk.gov.ua/news/vidkryte-zvernennya-golovy-nazk-nataliyi-korchak-do-nabu-gpu-nacionalnoyi-policiyi-rnbo>, consulted on 1.05.2019.

<sup>35</sup> Козаченко, І. П. (Kozachenko, I.P.), *Правова і соціальна необхідність оперативно-розшукової діяльності органів внутрішніх справ (Legal and social necessity for intelligence activity of the internal affairs bodies)*, „Проблеми юридичної науки та правоохоронної практики” („Problems of legal science and law enforcement practice”), 1994: 236.

<sup>36</sup> Закон України «Про очищення влади» (*The Law of Ukraine «On the Power Clearance»*). Відомості Верховної Ради України (Information from the Verkhovna Rada of Ukraine). 2014. № 44. Ст. 2041.

The judge L. Holnyk is a vivid example of how the state “cares” about the whistleblowers. In Ukraine, she is called a judge – whistleblower. The mayor of Poltava, Olexander Mamai appealed to her with attempts to “arrange” and to close the administrative proceeding, which concerned him personally, for the adoption of decisions with the conflict of interest. However, the judge did not agree to such unlawful actions, withstood the pressure, and moreover, she filmed the attempt of the Poltava Mayor to “hush up” the case, and now these facts also became the subject of investigation by law enforcement officers. However, there are few people who want to come after L. Holnyk, and this is due to the consequences that she has received for her irresistible desire to fight for justice. The information about the pressure on L. Holnyk does not come from the front pages of the Internet editions and TV broadcasts. Despite the considerable resonance and publicity, the “system” does not stop the attempts to wipe up the judge – whistleblower.

Ukraine is not alone with the problems of social and legal protection of whistleblowers. One example of the lack of adequate protection of whistleblowers in Romania should be presented.

So, assessments of whether the agency had too much or not enough power varied. Parts of civil society and a number of external observers considered the law did not go far enough. For example, Jorge criticized the fact that the law does not encourage – even discourages - citizens to file a complaint or a notice with ANI (“Agentia Nationala de Integritate”) if they observe irregularities, by requiring such notifications to be signed and dated, and by failing to provide protection for whistleblowers. He also criticized that “the President of ANI maintains the monopoly of the decision, with a lack of objective criteria to limit his/her discretion”, and that the law limits the powers of the integrity investigators to obtain information for their cases. A coalition of Romanian CSOs voiced similar critiques. The EU also criticized the fact that the discrepancy between declared and observed wealth that triggered investigation was too high and that the replacement of the expression «unjustified wealth» with “illicit wealth” made the agency’s activity a duplication to other organizations (such as the National Anticorruption Directorate), and made it difficult for the courts to seize assets that could not be justified.<sup>37</sup>

As Sabina Schnell notes, Romania’s history with legislation requiring public officials to declare their assets goes as far back as 1932. The 1932 law foresaw a 90% tax on unjustified wealth, but also punishment for whistleblowers if the accusations turned out to be false, and even prison for accusations brought in “bad faith”.<sup>38</sup>

Apaza and Chang found that even without legal action, external whistleblowing is effective; however, Apaza and Chang also found that without

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<sup>37</sup> Schnell, Sabina, *op. cit.*, 1999, 222.

<sup>38</sup> *Idem*, p. 201-202.

proper legal protection, the whistleblower is likely to face harsher retaliation.<sup>39</sup>

Scholars, practitioners, and public figures approve such a legislative initiative and believe that implementation of whistleblowers means a radical reduction of tolerance to corruption. Sociological surveys show that 45.5% of Ukrainians are ready to inform about corruption to law enforcement agencies and seek a fair punishment for corrupt officials, but only 2% of the population are real whistleblowers.<sup>40</sup> In 2014, the number of people willing to expose corruption was 13%, it would seem that a positive trend could be observed. But, according to our belief, not everything is as good as sometimes is shown in sociological studies.

As the authors of the monograph «Institution of Confidential Cooperation in Operative and Investigative Law» say, modern Ukrainian society is in a deep moral crisis, which manifests itself in distrust of citizens to state bodies responsible for crime prevention. The low level of legal culture, legal nihilism, corruption, low executive discipline, violation of the rule of law, human rights and freedoms cause the global reluctance citizens to participate in crime prevention.<sup>41</sup>

The above talking point is confirmed by our own empirical studies. When researching the issues of confidential cooperation in penitentiary bodies and institutions, we asked persons who were engaged in confidential cooperation about their attitude to those who cooperate secretly with intelligence units. The results showed that 11% of the respondents despise their assistants, 29% of them perceive their help in a neutral way, and 60% believe that they are doing important work. Consequently, 40% of practitioners whose professional duties involve direct coordination of whistleblowers activities do not consider their work as very important task. This may indicate that Ukrainian society is not yet ready to accept corruption at zero level.

Participating in corruption exposure requires a lot of courage. The mental, emotional and financial difficulties that a whistleblower may face are to be fully realized before the person takes measures to spread information about exposing corruption.

The study of special literature shows that society perceives whistleblowers ambiguously. Ukrainian society inherited the «Soviet legacy» in the form of total distrust, hostility towards law enforcement agencies, as well as those who cooperate with them.<sup>42</sup> Such attitude of citizens towards whistleblowers is not surprising, because for the society, which for several generations lived in the tradition of silence and perceived corruption as a kind of convenient type of relationships, it is extremely difficult to change its beliefs and moral values.

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<sup>39</sup> Apaza, C., Chang, Y., *The Impact of External Whistleblowers on Uncovering Corruption: A Comparative Study*, Conference of the Ethics and Integrity of Governance Study Group, Rotherdam, Netherlands, 2008.

<sup>40</sup> *В Україні почав формуватися новий прошарок суспільства – викривачі корупції (Corruption Whistleblowers as a New Stratum of Society Began to Emerge in Ukraine)*, [http://dniprograd.org/2016/05/17/v-ukraini-pochav-formuvatisya-noviy-prosharok-susplstva-vikrivachi-koruptsii\\_45932#sthash.n9mV8VMF.dpuf](http://dniprograd.org/2016/05/17/v-ukraini-pochav-formuvatisya-noviy-prosharok-susplstva-vikrivachi-koruptsii_45932#sthash.n9mV8VMF.dpuf), consulted on 1.05.2019.

<sup>41</sup> Тарасенко, В. С., Тарасенко Р. В. (Tarasenko, V. Ye., Tarasenko R. V.), *op. cit.*, 2009, 53-54.

<sup>42</sup> *Idem*, p. 55.

Therefore, the ambiguous perception of the whistleblowers institution by society will be one of the key issues that will arise when implementing it in Ukraine.

In the process of whistleblowers activities, the interference in the sphere of rights and interests of individuals protected by the law is partially allowed. In addition, the state of modern society, its criminalization can lead to an encouraging attitude to criminality and corruption, which also does not contribute to the broad public recognition and support of operative and investigative activities in general and the institution of whistleblowers in particular.

Post-Soviet countries are characterized by the phenomenon of lack of tolerance as to whistleblowers. For example, in Latvian society, it is also not entirely accepted to inform about corruption. Because such people are usually called “snitchers”. This opinion is shared by the member of the “Delna” Open Society Peteris Winkelis, commenting on the “Beat the alarm” campaign, initiated by the society, in order to encourage the public not to keep silent about corruption or other unlawful actions. “The issue is to protect those people who inform about corruption, to guarantee these people that they are doing according to the law and their rights will be protected. The problem is in the lack of protection for the people reporting about corruption”, said P. Winkelis.

This problem is observed both in society and in the political sphere. According to P. Winkelis, the root of corruption is in society. Quite often, people who report about corruption are called «snitchers».<sup>43</sup> Rejecting the whistleblowers of corruption by the society negatively affects the effectiveness of preventing this phenomenon.

The level of corruption in Latvia, according to the opinion of the representatives of the “Delna” union, has not significantly changed since 2014 due to the problems within the Bureau for Prevention and Combating Corruption, as well as the fact that the courts fight against economic crimes improperly.<sup>44</sup>

In Corruption Perceptions Index (CPI) of 2016, Latvia has got 57 points out of 100. In the World ranking this country takes the 44<sup>th</sup> place out of 176 countries worldwide. In CPI of 2016, Ukraine has got 29 points out of 100 possible. This is 2 points more than last year, but it is not enough for a country whose government has called corruption as a top priority. Ukraine takes the 131<sup>st</sup> place out of 176 countries in the world ranking in CPI this year.

Ukrainian researcher Z. Zahynei notes that there are no proper mechanisms for implementing the relevant legislative provisions in practice. The author explains this fact as an imperfection of the Law of Ukraine “On Prevention of Corruption”, as well as the absence of detailed regulation of the procedure for

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<sup>43</sup> Общество Delna: обличителей коррупции в Латвии называют стукачами (Society «Delna»: corruption whistleblowers are called «snitches» in Latvia), [http://www.mixnews.lv/ru/society/news/174342\\_obs4estvo-delna-obli4itelej-korruptcii-v-latvii-nazyv-ayut-stuka4ami-audio/](http://www.mixnews.lv/ru/society/news/174342_obs4estvo-delna-obli4itelej-korruptcii-v-latvii-nazyv-ayut-stuka4ami-audio/), consulted on 1.05.2019.

<sup>44</sup> Эксперт: В Латвии коррупция не уменьшается (Expert: Corruption Does Not Decrease in Latvia), [https://regnum.ru/news/20\\_65846.html](https://regnum.ru/news/20_65846.html), consulted on 1.05.2019.



filing, reviewing and deciding on the fact contained in whistleblower's report, as well as inadequate theoretical studies of this problem.<sup>45</sup>

In our opinion, the creation of a new anti-corruption institution that has a political independence (such as the NABU) will contribute to combatting corruption. NABU's recent activities regarding detention of People's Deputies of Ukraine show to the community the desire of the new anti-corruption authority to combat corruption at a high level. Such trends have a direct impact on the establishment of the whistleblowers institution, because a person will be confident in the anti-corruption system.

#### 4. Conclusion

Summarizing the issues of this article, it should be noted that a person reporting about corruption is automatically entering into the fight against this negative phenomenon. And such person must be sure of the ultimate outcome of such combating. Because getting a certain information by an individual objectively puts him in a difficult situation: on the one hand, this is interpersonal relationship, for example, where a neighbor or a colleague is the channel and the condition of information, and on the other hand, the informal norms regulating these relationships, as a rule, are an obstacle while making a decision to transfer this information for use in order to prevent a crime. In the vast majority of cases, this explains the absence of desire of individuals to work as whistleblowers, and the need to remain anonymous overpowers the desire to help in the fight against corruption.

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<sup>45</sup> Загиней, З. (Zahunej, Z.), *Викривачі корупції: Quid prodest? (Corruption Whistleblowers: Quid prodest?)*, „Науковий часопис Національної академії прокуратури України” („Scientific journal of the National Academy of Public Prosecutor of Ukraine”), 2, 2016: 125-136.

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