

# WHISTLE BLOWING LAW:

## A NECESSARY TOOL FOR COMBATING CORRUPTION IN THE DEMOCRATIC REPUBLIC OF CONGO

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**Abstract:** This paper highlights the necessity of passing whistleblowing legislation in the Democratic Republic of Congo (DRC) in order to serve as an effective anti-corruption tool. Corruption being more attractive where the possibility of detection and investigation is minor; therefore the person well-placed to detect or disclose corruption and related offences is this one who works where such misconduct is occurring. Encouraging people to make disclosures about wrongdoing requires the setting up of legal mechanisms to protect those who speak out for public interest because they are frequently exposed to reprisals as a result of their disclosures. Not surprisingly, in the environment where there is no such encouragement and protection, people prefer to stay silent and not to disclose information which might be crucial for public interest.

Following the model of legislations in the United States, United Kingdom, South Australia, South Africa, or New Zealand, the DRC should also enact its own version of whistleblowing law in order to end the spectrum of secrecy, and thereby increase its chance of detection of, investigations of, and deterrence of corruption and related offences.

**Keywords:** Corruption, information, whistleblowing, workplace

### I. INTRODUCTION

Corruption is one of the greatest tribulations of the modern time. Its effects negatively impact social life and undermine good governance. As the former UN Secretary-General Kofi Annan noted, "Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid." [1]

The Democratic Republic of Congo (DRC) is one the countries in the world most concerned by the scourge

of corruption,[2]which paralyses both the public and private sectors of its national life. In order to eradicate corruption several mechanisms have been set up such as the *Code de conduite de l'agent public de l'Etat* (Code of Conduct of the Public Agent of State), [3]*Commission d'Ethique et de Lutte contre la Corruption* (Committee of Ethics and Struggle Against Corruption),[4] *Observatoire du Code de l'Ethique et Profession* (monitoring agency of the code of ethics and profession),[5] organization of workshops on the struggle against corruption, and the so-called "zero tolerance" politic against corruption, instituted by the Government, which consists of tracking and punishing those public representatives engaged in corruption. Although those mechanisms have a lot of merit, the situation on the ground seems, however, to be unchanged. This is because the secretive practice of corruption makes the detection, investigation, and prosecution of cases very difficult. Corruption is more attractive where the possibility of detection is slight. [6] Therefore, the person well-placed to detect or disclose acts of corruption is one who works where such misconduct is occurring. However, employees, who disclose corruption or other wrongdoing in the workplace, are very often victims of detrimental conducts resulting from their disclosures, because they are considered the violators of the duty of fidelity imposed on them by the terms of employment. [7]

With the increasing rate of corruption, numerous international and regional anti-corruption instruments compel States' parties to adopt legislation that encourages and protects whistleblowers who disclose information concerning corruption and other wrongdoing, namely: the United Nations Convention against Corruption, [8] the African Union Convention on Preventing and Combating Corruption, [9] the Organization for Economic Cooperation and Development (OECD), [10]and the SADC Protocol Against Corruption. [11] Accordingly, a number of

countries have now passed legislation intending to encourage and protect whistleblowers who disclose in good faith any information for the public interest, such as the US Whistleblower Protection Act 1989, South Australia Whistleblower Protection Act 1993 (WPA), UK Public Interest Disclosure Act 1998 (PIDA), South Africa Protected Disclosures Act 2000 (PDA), and New Zealand Protected Disclosures Act 2001 (PDA).

In the context of the DRC, the recent Congolese Labor Code still does not allow an employee to disclose any (unlawful) information and conduct made by the employer or other employee. [12] Furthermore, even if the Code of Conduct of the Public Agent of State authorizes an agent of State, who is exposed to a temptation or witnessed corruption in the workplace, to inform his/her hierarchical superior or judicial authorities, [13] it does not provide any protection to that agent against reprisals that might result from his/her disclosure. Due to that culture of secrecy and lack of legal protection, many employees in both public and private sectors prefer to play the role of “blind eyes” or “deaf ear” before acts of corruption which are being performed in their workplace.

Following the conceptual model of the American, British, South African, and New Zealander whistleblowing legislations, the Democratic Republic of Congo should also enact its own version of law to create a culture which facilitates the disclosure of information by employees concerning corruption and other irregular conduct in the workplace, to promote the eradication of criminal and other irregular conduct in organs of state and private bodies and to protect the informer against any reprisals as a result of such disclosure. [14]

For this purpose, the paper aims to underline the importance of protecting whistleblowers in the context of combating corruption in the DRC and to sketch a Congolese whistleblowing law.

Briefly, this paper is structured as follows: The understanding of the concepts of corruption and whistleblowing (Section 1), a comparative synopsis of national whistleblowing legislations (Section 2), and a sketch of the “Congolese whistleblowing legislation” (Section 3).

## II. SECTION 1 : UNDERSTANDING THE CONCEPTS OF CORRUPTION AND WHISTLEBLOWING

### 1. Understanding the concept of corruption

#### A. Definition

There is no universally accepted definition of the term “corruption”. Generally, corruption is defined as the abuse of public office for private gain. [15]

According to Joseph Nye, corruption “is a behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain private regarding influence.”[16]

As Jeremy Pope noted, corruption is defined simply as the misuse of entrusted power for private benefit. [17]

From the combination of definitions provided by the provisions of international and regional anti-corruption instruments such as, Article 15 of the United Nations Convention against Corruption,[18] Articles 1 and 4(1) of the African Union Convention on Preventing and Combating Corruption [19] or Article 1 of the SADC Protocol against Corruption, [20] corruption can be also understood as *the promise, offering, giving to or, the solicitation or acceptance by public official or private individual, directly or indirectly, of an undue advantage, for the official/individual him/herself or another person, in order for the official/individual to act or refrain from acting in the exercise of him/her responsibilities.*

The Congolese Penal Code describes corruption as an “act of offering, promising or accepting a gift by a representative of public or private society in order to act or refrain from acting in the exercise of his/her duties.” [21]

In light of the above definitions, Kristen Drew observed that corruption is a practice that involves two parties: “*the bribe-maker* (the private sector individual or organization) and the *bribe-taker* (the public sector official, politician or political party) who, driven by the prospect of making significant economic gains, engage in a ‘win-win’ transaction.” [22] Yet, corruption is often used as a broad concept which includes many other forms of illicit activities such as: bribery, embezzlement, money laundering, misappropriation or other diversion of property by a public official, and trading in influence.

Nevertheless, the Congolese penal code distinguishes two categories of corruptors: active and passive. The active corruptor is the person who makes the offer (briber-maker) while the passive corruptor is the one who accepts the offer (briber-taker).

However, Heidenheimer differentiated three sorts of corruption: petty, routine, and aggravated. [23] *Petty corruption* concerns small amounts of money such as, fixing parking tickets (or paying directly to the police officer) or getting favorable treatment from

bureaucrats that others cannot receive – either for small “favors” or “gifts” or by personal connections; while *routine corruption* concerns granting friends contracts for public services or giving “gifts” to patrons [24] or awarding “presents” to judges to have a favorable judgment. *Aggravated corruption* involves big money, often giving rewards to or bribing political leaders who award lucrative government contracts to their friends,[25] for instance: in the case of the public procurement of materials or goods.

Petty, routine and aggravated are very widespread in developing societies, more particularly in the Democratic Republic of Congo (DRC) where ordinary people (clients) are grateful to benefactors, or where political leaders, politicians, and public servants are becoming more interested in the pursuit of personal gains at the detriment of collective interest.

## B. Impacts of corruption on development

Without any doubt, corruption has a negative impact on all sectors of social life, namely Socio-economic, political and institutional domains. Its impact, as A. H. Kargbo noted, “ is not only limited to the size of the payments involved, but the very process of extorting and giving bribes has distortionary effects that are socio-economic and political, even in terms of economic growth.” [26]

Corruption slows down economic growth and discourages foreign investment because of the fact that bribery contracts are irregular contracts, and they are not enforceable.

Politically, corruption reinforces bad governance, unaccountability, lack of transparency or undermining of democratic values and rule of law. Thereby, people lose trust on government and political leaders.

Corruption also feeds inequality and injustice. In the context of the DRC, Prof Mbwebwa Kalala noted that, owing to corruption in political institutions: “Each passing day seems to avert the prospect of the DRC to join prosperous countries and poor people become poorer and rich become richer.” [27]

## C. International and national actions against corruption

### 1. International actions

The practice of corruption is becoming a transnational phenomenon that affects all societies and economies; therefore on the international/regional level, some mechanisms have been taken in order to prevent and control acts of corruption through the adoption of conventions and setting up of economical rules, namely:

- The United Nations Convention against Corruption (UNCAC)-adopted on October 31, 2003: this Convention is the first legally binding international anti-corruption instrument. It compels State Parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices.[28] These measures intend to promote the prevention, [29] criminalization and law enforcement, [30] international cooperation, [31] asset recovery, [32] technical assistance and information exchange, [33] and mechanisms for implementation. [34]

- African Union Convention on Preventing and Combating Corruption- adopted on July 11, 2003 by State members of the African Union: It is also a binding instrument for African countries that ratified it; and it covers the public and the private sectors. Like the UNCAC, this Convention provides for prevention, criminalization, regional cooperation and mutual legal assistance, and recovery of assets. As a follow-up mechanism, the Convention sets up an Advisory Board [35] which has broad responsibilities for promoting anti-corruption work, collecting information on corruption in Africa, developing methodologies, advising governments, developing codes of conduct for public officials, and building partnerships. It also requires States Parties to submit, on a regular basis, a report to the Executive Council on the progress they are making in complying with the provisions of the Convention. [36]

- SADC Protocol against Corruption- adopted by all 14 States members of SADC on August 14, 2001: The Protocol’s purpose is to promote the development of anti-corruption mechanisms at the national level, [37] to promote cooperation in the combat against corruption by States Parties, [38] and to develop and harmonize anti-corruption national legislation in the sub-region. [39] The Protocol provides preventive, enforcement, and implementation mechanisms. [40] Its preventive measures comprise the development of a code of conduct for public officials, transparency, criminalizing corruption, public education, awareness against corruption, and the setting up of anti-corruption agencies. [41]

- OECD Anti-bribery convention – signed in 1998 and entered into force in 1999: The Convention is implemented by all 30 OECD States members as well as by eight non-States members (including Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, Slovenia and South Africa). [42] It is the first legally binding standard which intends to effectively combat bribery of foreign public officials in international business transactions States parties to the Convention should enact legislation that criminalizes bribery of a foreign

public officials as well as complicity of bribery, cooperate during criminal investigation, and provide mutual legal assistance. For implementing its plans, the convention sets up monitoring and surveillance procedures that are carried out by the OECD Working Group on Bribery, made up of all States Parties. [43]

- World Bank Anti-Corruption Strategies: corruption is perceived by the World Bank as a result of poor governance. [44] The Bank's strategies, therefore, intend to develop capable and accountable states and institutions which can create and implement sound policies, provide public services, establish the rules governing markets, and fight corruption, thus, facilitating to reduce corruption. There are three principal areas in which the Bank Group activities relating to governance and anti-corruption fall in, namely: preventing fraud and corruption within bank-financed projects, helping countries in their efforts to reduce corruption by advising on economic policy and other reforms and strengthening institutional capability, and adding voice and support to international efforts. [45]

## 2. National actions

The Democratic Republic of Congo (DRC) is a State member of the UN, AU, and SADC. Despite its membership to those organizations, the DRC has not yet ratified the United Nations Convention against Corruption, African Union Convention on Preventing and Combating Corruption, nor the SADC Protocol against Corruption; thereby, it is not legally bound by these international standards.

However, on the domestic level, the DRC proceeded to some juridical and institutional changes in its combat against corruption, namely:

- The Parliament's adoption of the legislation on the organization, power and functioning of the Committee of ethics and struggle against corruption (*Commission d'Ethique et de Lutte contre la Corruption*, "CELC"). [46] The purpose of the CELC is to raise awareness on issues of ethics and combat against corruption, influence political, public and religious authorities, increase the capacity of national institutions to promote integrity and ensure their involvement in the fight against corruption. Although the CELC is chaired by a representative of civil society, it is however controlled by the government, which may limit its ability to take effective measures against corruption.

- The Promulgation of the Code of Tax in March 2004. In order to simplify the procedure of collecting taxes and reduce the occurrence of corruption, the Tax Code has created two new managements inside

of the General Director of Taxes (*Direction Générale des Impôts*): a management for major businesses (*direction des grandes entreprises*) and a central management of taxes (*direction centrale des impôts*).

- The adoption of the Code of conduct of the public agent of State (*Code de conduite de l'agent public de l'Etat*) on October 3, 2002. [47] This Code aims to set up rules applicable to the issues of moral integrity and professional ethics, facilitate good governance, and combat wrong behaviors in socio-professional environment. [48] It condemns acts of corruption, and it compels also public agents to denounce the practice of corruption in the workplace. [49] As a follow-up mechanism, the Code sets up a monitoring agency (*Observatoire du Code de l'Ethique et Profession "OCEP"*) [50] which has responsibilities for promoting the code, monitoring its implementation, preventing and punishing violations of the code. [51]

- The new Code of Public Procurement: The Congolese government drafted a Bill on the new Code of Public Procurement, which is under examination at the Parliament. This Code aims to update the current legislations, [52] which are obsolete and inefficient, to regulate the procedures of awarding, executing and controlling procurement. Its main purpose is to simplify and clarify procedures of procurement that are affected by corruption.

Besides those juridical and institutional reforms, civil society also organized a series of anti-corruption seminars and workshops. [53] Additionally, the government has instituted a "zero tolerance" politic to track and punish those public representatives engaged in corruption. For instance, the Congolese penal code, through articles 147 to 149, punishes the representative of public or private society involved in corruption. The corrupted will be condemned from six months to ten years of imprisonment if he/she accepted gifts in order to act in the exercise of his/her duties, and the punishment will double if he/she accepted gifts in order to refrain from acting in the exercise of his/her duties.

Yet, the recent 2009 Corruption Perceptions Index per country, published by *Transparency International*, reveals that the Democratic Republic of Congo (DRC) ranks 162 out of 180 [54] compared to 133 out of 146, in 2004, [55] meaning that the level of corruption in the country is more or less identical since five years ago.

The question posed is: why is the corruption situation in the DRC unchanged in spite of significant reforms made?

## 2. Understanding the concept of whistleblowing

### A. Background

In all organizations of people, especially a business or governmental agency, there is always the risk that something will go seriously wrong. The risk may concern, for instance, the quality of food to buy which is dangerously contaminated, the standard of healthcare at the hospital which is fatally unhygienic, taxes are stolen or misappropriation of property by a public official. At any time that a risk comes up from activities of a business or governmental agency, the first people to know about it are very often those who work where that wrongdoing occurred. Therefore, employees are well-placed to detect or disclose the risk and act as an early warning mechanism towards removing or reducing the danger. By so doing, however, employees are frequently vulnerable to losing their job, damaging their career, or facing reprisal. [56] This is common in organizations that do not allow an employee to disclose any unlawful conduct made by the employer or other employees. Consequently, many employees are forced to play the role of 'blind eyes' or 'deaf ears' in the workplace.

### **B. Definition of whistleblowing**

There is no unanimously accepted definition of the term 'whistleblowing'. The meaning of whistleblowing varies from one author to another.

According to the *UK Standing Committee on Standards in Public Life* whistleblowing is defined as "raising a concern about malpractice within an organization or through an independent structure associated with it." [57] Mathews defined whistleblowing as the act by an individual who believes that the interest of the public overrides the interests of the organization that he or she serves. [58] For Professor Calland and Dehn, whistleblowing is an available option to an employee to raise concerns about workplace wrongdoing. [59] They further emphasize that whistleblowing refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance. [60]

In light of these definitions, whistleblowers appear to be people who openly disclose wrongdoing for public interest rather than personal interest. Therefore, they are different from the anonymous informer that authoritarian systems foster. [61] Additionally, they are different from the confidential or "off-the-record" sources which journalists will also rely on for information. [62]

### **C. Rapport between whistleblowing and corruption**

As earlier said, corruption is a secretive practice, which is more attractive where the possibility of detection is minor [63] and the sanctions applied to those who are caught are insignificant. [64]

Whistleblowing is, however, a mechanism that breaks secrecy and fosters people to speak openly out about illegal conduct and other malpractice. From this viewpoint, whistleblowing is an alternative that increases the chance of detection and investigation of corruption. Therefore, providing protection for whistleblowers and encouraging people to speak out should provide an effective deterrent against corruption as long as the reprisals from disclosure are severe. [65]

Accordingly, all international anti-corruption instruments require special protection for the person who discloses, in good faith, information about corruption and related offences. For instance, article 33 of the UN Convention against corruption stipulates that:

"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

Similarly, the OECD Convention against Corruption, [66] African Union Convention on Preventing and Combating Corruption [67] and SADC Protocol against Corruption [68] reiterated the same principle.

Complying with that order, the US, UK, South Africa, and New Zealand adopted legislations to protect whistleblowers against any kind of reprisal. Although authorizing witnesses of corruption to disclose information about that practice, the Congolese Code of Conduct of the Public Agent of State (2002) does not provide any protection to those public agents against reprisals that might result from their disclosure. [69]

## **III. SECTION 2 : COMPARATIVE SYNOPSIS OF NATIONAL WHISTLEBLOWING LEGISLATION**

As already said, a number of countries passed legislation to encourage and protect whistleblowers against reprisals as a result of their disclosures. The whistleblowing legislation was first introduced in the USA through the Whistleblower Protection Act (1989), and then other countries followed, including the UK Public Interest Disclosure Act 1998 (PIDA), the South Africa Protected Disclosures Act 2000 (PDA), the New Zealand Protected Disclosures Act 2001 (PDA), etc.

National whistleblowing legislation varies from country to country in terms of the scope of the person protected (1), what information is protected (2),

procedure of disclosures (3), nature of protection (4), and defense to whistleblowing (5).

### 1. The scope of the person protected

A large majority of national whistleblowing laws intend to restrictively protect persons who fall within the definition of “employees” from revenge resulting from their disclosures about wrongdoing in the workplace in the public interest, with the exceptions such as the South Australian Whistleblowing Protected Act 1993, which covers *citizens* (including unemployed) rather than employees. [70] This means that most countries developed the employed-based legislation by restricting the coverage of their protection to the employer-employee relationship. Some domestic legislation, however, only covers *public sector employees* in the detriment of *private sector employees*; whereas some others cover both *public* and *private sector employees*. For instance, the US Whistleblower Protection Act 1989 (WPA) protects solely *federal workers*, [71] including current employees, former employees, or applicants for employment to positions in the executive branch of government; and it excludes employees of the intelligence agencies: Federal Bureau of Investigation (FBI), as well as congressional and judicial staff, who are however protected by a parallel statute. [72] On the other hand, the UK Protected Interest Disclosure Act 1998 (PIDA) protects public and private sector employees, excluding the security service and the police; [73] the South Africa Protected Disclosures Act 2000 (PDA) also protects employees from both sectors but it specifically excludes independent contractors; [74] and the New Zealand Protected Disclosures Act 2001 (PDA) covers public and private sector employees, including employees contracted to do work for the organization. [75]

The protection of public and private sector employees is vital as corruption seriously affects both sectors. But limiting the scope of coverage of whistleblowing legislation to the relationship between employers and employees is, however, a fundamental weakness in view that an important number of respondents made their disclosure to people who do not work with them. [76] If employed whistleblowers are exposed to losing their job or damaging their career, then unemployed-whistleblowers are exposed to facing criminal and civil defamation actions as a result of their disclosures. Therefore encouraging all citizens (employees and unemployed persons) to disclose wrongdoing and protecting them equally from unfair treatment if they do so, is crucial in the struggle against corruption to the extent that it will increase the detection of corruptive activities unknown from employees.

### 2. What information is protected?

Generally, all domestic whistleblowing legislation aims to protect any disclosure of information of wrongdoing that occurs in the workplace.

Accordingly, the US Whistleblower Protection Act protects any information that the employee *reasonably* believes violates law, rule or regulation, a gross waste of funds, gross mismanagement, abuse of authority, or a significant and specific danger to public health and safety. [77]

The UK PIDA covers any disclosure about: (1) a criminal offence, (2) a failure to comply with any legal obligation, (3) a miscarriage of justice, (4) danger to the health and safety of any individual, (5) damage to the environment, and (6) deliberate concealment of information relating to any of the above that has been, is being, or is likely to be committed. [78]

The South Africa PDA, along with protecting similar information as the UK PIDA, requires the disclosure to be related to the conduct of the employer or the employee of the employer. [79]

Protected information which the New Zealand PDA covers, concerns: (a) an unlawful, corrupt or irregular use of public funds or public resources; or an act, omission or course of conduct that is (b) a serious risk to public health or public safety or the environment; or (c) a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; or (d) an act by a public official that is oppressive, improperly discriminatory or grossly negligent or that constitutes gross management. [80]

Professor D. Lewis and S. Homewood [81] made a good observation about these categories of protected information:

Firstly, they are not restricted to confidential information and are independent of the common law concept of public interest; secondly, there is no requirement for any link between the matter disclosed and the worker's employment; and thirdly, the matter disclosed may have occurred in the past, be currently occurring or likely to occur.

Also, it should be noted that both the UK PIDA and the South Africa PDA cover the disclosure of information regarding wrongdoings that occur outside of their territories and which are not covered by their domestic laws. [82]

Furthermore, the protected disclosure covers both oral and written communications; therefore a whistleblower may disclose information in writing,

through correspondence, books, an article in the newspaper, images, or in an oral statement by using broadcast, speech, interview and so forth. [83]

### 3. Procedure of disclosures

To examine the issue of the procedure of disclosures implies answering the question as to whom the disclosures have to be made in order to be protected. Procedural requirements for a disclosure to be considered protected are explicitly determined by legislation, which varies from one country's legislation to another.

The British, South African, New Zealander, and recently Japanese [84] whistleblowing legislations promote "internal disclosure". Their approach is classically based on the hypothesis of changing the internal culture to boost internal communications to prevent problems, which is a key means to resolve problems. [85] This encourages employees who detect illegal behavior in the workplace to internally disclose it so that it can be resolved before it becomes a bigger problem. [86] Therefore, British, [87] South African, [88] New Zealander, [89] and Japanese [90] legislations establish detailed internal procedures to be followed prior to releasing information in particular circumstances: (1) a legal advisor, (2) an employer, (3) a minister of the Crown/member of Cabinet (or the Executive Council) or (4) a person/body in accordance with the (specific) Act. However, in the case of failure of internal disclosure, an alternative to "external disclosure" is allowed and limited to a certain number of bodies such as the Secretary of State or Public Prosecutor or Auditor-General, and disclosures particularly to the media body are used as a last resort if the procedure and series of requirements are satisfied. [91] Thus, it clearly appears that the employee, who escapes internal disclosure and instead makes a public disclosure, will be unprotected no matter the relevance of information disclosed for the public interest.

The approach used by the US WPA does not, however, require federal employees to make a disclosure internally (within the government agency). Rather, there is no procedure that must be followed to ensure that employees are free to disclose wrongdoing internally and/or publicly to any person/body. [92] Therefore, employees may directly make a public disclosure without being worried. Disclosures are, however, unprotected if they are prohibited by law or Executive Order for the interest of national defense or the conduct of foreign affairs, except when disclosures are made to the Special Counsel or to the Inspector General of an agency or

another employee designated by the head of the agency to receive such disclosures. [93]

### 4. Motive for whistleblowing

People must make disclosures of information in "good faith". The concept of *good faith* can be understood as a "reasonable belief" of an employee who thinks that information disclosed is unlawful and true, and does so for impersonal gain. [94]

The Appeal Court of Texas, in *Texas Department of Transportation v Needham case*, [95] held that *good faith* "means that the employee believed that conduct reported was a violation of law and the employee's belief was reasonable in light of the employee's training and experience."

Therefore, employees who disclose information in bad faith and for personal motive will be unprotected. In view of that, the UK Employment Tribunal held, in *Street v Derbyshire case*, that:

While the applicant had reasonably believed in the substantial truth of the disclosures... she had been motivated to make them by her personal antagonism to the manager. Therefore her allegations were not protected as personal antagonism was her dominant, if not her sole motive. [96]

In *Tshishonga v Minister of Justice and Constitutional Development case*, [97] the South African Court also reaffirmed the same principle in stating that:

A whistleblower who is overwhelmed by an ulterior motive that is, a motive other than to prevent or stop wrongdoing may not claim the protection under the Protected Disclosure Act.

Yet, the posed question is as to how to assess whether or not information disclosed is made in good faith. The requirement of good faith, as a *condition sine qua non* of the protected disclosures, rises up a "proportionality test" to determine the dominant motive of the whistleblower. [98] The proportionality test comprises two elements: subjective and objective. [99] The subjective element refers to the "*honesty of the fact*", which ensures that the employee believed that he/she was reporting an actual violation of law, whereas the objective element relies on the "*reasonable belief*" of the reporting employee, which ensures that any reasonably prudent employee in similar circumstances would have believed that the facts as reported were a violation of law. [100]

The proportionality test was applied in *Texas Department of Transportation v Needham case*, [101] where the Texas Court of Appeal had to determine

whether or not the Texas Department of Transportation (TxDOT) is an appropriate law enforcement authority to which a public employee may report an alleged driving while intoxicated incident. If not, the Court should determine whether the respondent, as a public employee, had a good faith belief that it was an appropriate law enforcement authority. In its merit, the Court of Appeal concluded as follows: Firstly, the Court held that Needham's persistence in reporting the drunken driving of his co-worker to various Texas department of transport (TxDOT) demonstrates that he subjectively believed that TxDOT was the appropriate law enforcement authority. [102] Secondly, the Court stated that the fact that TxDOT supervisors told Needham to whom he should report the co-worker's conduct reinforces the reasonableness of Needham's belief that the individuals to whom he has reporting were appropriate law enforcement authority. Therefore, the Court of Appeal concluded that Needham acted in good faith. [103]

A similar test of proportionality was recently applied by the South African Labor Court, in *Theron v the Minister of Correctional Services and others case*. [104] The facts of that case concern Mr. Theron, a senior medical practitioner at Pollsmoor Prison, who, after unsuccessfully complaining about the poor standard of healthcare at the Pollsmoor Prison's Hospital to officials of both the Department of Correctional Services and the Department of Health, disclosed that information to the Office of the Inspecting Judge of Prisons. In its merit, the South African Labor Court held as follows: First, that the applicant had previously made disclosures of substantially the same information to his employer (DCS) and that no action had been taken within a reasonable period. Secondly, it had been reasonable for the applicant to make the disclosure to the office of the Inspecting Judge and the Portfolio Committee as these two bodies clearly had a direct nexus to correctional services. Therefore, the Court concluded that the applicant had made protected disclosures as he acted in good faith. [105]

Yet it is also important to emphasize that despite the *honesty of the fact* (subjective element) and the *reasonableness* of the employee (objective element), the disclosure to the media requires a special element: *'the public interest'*. [106] Accordingly, in *Tshishonga case*, [107] the South African Court Labor Court held that, "disclosures to the media will not be justified if it is not in public interest."

## 5. Nature of protection and legal remedies

### A. Nature of protection

Naturally, whistleblowing legislations aim to protect employees from reprisals resulting from their disclosures. At the question as to what kind of protection do they offer, it should be noted that most whistleblowing legislations offer broad protection to whistleblowers, including protection against disciplinary action and civil and criminal proceedings. For instance, the UK PDA grants workers the right not to be subjected to any "detriment" by his employer done on the ground that the employee has made a protected disclosure. [108] Inspired from the British model, the South Africa PDA also protects employees against any 'occupational detriment', which consists of disciplinary action, dismissal, suspension, transfer against the will of employee, refusal of transfer or promotion, retirement which is altered or kept altered to the disadvantage, refusal of reference or adverse reference, and denying of appointment, threatening. [109] Also, the New Zealand PDA provides to whistleblowers immunity from civil and criminal proceedings. [110] This means that employee-whistleblowers should not face, for example, civil and/or criminal defamation action owing to protected disclosures that they make.

Indeed, the dismissal of an employee by his employer, as a result of protected disclosures he made, will be automatically considered as an unfair dismissal or unfair labor practice. As the South African Court ruled, in *Pedzinski v Andisa Securities case*, [111] "the applicant was dismissed because of the protected disclosure she had made. Therefore, the employee's dismissal was found to be an automatically unfair dismissal." Similar ruling was confirmed, in *Theron v Minister of Correctional Services and Other case*, where the Court considered the removal of the applicant from his post of senior medical practitioner at Pollsmoor Prison as an occupational detriment and unlawful administrative action because that dismissal was solely based on his protected disclosure. [112]

So, what remedies should a whistleblower obtain for unfair labor practices of his employer?

### B. Legal remedies

An employee, subjected to reprisals or unfair labor practice or occupational detriment on the ground of his protected disclosure, may approach any Court which has jurisdiction, including labor Court, or pursue any other process prescribed by the law in order to obtain remedies from damages endured. [113] In most situations, remedies available include reintegration (if the employee is dismissed or suspended), or compensation of remuneration, or pay of salary. [114] For instance, in the *Theron case*, the



Court granted him an interim relief in the form of reinstatement to his position as the senior medical practitioner at Pollsmor Prison. [115] In *Fernandes v Netcom Consultants Ltd case*, the UK Court awarded to Mr Fernandes £293,441 on the ground that the 58 year old chief financial officer would not secure similar work in the future. [116] Similarly, in *Pedzinski v Andisa Security case*, the Court ordered the employer to pay the employee a compensation of 24 months of remuneration. [117]

It should, however, be noted that legal remedies provided to employee-whistleblowers are sometimes partial and weak rather than absolute. Whistleblowing laws do not, unfortunately, mention how to punish employers who commit unfair labor practices or occupational detriment against their employee-whistleblowers. As Professor Calland noted, “the South African Protected Disclosures Act is based on prevention rather than cure....” [118] This assertion appears to be accurate, and it can be verified, for instance, in *Tshishonga case*. In this case, though Mr. Tshishonga successfully challenged his suspension before the Labor Court, his employer (the Department of Justice) refused to comply with the Court’s decision compelling his reinstatement, and then his job was terminated. In appeal, the Labor Appeal Court, however, ordered the employer to pay compensation as Mr Tshishonga suffered humiliation and indignity of losing his employment. [119]

Nevertheless, after having comparatively analyzed the American, British, South African and New Zealander whistleblowing legislations, the question posed is as to what features should be included in the “future Congolese whistleblowing legislation.”

#### IV. SECTION 3: SKETCH OF THE “CONGOLESE WHISTLEBLOWING LAW”: RECOMMENDATION

As above mentioned, there is no legislation that encourages and protects whistleblowers in the DRC. The existing legislations, such as the Labor Code and Code of Conduct of the Public Agent of State, foster the culture of secrecy and offer no protection against reprisals to employees who make disclosures for public interest.

Inspired from the examples of whistleblowing legislations as early developed, it suggests following elements that should be taken into account in the drafting of the “Congolese version of whistleblowing law”:

##### 1. The person protected

Unlike the US, British, South African or New Zealander legislation, the Congolese version of whistleblowing law should extend the scope of coverage of persons protected beyond the mere

relationship between employer and employee. Like the South Australia Whistleblowing Protected Act 1993, [120] both employees and unemployed persons should be protected under the whistleblowing law. The rationale of that extension is to equally encourage and protect everyone who makes a disclosure for public interest, largely to combat corruption.

##### 2. Motive of disclosure

The person who discloses information should be protected only if he/she acts in “good faith.” Therefore, the requirement of good faith is imposed to avoid disclosures that might be made in *mala fide* and motivated by personal interest rather than public interest.

##### 3. Information protected

Like the British and South African legislations, the Congolese version of the law should protect any information, including criminal violations, violations of civil law, miscarriage of justice, danger to health and safety of an individual, damage to the environment, unfair discrimination, or the concealment of information. This also takes account of any wrongdoing that occurs outside of the national boundary and which is not covered by the Congolese law. Considering the transnational nature of corruption, it is important that legislation cover any information about corruptive activity that happens outside of the country and which may be vital for public interest.

##### 4. Procedure of disclosures

The procedure of disclosures should include both the internal and external disclosures. Internal disclosure should be mandatory for all employees, and this intends to encourage employees who detect wrongdoing in the workplace to internally disclose it so that it can be resolved before the problem grows. [121] Similar to the British and South African legislations, the following internal procedure must be applied before releasing information in particular circumstances: (1) a legal advisor, (2) an employer or its representative, (3) a member of Central Government (or Provincial Government) or (4) a person/body that will be specified by the law (such as: *Commission d’Ethique et de Lutte contre la Corruption* or *Observatoire du Code de l’Ethique et Profession*).

External disclosure should, however, be allowed to employees as an alternative in the case of failure of internal disclosure. It should be used by unemployed persons as a method of disclosure, and should be limited to a certain number of bodies, such as

Ministries of the Republic. In the case of fraud and corruption, external disclosure should be made to the Officer of Judiciary Police (*Officier de Police Judiciaire*), Public Prosecutor or Auditor-General or *Commission d'Ethique et de Lutte contre la Corruption*. Disclosures to the media body should be foreseen as a last resort procedure to be used in certain circumstances.

### 5. Nature of protection and legal remedies

Broad protection to whistleblowers is suggested, including protection against disciplinary action (if the whistleblower is an employee) and civil or criminal proceeding. Therefore, unemployed persons should be immunized from civil and/or criminal defamation actions for their protected disclosures. Additionally, as the British, South African and New Zealander legislations, the Congolese version of law should also offer the employee-whistleblower, as a victim of reprisals or occupational detriment on the ground of his protected disclosure, the right to approach any Court (including Labor Court), or pursue any other process prescribed by the law in order to get relief. Beyond remedies, which are usually available to employees as reintegration, compensation of remuneration, or pay of salary, the Court should have the possibility of imposing drastic sanctions against employers who commit occupational detriment against their employees based on the protected disclosures they made concerning the situations of fraud and corruption. Legislation should not only be focused on prevention of reprisals, but it should also offer a complete cure against such reprisals, such as sanctioning cases of occupational detriment.

### REFERENCES

- [1] K. Annan, "Statement on the adoption of the United Nations Convention against Corruption," Mexico, 2003. Available: <http://www.un.org>
- [2] *Transparency International*, Indice de perceptions de la corruption, 2004. Available : <http://www.transparency.org>
- [3] *Décret-Loi No 017/2002 du 3 octobre 2002 portant code de conduite de l'agent de l'Etat*
- [4] M. Kodi (2008, November, 1). *Corruption et Gouvernance en RDC durant la Transition (2003-2006)*. Monograph153. Available: <http://www.iss.co.za>
- [5] *Observatoire Anti-Corruption*, Corruption et spoliation du patrimoine de l'état dans la liquidation de la BCCE, dans l'ONPT et dans la GECAMINES, Doc. 2, Kinshasa, OAC, 2003. Available : <http://www.iss.co.za>
- [6] D. Hall and S. Davies (1999, December). Corruption and whistleblowing- a background note for Trade Union Advisory Committee. Report No 9912 U, PSIRU. Available: <http://www.psiru.org/reports/>
- [7] D. Lewis and S. Homewood (2004). Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected? Issue 5. Available: <http://webjcli.ncl.ac.uk/2004/issue5>
- [8] Article 33 of the United Nations Convention against Corruption, adopted in October 13, 2003.
- [9] Article 5 of the African Union Convention on Preventing and Combating Corruption, adopted in June 2003.
- [10] OECD Guidelines for Managing Conflict of Interest in the Public Service. Available: <http://www.oecd.org>
- [11] Article 4(1)(e) of the SADC Protocol Against Corruption, adopted in October 14, 2001.
- [12] Article 52(3) of the Congolese Labor Code (*Loi No 015-2002 portant Code du Travail*).
- [13] Article 18(1) du *Décret-Loi No 017/2002 du 3 octobre 2002 portant code de conduite de l'agent de l'Etat*.
- [14] South Africa Protected Disclosure Act 26 of 2000, entered into force in February 2001.
- [15] A. H. Kargbo, "Corruption: Definition and Concept Manifestations and Typology in the Africa Context," presented at the 2006 Corruption Workshop, Sierra Leone.
- [16] J. Nye (1967, June), "Corruption and Political Development: A Cost-Benefit Analysis," *American political science review*, Vol. 61, No2.
- [17] A. H. Kargbo, op.cit., p.3
- [18] Article 15 of the UN Convention against Corruption 2003
- [19] Articles 1 and 4(1) of the African Union Convention on Preventing and Combating Corruption.
- [20] Article 1 of the SADC Convention against Corruption
- [21] Article 147 of the Congolese Penal Code
- [22] K. Drew (2003, January). Whistleblowing and Corruption: An Initial and Comparative Review. Public Services International Research Unit, London. Available: <http://www.psiru.org>
- [23] W. Cho, "What Are The Origins of Corruption in Africa? Culture or Institutions," presented at the 2009 International Studies Association Convention, New York, USA.
- [24] Loc. cit.
- [25] Loc.cit.
- [26] A. H. Kargbo, op.cit., p.7.
- [27] J.P. Mbwebwa Kalala, "La corruption dans les institutions politiques de la République Démocratique du Congo," Communication présentée, en juillet 2008, lors de la Conférence

- internationale sur les Institutions financières internationales et la pratique de la corruption en RDC.
- [28] Article 65 of the UN Convention against Corruption.
- [29] Id., articles 5 to 14.
- [30] Id., articles 15 to 44.
- [31] Id., articles 43 to 49.
- [32] Id., articles 51 to 59.
- [33] Id., articles 60 to 62.
- [34] Id., articles 63 to 64.
- [35] Article 22(1) of the African Union Convention on Preventing and Combating Corruption.
- [36] Id., article 22(5)(h).
- [37] Article 2 (a) of the SADC Protocol against Corruption.
- [38] Id., article 2(b).
- [39] Id., article 2(c).
- [40] Id., article 2 (a).
- [41] Id., article 4.
- [42] Organisation for Economic Co-operation and Development Anti-bribery Convention. Available: <http://www.oecd.org>
- [43] Loc.cit.
- [44] World Bank Anti-corruption Strategies. Available: <http://www.web.worldbank.org>
- [45] Loc.cit.
- [46] M. Kodi, op. cit., p.66.
- [47] *Décret-Loi No 017/2002 du 3 octobre 2002 portant code de conduite de l'agent de l'Etat.*
- [48] Id., article 2.
- [49] Id., articles 17 and 18.
- [50] Id., article 28(1).
- [51] Id., article 28(2).
- [52] *Ordonnance-loi n° 69-054 du 12 décembre 1969 relative aux passations des marchés publics et Ordonnance n° 69-279 qui traite des marchés publics des travaux, fourniture, de transport et des prestations.*
- [53] *Global Financial Integrity*, "Conférence Internationale sur le thème: Institutions Financières Internationales et la Pratique de la Corruption en République Démocratique du Congo," 2008, Kinshasa, RDC.
- [54] *Transparency International*, Indice de perceptions de la corruption, 2009. Available : <http://www.transparency.org>
- [55] *Transparency International*, Indice de perceptions de la corruption, 2004. Available : <http://www.transparency.org>
- [56] R. Calland and G. Dehn (2004). Whistleblowing Around the World: Law, Culture and Practice, ODAC and PCaW, London, UK.
- [57] *United Kingdom Parliament*, Standing Committee on Public Life 9<sup>th</sup> Report, 1994.
- [58] N. Holtzhausen, "Whistleblowing and Whistleblower Protection in the South African Public Sector," PhD dissertation, Dept. Public Adm., UNISA, 2007.
- [59] R. Calland and G. Dehn, op.cit., p.9.
- [60] Loc.cit.
- [61] Loc.cit.
- [62] Loc.cit.
- [63] D. Hall and S. Davies, op.cit., p.6.
- [64] K. Drew, op.cit., p.6.
- [65] Loc.cit.
- [66] *Organisation for Economic Co-operation and Development*, Guidelines for Managing Conflict of Interest in the Public Service, 2003. Available: <http://www.oecd.org>
- [67] Articles 5(5) and 5(6) of the African Union Convention on Preventing and Combating Corruption.
- [68] Article 4(1)(e) of the SADC Convention against Corruption.
- [69] Article 18(1) de Code de conduite de l'agent public de l'Etat.
- [70] Article 5(1) of the South Australia Whistleblowing Protected Act 1993.
- [71] P. Whitaker, "Whistleblower Protection Act: An overview (Report for Congress)," CRS, 2007.
- [72] K. Drew, op.cit., p.14.
- [73] Section 43 K of the UK Protected Interest Disclosure Act 1998 (PIDA)
- [74] Section 1(iii) of the South Africa Protected Disclosures Act 2000 (PDA).
- [75] Section 3 of the New Zealand Protected Disclosures Act (PDA).
- [76] D. Lewis and S. Homewood (2004). Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected? Issue 5. Available: <http://webjcli.ncl.ac.uk/2004/issue5>
- [77] K. Drew, op.cit., p.14.
- [78] Section 43B of the UK PIDA.
- [79] Section 1 of the South Africa PDA.
- [80] Section 6 of the New Zealand PDA.
- [81] D. Lewis and S. Homewood (2004). Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected? Issue 5. Available: <http://webjcli.ncl.ac.uk/2004/issue5>
- [82] Section 43B(2) of the UK PIDA and Section 1(g)(iv)(b) of the South Africa PDA.
- [83] R.C. Liwanga, "The Protected Disclosures Act 2000: Limitation on the Defamation Law in South Africa," LL.M dissertation, Dept. Public Law, UCT, 2008.
- [84] Japan Whistleblower Protection Act 2004, which came into operation in 1<sup>st</sup> April, 2006.

- [85] D. Banisar, "Whistleblowing International Standards and Development," presented at the 2006 *Primera Conferencia Internacional sobre Corrupcion y la Transparencia*, Mexico.
- [86] *Id.*, p.51.
- [87] Sections 43C, 43D, 43 E and 43F of the UK PIDA.
- [88] Section 1 (ix) of the South Africa PDA.
- [89] Sections 7 to 10 of the New Zealand PDA.
- [90] H. Mizutani (2007), "Whistleblower Protection Act", Japan Labor Review, Vol. 4, No 3, pp. 95-120.
- [91] D. Banisar, *op.cit.*, p.58.
- [92] US Whistleblower Protection Laws 1989. Available: <http://www.answers.com/topic/whistleblower-protection-laws-1989>
- [93] P. Whitaker, *op.cit.*, p.4.
- [94] Section 9(1)(a) of the South African PDA.
- [95] *Texas Department of Transport v. Needham*, Court of Appeal of Texas, April 2002.
- [96] *Street v Derbyshire Unemployed Workers' Center (EAT/0508/02/ZT)*.
- [97] *Tshishonga v Minister of Justice and Constitutional Development [2006] JOL 16856*.
- [98] *Loc.cit.*
- [99] *Texas Department of Transportation v. Needham*, Court of Appeal of Texas, April 2002.
- [100] *Loc.cit.*
- [101] *Loc.cit.*
- [102] *Loc.cit.*
- [103] *Loc.cit.*
- [104] *Theron v Minister of Correctional Services and MEC for the Department of Health in the Western Cape, Case No C579/07*.
- [105] *Id.*, at 43.
- [106] R.C. Liwanga, *op.cit.*, p. 27.
- [107] *Tshishonga v Minister of Justice and Constitutional Development [2006] JOL 16856*.
- [108] Section 47B of the UK PIDA.
- [109] Section 1(vi) of South Africa PDA.
- [110] Section 18 of the New Zealand PDA.
- [111] *Pedzinski v Andisa Securities (Pty) [2006] ILJ 362 (LC) or [2006] 2 BLLR 184 (LC)*.
- [112] *Theron v Minister of Correctional Services and others, at 29*.
- [113] Section 47B of the UK PIDA, Section 4(1) of the South African PDA, and Sections 17 and 18 of the New Zealand PDA.
- [114] R.C. Liwanga, *op.cit.*, p.29.
- [115] *Theron v Minister of Correctional Services and others, at 43*.
- [116] D. Lewis and S. Homewood (2004). Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected? Issue 5. Available: <http://webjcli.ncl.ac.uk/2004/issue5>
- [117] *Pedzinski v Andisa Securities (Pty), [2006] ILJ 362 (LC) or [2006] 2 BLLR 184 (LC)*.
- [118] R. Calland, "Whistleblowing: A practical tool in combating corruption," presented at the 2001 10<sup>th</sup> International Anti-corruption Workshops, Prague, Czech Republic. Available: <http://www.10iacc.org>
- [119] *Minister of Justice and Constitutional Development v Tshishonga, Case No.: JA 6/2007 at 24*.
- [120] Article 5(1) of the South Australia Whistleblowing Protected Act 1993.
- [121] D. Banisar, *op.cit.*, p.51.

#### BIOGRAPHY

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