

Institution of a Whistleblower in the Polish Legal System – Meaning and Perspectives in the Area of Public Administration Activities

The topic of whistleblowers is discussed not only in the area of legal science, but also in the area of the widely understood journalism. The issue arouses controversy, and it is sometimes called a return to the dark times of informing. The supporters of this institution point to the measurable benefits of using it. Authors decided to analyse this issue. They present the institution of a whistleblower which is planned to be implemented in Poland. They also attempt to explain the meaning of the institution and its perspectives in the area of administration. They discuss the historical aspect of the signaller as well as its potential impact on public administration. The authors believe that their analysis may be useful in forecasting the opportunities and threats accompanying the introduction of sygnalists.

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1. Introduction

In the article, we attempt to present the institution of a whistleblower whose implementation is planned for the Polish legal system, together with an attempt to explain its meaning and perspectives in the area of administration activities. We pay special attention to the presentation of the historical and legal aspect of the discussed institution and its potential impact on public administration. We recognize that the experience gained from analyzing this context may prove useful in forecasting opportunities and threats accompanying the introduction of whistleblowers into the Polish legal system. This is a highly controversial

and discussed issue, not only in the area of legal sciences, but also in widely understood journalism. The issue arouses controversy, and by some debaters it is called a return to the dark times of informing¹, in turn, the supporters of this institution point to the tangible benefits of using it. This publication was written under the implementation of the research project No. 2017/25/N/HS5/00563 entitled „In Search of a Model for the Legal Protection of a Whistleblower in the Workplace“ financed by National Science Centre in Poland.

2. Meaning of the term „signalman” („whistleblower”)²

In the Polish Language Dictionary PWN we read that “a signalman is a person who transmits and receives signals using appropriate devices”³. We can also find there the related notion of a „whistleblower”, defining a person revealing secret conspiracies, illegal connections, actions of people who want to leave their activities in hiding. „There were many signalers: pane, rail, but none of them dared to cross the barriers of general vocabulary, they remained in specialist. Our new signalman will probably find out differently in the dictionary. Will he be there?”. Asks the linguist prof. Jerzy Bralczyk adding that there are some problems with a good translation of the English word „whistleblower” into Polish⁴.

Currently, in the cultural circle of democratic legal states of the Western model, the term „whistleblowing” is often used to refer to the „whistleblower”. The term comes from England, where it was associated with alarming the escape of the perpetrator from the scene of the event and literally means „blowing in the whistle”. It seems that the purpose of this signal was to inform other policemen and passers-by about the incident.

A *whistleblowinger* is a „man who draws attention to misconduct in an enterprise, informing his superiors about it or even leaving the company”⁵. In

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- 1 Marek Węcowski, *Dylemat więźnia: ostracyzm ateński i jego pierwotne cele* (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2018), 57, where it was stated that „the demagogs and sykopphants played the worst role”.
 - 2 In Polish, the most precise translations into English are „signalman” or „signalist”. However, the terms “whistleblower” or „whistleblowinger” are commonly used. In this article, we use this term interchangeably.
 - 3 *Słownik języka polskiego*, ed. W. Doroszewski. <sjp.pwn.pl>, [accessed: 27.07.2019].
 - 4 Jerzy Bralczyk, „Sygnalista” *Gazeta Wyborcza*, 9 December 2017.
 - 5 Robert Patterson, *Kompendium terminów z zakresu rachunkowości po polsku i angielsku*, transl. Ewa Kieres (Warszawa: Wydawnictwa Akademickie i Profesjonalne: Polska Akademia Rachunkowości, 2008), 57.

popular science discourse, it is claimed that „a whistleblower is a person who publicises activities which in her opinion is most likely illegal or dishonest (...). The signalman informs the public about embezzlement, corruption acts, violations of laws and similar irregularities taking place in an organization in which He works. It is a specific informing that a given employee reports to persons responsible for ethical and disciplinary matters cases of dishonesty, dishonesty or violation of ethical principles or law by other employees. Often the consequence of such an act is mobbing: the whistleblower may have problems in his work environment, suffer persecution and humiliation by superiors and associates”⁶.

Currently, Polish literature also uses the terms „signaler”, „whistleblower”, „denunciator”, „informer in good faith” or „informer” interchangeably, but due to the negative connotation, these proposals have not received broader approval⁷. Whistleblowers are commonly considered to provide information about irregularities in the place of employment to persons or individuals able to take effective action to stop these practices. Such anomaly may be breaking the law or threatening the public interest (eg fraud or corruption). It is also worth citing the definition of the United Nations Convention against Corruption ratified by Poland on September 15, 2006⁸, which art. 33 per person reporting (*reporting person*) considers a person who „reports in good faith and on a reasonable basis to the competent authority all events related to offenses established in accordance with this Convention”.

The concept of *whistleblowing* can specify different types of activities. These can be internal, external, anonymous, voluntary activities. They can be run by current (or even sometimes former) members of the relevant institutions. Key features that should distinguish whistleblowers are: acting in good faith (and not, for example, as part of revenge or for financial gain) and actions taken in the public interest. In doctrine⁹ the following characteristic features of *whistleblower* operations are distinguished:

- a) unexpected discovery of actions violating the law or binding ethical and moral rules;

6 [https://en.wikipedia.org/wiki/Sygnalista_\(demaskator\)](https://en.wikipedia.org/wiki/Sygnalista_(demaskator)), [accessed: 25.07.2019].

7 Marcin Wujczyk, „Podstawy whistleblowingu w polskim prawie pracy” *Przegląd Sądowy*, nr 6, (2014), 114; Marta Derlacz-Wawrowska, „Whistleblowing a ochrona informacji poufnych pracodawcy”, [in:] *Prawo pracy. Refleksje i poszukiwania. Księga jubileuszowa Profesora Jerzego Wrątnego*, ed. Gertruda Uścińska (Warszawa: IPISS, 2013), 390.

8 Dz. U. 2007 No. 84, item 563.

9 *Sport bez korupcji. Podręcznik dobrych praktyk*, ed. H.-M. Arndt, D. Miebach (Warszawa: Ministerstwo Spraw Wewnętrznych i Administracji, 2008), 36, for: Wujczyk, *Podstawy*, 115.

- b) being motivated by noble motives in deciding whether to reveal your discovery (the good of the employer and the desire to protect people who have been harmed as a result of detected abuses);
- c) informing about irregularities detected. In the first place, the notification should be directed to the superiors / employer. If such actions fail, then it is only possible to go out with the information „outside” – to the appropriate institutions or public opinion;
- d) danger to your own situation. *Whistleblower* often meets negative reactions from colleagues and the employer. This may result in mobbing, unfair punishment, or even loss of employment.

The signalman deciding to take any action undoubtedly faces many dilemmas. When should the public interest be above loyalty to the employer and co-workers? Are ethical denunciations a manifestation of employee's loyalty towards the employer or rather disobedience/betrayal? In addition to legal problems, these are certainly moral dilemmas of an informant who has to weigh up interests and values¹⁰.

3. Whistleblower – historical and legal aspect

It needs to be emphasized that the institution in question is certainly not new and was already known to the ancient legal order; Greek and Roman.

For example, in the legal system of Athens there was an institution of *sykophant*, from Greek: Συκοφάντης, *sykophántēs*, which literally means „point to the figs”¹¹. “The sykophant called a caretaker at the Athenians, following the industrialists who exported and sold figs from Attiki (Greek: Syka) against the existing ban and reporting power. In the aftermath of time, the expression of every freak and impostor was accused of accusing others of harming them from malice or for profit. This class of people, quite numerous from Pericles, nested in Athens, where the greatest contempt existed”¹². In other words, „the name of the sykophants in the ancient Greeks was swapped for the temples and the bakers, which advises them to eat the sweet figs of

10 Łucja Kobroń, „Whistleblower – strażnik wartości czy donosiciel?” *Palestra*, No. 11-12 (2013): 296-301.

11 See Władysław Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, (Warszawa: Wiedza Powszechna, 1978), 305. See also: Guy Rachtet, *Słownik cywilizacji greckiej*, przeł. E. Papuci-Władyka (Katowice: Wydawnictwo Książnica, 2006), 367.

12 *Encyklopedia powszechna*, Vol. XXIV (Warszawa: S. Orgelbrand, 1867), 442-443.

those whom they flattered. Syka, in Greek fig, and the sykofant originally in Attica meant the deliverer of industrialists, exporting non-priced figs¹³.

At the same time, the legal dichotomy of the institution in question is somewhat noticeable. It is pointed out in the literature that „in ancient Greece, which was an inestimable laboratory of democracy (...), sycophants, voluntary prosecutors, were half-private and half-institutionally”¹⁴. It seems that the institutionalization of sykofants was favored by the lack of the office of public prosecutor, while „|someone” such a function – in the important for the nature of business activity in the area of the state’s activity – had to exercise. At once with the spreading of denouncing to other areas of public life, there is a need to legally protect the interests of the accused; a process called a *graph of sykofantias* served it¹⁵.

The Roman legal order also knew the similar institution. „*Delator*, this is what the Roman Emperors called every accuser who accused citizens for private gain, often even falsely and who made such formal craftsmanship. The emperors favored such delators, although some, especially the later ones, got to know the resulting (original spelling, editor’s note AK) abuse, they tried to curb it. Today, similar delators call themselves denunciants, or simply spies”¹⁶.

Also the Polish legal order knows the institution of the signalman, but “attempting to polish the latin phrase *delator* – it was called a reporting or even informer”¹⁷. Explaining this term in the literature, it is pointed that „this was usually called every plaintiff or plaintiff in criminal cases, i.e. in which the respondent could answer his head and, as the Poles said, „the

13 Marian Dubiecki, *Historia Stanów Zjednoczonych: Rys dziejów od r. 1788 do r. 1865*, Vol. IV (Warszawa: Wydawnictwo Michała Glückberga 1878), 16.

14 Bronisław Łagowski, *Duch i bezdusznosc Trzeciej Rzeczypospolitej* (Kraków: Universitas, 2007), 56.

15 Aristotle, *Political system of Athens*, 76. <libertarianin.org/Ebooks/Aristoteles/Aristoteles-Ustrój%20Polityczny%20Aten.pdf>, [accessed 25.07.2019] and in own materials. It was pointed out, among others, that „In the sixth stage, apart from the matters mentioned above, they also order a vote by raising their hands on ostracism, namely whether it must be carried out or not, then on taking legal action against sykofants, on the part of the Athenians like meta”.

16 *Encyklopedia powszechna*, Vol. VI (Warszawa: S. Orgelbrand, 1867), 918.

17 Marian Mikołajczyk, *Na drodze do postania procesu mieszanego: zmiany w polskim procesie karnym w latach 1764-1794* (Katowice: Uniwersytet Śląski, 1991), 62.

throat”. In matters of offended majesty and treason, the accuser was the accuser, and the informer stood as a witness whose first name must have been mentioned in the lawsuit: in the first instance, the informer had to stand in court, if he did not stand, the court suspended the verdict and issued only the sentence about the infiltrator: *Teneri adesse delator*. In the applause, the informer could not stand and everyone was allowed to stand against the appeal, so long as he made a warranty (*vadimonium*) that in the event of losing the penalty for unjust accusation he would suffer. It was even closed to the tower so that it would lose if it did he did not escape the punishment for insult: only a nobleman could be accused of appropriating nobility. Among the laws on delinquents there were, for example: 1) Delator, commanding the deputativ of the purchase or sale of goods during his sitting at the tribunal, gains 2000 fines; 2) To the Delator who will prove *vacua spatia*, that is, leave clean paper in the records of the land or city office, a land writer or town regent will be forced to pay it 2,000 fines¹⁸.

Interestingly, in a somewhat similar way to the „Polish delator” known from the Athenian legal order „according to the regulations of 3 and 17 VI, as well as the Lithuanian Uniwersal of 24 IV37 (...) he could start the trial before the courts on an equal or almost equal basis with the prosecutors public¹⁹.

In summary, the whistleblower institution, although not homogeneous and variously called, has its historical and legal roots. It seems, although it is a field for historical research within Polish philology, that the currently negatively marked semantic meaning of the term „informer” was originally neutral, meaning notifying about irregularities in good faith, for the protection of public order. The attention is also drawn to the tendency to disseminate legally accepted informers, to wider than originally expressed areas of social life. Such observations may lead to a legislative postulate for the legislator, the need for precisely defined boundaries of this institution as well as methods of effective protection against groundless accusations along with sanctions for raising them.

Particular emphasis is placed on the fact that *whistleblower* activities have an impact on the perception in the society – historical experience – completely different in, for example, the United States from post-Soviet countries, not omitting the period of German occupation during World War II. The informers were perceived by the society in totalitarian countries in

18 *Wielka encyklopedia powszechna ilustrowana*, Vol. XV, ed. J. Aleksandrowicz, Warszawa 1895, 268. See also: *Inwentarz Praw, Statutów, Konstytucji Koronnych Voluminow legum: Przedruk wydania xx. Pijarów, do tomów I-VI*, Warszawa 1789, 48.

19 *Krakowskie studia prawnicze*, Vol. XIV-XVII, Warszawa 1981, 97 and n.

a negative light as „sellers”, „kapusie” or „traitors of the nation”²⁰. Therefore, in the eyes of many citizens of these countries, the boundary between the ethical informer and the negative informer is blurred. It seems that a whistleblower may be universally perceived positively also in Poland, however his activity must be assessed only through the prism of disclosed information and its motivation (good faith)²¹. *Whistleblowing* has been undergoing the greatest development in *common law* countries, where over the years “ethical denunciations” as well as informers have often been taken care of by the state²².

4. Legal protection of whistleblowers

It should be noted that many countries in the world have created a legal protection model for whistleblowers. Legal regulations regarding *whistleblowing* survived the greatest development in the United States, where in the 19th century, a law was introduced to protect persons who reported irregularities²³. Currently, this act provides for measures to combat abuse against the federal government, but originally provided protection to legal informers who disclosed frauds against the Union’s forces during the Civil War. Today, the most important act in the subject matter in the United States is the *Whistleblowing Protection Act* of 1989, which only applies to employees of federal services. In contrast, some private sector employees have been covered by specific laws, such as the *Sarbanes Oxley Act*²⁴ from 2002 (imposes on international corporations with the participation of American companies or listed on the American stock exchanges the obligation to introduce internal *whistleblowing* procedures).

20 Kobroń, *Whistleblower*, 296.

21 Siddhartha Dasgupta and Ankit Kesharwani, „Whistleblowing: A Survey of Literature” *The IUP Journal of Corporate Governance*, No. 4 (2010): 57-70, for Ł. Kobroń, *Whistleblower*, 296.

22 Mary Dodge, „Whistleblowers”, [in:] *Encyclopedia of white-collar and corporate crime*, Vol. I-II, ed. Lawrence M. Salinger (Thousand Oaks: Sage Reference, 2005), 860.

23 False Claims Act, Title 31 of the United States Code, § 3729-3733, also referred to as „Lincoln Law”. The text of the Act is available at: http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf, [accessed: 25.07.2019].

24 Corporate and Criminal Fraud Accountability Act, Public Law 107-204, July 30, 2002, 200218 USC Section 1514A. The text of the act is available at: <http://www.osha.gov/dep/oia/whistleblower/acts/ccfa.html>, [accessed: 25.07.2019].

In some countries, rules on whistleblowers have a wider range, e.g. in Norway²⁵ the protection of employees who disclose irregularities is included in the general act relating to all employee matters and covers both the public and private sectors²⁶.

The need to create a whistleblower protection model is increasingly being signaled, both internationally and in our home yard. On April 23rd, 2018, the European Commission published a draft directive on the protection of persons reporting breaches of EU law²⁷. Not only employees, but also self-employed, shareholders in companies, managers, volunteers, unremunerated trainees, and all persons working under the supervision and management of contractors, subcontractors and suppliers related to a given company will benefit from the protection. It also follows from its provisions that the whistleblower will be protected against any forms of direct or indirect retaliatory actions taken by the employer, including dismissal, degradation, obstruction or omission in promotions, reduction of remuneration, imposition of a disciplinary penalty, early termination of employment or negative periodic assessment. The draft directive also provides for the obligation to introduce systems of internal reporting of violations or abuse of law or other unfair behavior in the workplace.

The sources of legal protection for whistleblowers among Polish regulations can be sought in art. 100 § 2 point 4 of the k.p.²⁸. This provision imposes an obligation on the employee to care for the welfare of the workplace and to protect his property and to keep confidential information, the disclosure of which might expose the employer to detriment. As part of this obligation, an employee is obliged to undertake, in the interest of the workplace, certain activities that do not go beyond or exceed the content of the employment relationship, both on the basis of the employer's order and on his or her own initiative²⁹. Undoubtedly, this is the duty of the employee to signal per-

25 Act of 17 July 2005, No. 62, as amended by the Act of 19 July 2009, No. 83, Acting to working environment, working hours and employment (Working Environment Act). The text of the Act is available at: <http://www.arbeidstilsyncntno/binfil/download2.php?Tid=92156>, [accessed: 25.07.2019].

26 Derlacz-Wawrowska, *Whistleblowing a ochrona*, 396.

27 Proposal for breaches of Union law (COM (2018) 218 final) (2018/0106 (COD)) (Whistleblower Protection Directive).

28 The Act of June 26, 1974, the Labor Code, Dz. U. 2018 item 917 with changes.

29 Andrzej Chobot, „Legal and social characteristics of the good of the workplace”, *Legal, Economic and Sociological Movement*, No. 2 (1984): 101-102.

ceived irregularities in the workplace, which is confirmed by the case law of the Supreme Court.

It is also necessary to pay attention to the regulation regulated in art. 100 § 2 point 6 of the k.p., the obligation to observe the rules of social coexistence. According to the authors of the obligation to comply with the principles of social coexistence, the duty of actions described as *whistle-blowing* should be deduced, i.e. the obligation to disclose behaviors that violate these principles. In addition, pursuant to art. 304 of the Code of Criminal Procedure³⁰ each person who has obtained information about a crime prosecuted *ex officio* has a social obligation to notify the prosecutor or the Police. This obligation is not subject to any legal sanctions in the event of omission, while its violation may involve social consequences (exclusion, marking)³¹. The exceptions are some of the offenses listed in art. 240 § 1 of the Criminal Code³² (including genocide, coup d'état, espionage).

On the basis of these considerations, it should be noted that art. 115 § 13 item 4 of the Penal Code confers the status of a public official to a person who is an employee of a government administration, another state authority or local government, unless he performs only service activities, and to another person to the extent that he is authorized to issue administrative decisions. However, in accordance with art. 304 § 2 of the Criminal Code, state and local government institutions, which in connection with their activities learned about a crime prosecuted *ex officio*, are obliged to immediately notify the prosecutor or the Police and take necessary actions until the organ is appointed to prosecute crimes or until this body has an appropriate order to prevent smearing of evidence and evidence of crime. According to the verdict of the Supreme Court of February 12, 2008³³, in the event of failure to fulfill the obligation in the form of submitting a notification referred to in art. 304 § 2 of the CPC, a public official will be subject to criminal liability pursuant to art. 231 § 1 of the penal code³⁴.

As indicated above, in Polish law, there are some provisions regarding the reporting of irregularities in the workplace, but they are included in various legal acts and are characterized by inconsistency and incompleteness. In

30 The Act of June 6, 1997. The Code of Criminal Procedure, Dz. U. 2017 item 1904 with changes.

31 Derlacz-Wawrowska, *Whistleblowing a ochrona*, 396.

32 The Act of June 6, 1997, the Penal Code, Dz. U. 2017 item 2204 with changes.

33 WA 1/08 of the volume OSNKW 2008 item no. 31, 71.

34 Article 231 § 1 of the Penal Code provides: „A public official who, acting beyond his or her authority or acting to the detriment of a public or private interest, shall be punished by imprisonment of up to 3 years”.

addition, which confirms the judicature, they do not guarantee effective protection for whistleblowers³⁵.

The lack of a comprehensive regulation of *whistleblowing* in Polish law causes attempts to fill this gap with internal acts and practices established by individual employers. An example is the various codes of ethics, which indicate the obligation of employees to respond to any irregularities or actions that violate generally accepted norms³⁶.

Particularly noteworthy are the anti-mobbing and anti-discrimination policies. They are aimed at preventing the occurrence of such types of activities and constitute protection of the employer against accusations of inaction. Undoubtedly, they make it easier for employees to report detected fraud in the workplace. Among the internal procedures, it is also worth distinguishing telephone lines of trust or special mailboxes. Such solutions allow to quickly and (usually) anonymously signal detected irregularities, pass suspicions or report the fact of being subject to harassment or mobbing.

In Poland, *whistleblower* functions are often performed by trade union activists. According to art. 3 of the Trade Unions Act³⁷: „No one can suffer negative consequences because of belonging to Relationship professionally or staying outside of it or exercising a trade union function. In particular, this can not be a condition for establishing an employment relationship and being in employment and for promoting an employee”. Trade union activists enjoy greater legal protection than a regular employee, which enables greater activity in the field of informing about irregularities in the place of employment.

The factors conducive to the activity of whistleblowers in our country should also include the possibility of anonymity by the employee submitting a complaint to the authorities of the National Labor Inspectorate.

On the basis of these considerations, it should be noted that, despite some favorable factors, the lack of comprehensive legal regulation of *whistleblowing* institutions in our country, combined with social conditions in the form of negative perception of this phenomenon by a large part of society, constitutes a significant barrier to using signaling as an effective surveillance tool on irregularities such as in public administration.

35 Anna Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań* (Warszawa: Fundacja im. Stefana Batorego, 2011), 25.

36 Wujczyk, *Podstawy*, 118.

37 The Law of May 23, 1991 on trade unions, Dz. U. 2015, item 1881 with changes.

5. Draft law on transparency of public life

An opportunity to regulate the discussed issue may turn out to be a draft law on transparency of public life³⁸. On the website of the Government Legislation Center on January 8, 2018, the latest version of the draft of this bill appeared (already the fourth).

It contains the following definition of a whistleblower: „a natural person or entrepreneur whose cooperation with the justice system consisting in reporting information about the possibility of committing a crime by an entity with whom he is bound by an employment contract, professional relationship or other contractual relationship may adversely affect his or her life situation, professional and material, and which the prosecutor has granted the status of whistleblower”. According to art. 65 draft regulations, the signatory, with whom it was dissolved as a result of reporting information, without the consent of the prosecutor:

- 1) employment relationship or business relationship, he is entitled to compensation from the party terminating the employment relationship in the amount of twice the annual salary charged by the signaller at the last position held;
- 2) the contract, he is entitled to compensation from the party terminating the contract in the amount of the total payment due to the signatory specified in the content of this contract and not paid until the date of termination of the contract.

Concerns may arouse art. 79 of the draft of the above-mentioned Act, which states that in the event of conviction of the perpetrator for a signaled offense, the court may order a gratuity for the person who obtained the status of whistleblower or for the enterprise he runs. Doubts arise as to whether signaling in order to obtain a financial gratification in the form of an exaggerated by a court may be considered as acting in good faith.

6. Summary

In conclusion, the whistleblower institution can be of great importance in the practice of public administration. It depends, of course, on the final shape of the legal act in this respect.

It is worth paying attention to the polarization of positions in this area; on the one hand (positions “in favor”) it is indicated that such an institution has historical and legal roots, is desirable and contributes to combating undesirable phenomena, and on the other („anti” positions) there is contempt for informers, its unambiguously negative character and rooting in the dark practice of totalitarian systems.

38 On the website of the Government Legislation Center on January 8, 2018, the latest version of the draft law on transparency of public life appeared.

Particular attention should also be paid to art. 79 of the draft law, which reads: „In the event of conviction of the perpetrator for the offense specified in 228-230a, art. 231 § 2, art. 250a, art. 258, art. 277a, art. 286, art. 296-297, art. 299-301, art. 303, art. 305 or art. 311, the court may order a gratuity for the benefit of the person who obtained the status of whistleblower or for the benefit of the enterprise he is running”. For, as the legitimate questions seem, do the signaling for its effectiveness include a contract element („something for something”, financial reward for indicating irregularities), or should such a solution be avoided due to moral dilemmas and experience? History dictates.

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