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Η κοινωνικοασφαλιστική παραβατικότητα ως «σκόπελος» για την κοινωνική δικαιοσύνη: η συσχέτιση με το εργασιακό καθεστώς και την καταγγελία δυσλειτουργιών

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# Social security circumvention as an obstacle to social justice: the correlation with labour status and whistle-blowing

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## Η κοινωνικοασφαλιστική παραβατικότητα ως «σκόπελος» για την κοινωνική δικαιοσύνη: η συσχέτιση με το εργασιακό καθεστώς και την καταγγελία δυσλειτουργιών

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### ABSTRACT

This article explores social security delinquency, which can impair social justice and its awarding. The parameters leading to social security fraud or delinquency are examined. Taking into account that the social security status is linked to employment, precarity in work or undeclared work are presented as a threat for the balance of a social security system. It is about a financial balance, but also a social one, since the previous can ultimately result in the disruption of social justice causing anti-motives for the participating in the social security system and the proper fulfillment of the obligations it entails. After presenting the situation in the EU as regards the “grey zones” of employment which then have their impact on social security equilibrium, U.S.’ mechanisms for reporting fraud and whistleblower’s protection are analyzed in order to explain the recent trends in many of the EU countries of adopting similar measures.

**KEY WORDS:** precarious work, social security coverage, whistle-blowing

### ΠΕΡΙΛΗΨΗ

Η παρούσα μελέτη διερευνά την παραβατικότητα της κοινωνικής ασφάλισης, η οποία μπορεί να βλάψει την κοινωνική δικαιοσύνη και την απονομή της. Υπό εξέταση τίθενται οι παράμετροι που οδηγούν στην απάτη ή την παραβατικότητα σε ό, τι αφορά την κοινωνική ασφάλιση. Λαμβάνοντας υπόψη ότι το καθεστώς κοινωνικής ασφάλισης συνδέεται με την απασχόληση, η επισφαλής και η αδήλωτη εργασία παρουσιάζονται ως απειλή για την ισορροπία του συστήματος κοινωνικής ασφάλισης. Κατόπιν της ανάλυσης της κατάστασης στην ΕΕ όσον αφορά τις «γκρίζες ζώνες» της εργασίας που έχουν, στη συνέχεια, τις επιπτώσεις τους στην ισορροπία της κοινωνικής ασφάλισης, σκιαγραφούνται οι μηχανισμοί των ΗΠΑ για την αναφορά απάτης και την προστασία των καταγγελιών, προκειμένου να εξηγηθούν και οι πρόσφατες τάσεις σε πολλές από τις χώρες της ΕΕ προς υιοθέτηση παρόμοιων μέτρων.

**ΛΕΞΕΙΣ-ΚΛΕΙΔΙΑ:** επισφαλής εργασία, κοινωνικοασφαλιστική κάλυψη, καταγγελία δυσλειτουργιών

## 1. Introduction

**I**n modern times, the validity of social rights is generally recognized (McKeever and Ni Aolain: 2007: 147). As Scheinin aptly observes though, the problem relating to the legal nature of social rights does not relate to their validity but rather to their applicability (Scheinin: 2001). Some have taken the view that rights can be sensibly formulated only in combination with correlated duties (Sen: 2000: 124). Indeed, aside from many lawyers, there are also distinguished philosophers who have argued in favour of the binary linkage between rights and exact duties of specified individuals or agencies (O' Neill: 1996). Furthermore, some do not see any sense in a right unless it is balanced by what Immanuel Kant called a "perfect obligation" — a specific duty of a particular agent for the actual realization of that right (Kant: 1956). In social security, the social responsibility of the insured may entail the obligation of the payment of the contributions, the sincerity of their applications and declarations regarding their personal or family situation, as well as their employment. Namely, it is interesting to examine the possible ways of reaction to the employer who enhances undeclared work or moonlighting since it may be the case that an individual is aware of an abuse as regards another individual to whom there is no employment relation. Further, failure or inefficiency of the institutions to guarantee fairness in the benefits rendering- social justice - creates unreliability (insecurity) to the insured shaking the structural feature of social security, solidarity. Therefore, the measures of protection can expand to those informing about any form of fraud. A social security fraud could be considered a subcategory of the classic financial fraud, but still it should be standardized separately.

## 2. Methodology and definitions

**S**ocial security implications according to the precarious and undeclared work are analyzed. The case of U.S.A. is underscored as to the role of the stakeholders in social justice making by the social security institutions. National cases are presented concerning whistle-blowing. Finally, the recent measures in EU countries towards the same direction are presented.

**Social justice** is perceived as the ability people have to realize their potential in the society where they live (Hart: 1961, Rawls: 1971, Swift: 2013). Classically, "justice" ensures that individuals both fulfilled their societal roles (Aristotelis: 350 BC) and received what was due from society. "Social justice" is generally used to refer to a set of institutions which will enable people to lead a fulfilling life and be active contributors to their community (Rawls: 1971: 4). According to John Rawls, "the principles of social justice provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of benefits and burdens of social cooperation" (Rawls: 1971: 4). Social justice might be also connected with the fair and proper administration of laws. Taking into account its various definitions, social injustice may take different forms. In any case, social security can be regarded as an integral part of social justice. Indeed, it has been already pointed out that social security signifies social justice and at the same time the latter serves the former (Stergiou: 2006: 26).

### 3. Social justice and participatory processes

As it has been famously argued by Henry Shue, human rights impose three levels of obligations: to respect, to protect, and to fulfill (Shue: 1996: 52). Any abuse of a social security system equates to an infringement of social security rights of any individual-stakeholder and a disruption of social justice. The ideal of reciprocity was encapsulated in Beveridge's third principle that, social security must be achieved by co-operation between the state and the individual (Beveridge: 1942). The focus on claimant responsibilities underlines the fact that supporting those in poverty is not the only objective of social security policy (McKeever: 2009: 141). Alcock refers to the range of aims and objectives underpinning social security policy as including "insuring against risk, supporting family relations and promoting social cohesion" (Alcock: 2006: 204-205).

Integration contains also a social claim for democracy implementation not only in the field of state's competences but also throughout the whole social space (Kasimatis: 1980: 112-114). In the modern state-organized social formation, a strong assertion of citizens' rights is observed but without being accompanied by the corresponding invocation of their obligations as well; as a result, the scientific dealing with the citizens' fundamental obligations is regarded meager compared to fundamental rights (Götz und H. Hoffmann: 1983). However, the participation of citizens and social institutions in the process of decision-making originates from the *status actives* (P. Häberle: 1972: 1980). Participation constitutes a right, which is included in the shaping and concreteness of the general interest (Kasimatis: 1983). The main consequences of the regulatory dimension of state activities are the increasing public rights (Henke: 1980, Dagtoglou: 1984: 154) and the expanding of the traditional bilateral administrative relationship towards a multilateral legal relationship (Schmidt-Assmann: 1982: 23).

Indeed, the social state faces severely closeness of goods and services, as well as the limited availability of the financial resources, thus, transformed into a recipient of contemporary claims and demands of citizens, social classes and groups seeking both equitable distribution of goods and services offered and the balancing of conflicting interests (Schmidt-Assmann: 1984: 10). As noted in relation with the administration of benefits, the initial entirely ruled by the person living area (*beherrscher Lebensraum*), which was a consequence of dominated livelihoods, declined dramatically after the second world war and was replaced by the "beneficial" (or real) living space (*effektiver Lebensraum*) (Forsthoff: 1959, Kasimatis: 1974, Rizos: 1984). State administration has transformed into a universal guarantor of existence of the person (*universal Daseinsgaranten*) (Schmitt Glaeser: 1984). Thus, a dynamic participation of the citizen in the decision-making process regulating the formation of his life is required (Schmitt Glaeser: 1973).

### 4. Social security fraud and precarity in work

In terms of individual claimant fraud, a distinction is pointed out between accidental error and intentional fraud, but also between "need" and "greed" (Dean and Melrose: 1996, Rowlingson et al: 1997, McKeever: 2009). According to the researchers, claimants commit fraud due to inadequate levels of benefit (Rowlingson et al: 1997) and there is continued evidence claimants are facing financial difficulties (Langan: 1998: 27-28, Peters and Joyce: 2006: 42). While it may appear that those committing fraud are doing so as a result of familiarity with the rules of social security, research as a whole rejects the idea that individual claimants possess a sophisticated

knowledge of the social security system, noting that only a small proportion are “street wise” in this regard (Dean and Melrose: 1996). The complexity of the system is an acknowledged problem (Sainsbury and Stanley: 2007: 43-56, Social Security Advisory Committee: 2008: 5-6, Irvine, Davidson and Sainsbury: 2008: 42, Sainsbury and Stephens: 2009: 12) and there is evidence of claimant ignorance of social security obligations resulting in benefit sanctions being applied for failure to discharge particular obligations (Mitchell and Woodfield: 2008: 26, Irvine, Davidson and Sainsbury: 2008: 48-49, 61-62). Fimister found that there is widespread ignorance among claimants regarding the information which needs to be reported and to whom in order to keep benefit payments accurate (Fimister: 2009: 11). Claimants in Rowlingson et al cited the administrative hassle involved in declaring changes of circumstances and subsequent delay of benefit payments as reasons why they did not report changes (Rowlingson et al: 1997: 2). This finding is further reinforced by another research, where claimants were reluctant to report even those changes of circumstances that could lead to an increase in their benefits (Irvine, Davidson and Sainsbury: 2008: 42). Although public intolerance towards fraud is increasing, it is still the case that the notion of fraud is variable, with some examples regarded as being more fraudulent than others (McKeever: 2009: 147-148). Labour’s 1998 Green Paper on fraud had recognized this by identifying the need to balance “the cost to the taxpayer, the individual’s natural wish to improve their own lot, the level of fraud, and the public’s willingness to support action to police the rules” (Department for work and pensions: 1998: 26).

Social security fraud can be correlated with the range of labour rights protection taking into account the form of employment. In order to obtain undue benefits or levels of payment, claimants provide incorrect information on their income or the hours of work (National Audit Office-Great Britain: 2006). Besides, the interdependence of “decent work” and social protection has already been underscored. The concept of “decent work” was launched in 1999, in the Report of the Director-General to the International Labour Conference meeting in its 87th Session elaborating four components of the notion: employment, social protection, workers’ rights and social dialogue (Ghai: 2003: 113). Decent work applies not just to workers in the formal economy but also to unregulated wage workers, the self-employed and home workers; it also refers to adequate opportunities for work, remuneration, safety at work and healthy working conditions (Ghai: 2003: 113).

When atypical forms of employment are adopted, the consistency and the social security obligations are difficult to be monitored. According to Eurofound’s European Industrial Relations Dictionary, “atypical” [or non-standard] work refers to employment relationships not conforming to the standard or “typical” model of full-time, regular, open-ended employment with a single employer over a long time span’. Study on precarious work and social rights 2012 (Study on precarious work and social rights: 2012) demonstrates how the definition of precarious work has been broadened to incorporate contextual and social concerns. The PWSR study finds that while the experience of precariousness in work is becoming more common, there is no single satisfactory way of identifying it and that precariousness arises from a combination of factors that are both specific to the employment relationship and particular to the category of work or to the individual circumstance (Study on precarious work and social rights: 2012: 12).

It is concluded though that the most precarious work involved the inability of individuals to enforce their rights, where social insurance protection is absent, where health and safety is put at risk and where work does not provide sufficient income to enable people to live decently (Study on precarious work and social rights: 2012: 8-9). As the abovementioned study indicates, social

insurance schemes reflecting the model of full-time, permanent work can exclude precarious workers when they are unemployed, sick, disabled or in retirement. Both this exclusion and cuts in social protection may create precariousness, as workers then enter unregulated forms of employment in order to survive.

Taking into account the “grey zones” among the forms of employment, there should not be an underestimation of a phenomenon which is regarded “grey zone” itself. Terms such as ‘black work’, ‘informal economy’, ‘shadow economy’, ‘moonlighting’ and many others have been used to describe the phenomenon or parts of it (Undeclared work in EU-Special Eurobarometer 2007). Anderson and Rogaly (2005) identified undeclared work: short-term, temporary or casual contracts, working for an agency or third party rather than being a direct employee, providing a contracted-out service and working for low wages that prevent the achievement of a decent standard of living, all being within the definition of precarious work. On the basis of that definition, they estimated that about one in five UK workers were working under what were termed precarious contracts. Similarly, Broughton et al (2010) in their development of the concept of ‘very atypical’ contractual relationships group these around forms of contract, based on notions of ‘standard’ and ‘non-standard’ work. Reinert, Flaspöler and Hauke (2007) in their paper on identifying occupational health and safety risks, also associated non-standard work with precariousness, but on the basis that these forms offered low levels of control over work, low levels of income and low social protection.

Munck, Schierup and Delgado (2011) in their on-going three-country study<sup>1</sup> (PRECARIAT) examine precarious work and social movements in the context of international migration, labour market restructuring, changing national frameworks of citizenship and emerging human and migrants’ rights regimes globally. At the heart of their project lies the theoretical and empirical development of the concept of a ‘*precariat*’ designed to capture the vulnerability of casual or “flexible” labour and a truncated citizenship. Neilson and Rossiter (2008) went even further to question whether indeed it should be Fordism that is seen as the exception and precarity as the norm (Neilson and Rossiter: 2008: 51). Ross (2009) has also questioned whether the dream of a secure job with full benefits and a decent salary is no longer realizable, at least for growing numbers of workers, using the concept of ‘precarious livelihoods’ to describe new patterns of work and life.

From the 1980s onwards, the possession of part-time, fixed-term, or temporary agency work employment contracts became the dominant way of understanding ‘precarious’ work (Study on precarious work and social rights: 2012). In all, temporary work represented 30 per cent of all paid jobs created between 1987 and 2007 (ACTRAV-ILO: 2011). The OECD Employment Outlook 2006 has already recognized that temporary jobs are not always a voluntary choice and do not necessarily serve as entry ports into permanent and stable employment. Secondary analysis of the third EWCS data on Employment status and working conditions suggests that working conditions of non-standard workers are worse than those of permanent workers (Goudswaard and Andries/Eurofound: 2002).

Other Eurofound research exploring the connections between work organisation and working conditions (Daubas-Letourneux and Thibaud-Mony/Eurofound: 2003) reveals that non-permanent and involuntary part-time employment contracts are overrepresented in the type of work organisation called ‘constrained work’. This form of work organisation is found in unclassified and unskilled manual jobs and has the highest proportion of women in the youngest (under 25 years) and oldest (55 years and over) age groups.



Moreover, undocumented migrants (both Third Country and intra EU27) generally were found in the most precarious work and female migrants specifically are seen as at high risk of being in precarious work, according to the interviews, the questionnaire survey and labour force survey data (Study on precarious work and social rights: 2012). Growing concerns are also pointed out in relation to the use of non-standard employment contracts in terms of implications for the well-being and health of workers (European foundation for the improvement of living and working conditions: 2010). The Risk Observatory of the European Agency for Health and Safety at work (OSHA) has conducted an expert survey on new emerging workplace risks. So-called 'precarious contracts', such as temporary or on-call contracts, rank high on the list of the top 10 emerging workplace risks (EU-OSHA: 2007).

National sources (European Industrial Relations Observatory) also give an indication of the extent to which successive waves of labour market reform have introduced new contractual forms with the aim of increasing labour market flexibility. Some authors regard the process of labour market flexibilisation as a 'partial and targeted deregulation' (Esping-Andersen and Regini: 2000). The *OECD Employment Outlook 2006* refers to the deregulation of the labour market as a 'partial reform strategy', shifting the emphasis onto the skill divide in the workforce: skilled-protected jobs versus unskilled deregulated and potentially precarious jobs. According to the OECD definition, employment protection refers both to regulations concerning hiring and firing (OECD Employment Outlook: 1999: 50). More flexible work arrangements may well lead to a bill that society will have to pay for later, since a large proportion of the population will not have appropriate savings for pensions (Study on precarious work and social rights: 2012).

On average in the EU27, employees without a contract account for about 7% of employment (European foundation for the improvement of living and working conditions: 2010: 8). However, this average hides significant variations between countries as the relevant Survey shows. Cyprus has the highest proportion of such employees (41%), followed by Malta (38%), Ireland (28%) and Greece (26%). Of the bigger countries, the UK has a high proportion of such employees (14%). Although *work performed without an employment contract is often regarded as a possible form of undeclared work*, the EWCS 2005 data do not enable an analysis to shed light into the relationship between undeclared work and working without a contract. The survey of European Foundation for the Improvement of Living and Working Conditions (2010) illustrates the distribution of working hours according to type of employment contract. A significant proportion of employees without a contract (22.2%) report working less than 10 hours a week. A lower proportion of such employees (9.6%) report working longer than 45 hours a week compared with the average proportion of employees working such hours (19%).

According to the Questionnaires source: QB30 of the Report on undeclared work (Special Eurobarometer: 2007), when asked for the reasons for not declaring work, almost half of all suppliers of undeclared work (47%) answered that it was because both parties benefited from (especially widespread in the Nordic countries). About a quarter of the suppliers of undeclared work (23%) stated that the work was only seasonal and not worth declaring. When asked whether they had (apart from financial considerations) experienced any negative consequences from working undeclared instead of doing the job in a regular manner, most undeclared workers were undecided or refused to answer (55%), those who gave a valid answer, the most frequently (21%) mentioned issue was the lack of insurance against accidents (Special Eurobarometer, Questionnaire source QB31: 2007).

The attention has to be drawn though to Questionnaire source: QB15, on the ground that it shows the implications the practice at issue can have on a social security system: *"The following two basic variants are distinguished: (1) No salary or only a relatively small salary (e.g. the legally prescribed minimum wage) is paid to the employee in a formal way which would imply the payment of taxes and social security contributions. Instead of a regular salary or in addition to it, the employee receives a so called 'envelope wage' for her or his agreed regular amount of work. (2) While the contractually agreed hours are paid in a formal way, the additionally worked hours are remunerated on a cash-in-hand basis, without declaration to tax or social security institutions. Thus, the employer avoids the payment of social security contributions for the salary of an employee or part of it. The employee in turn usually gets a salary that is higher than the net salary she or he would receive in the case of a formal payment. In some cases, however, employees might have no choice – either they accept the envelope wage or they do not get the job"* (Special Eurobarometer: 2007: 29).

Another parameter recognized by the Study on Precarious Work and Social Rights 2012 is bogus (or false) self-employment: a form of employment relationship located between subordinate and independent work, where the form of the employment relationship is classified as that of an independent, self-employed contractor but where the conduct of the relationship mirrors that of subordinate relationships (Study on precarious work and social rights: 2012: 25). According to the PWSC survey, it is more convenient, involves less administration and provides greater flexibility for the employer, while it is often accepted or sought after by the worker because it can provide short-term benefits through reduced tax or social insurance obligations (Study on precarious work and social rights: 2012: 26) Bogus self-employment was viewed as being widespread by interviewees from Greece, Italy, Latvia, the Netherlands, Poland, Spain, Sweden and UK.

As argued, despite the financial difficulties, there is a need to re-balance and to strengthen social rights (Study on precarious work and social rights: 2012: 11). Workers in irregular and informal work and in bogus self-employment have limited or no access to social rights. According to the PWCS Study 2012, responsibility should be placed on the state to ensure that rights are enjoyed, focused on those fundamental rights already established under the Charter and through ILO conventions and recommendations (Study on precarious work and social rights: 2012: 11). However, it is not only the state that has to stand for rights.

## 5. U.S.A: The developed legal context of SSA and whistleblower's protection

**W**hat is becoming the United Nations' general approach to practical policy through rights-based reasoning is extending the ethical claims that transcend legal recognition (Sen: 2000: 123) aiming at a decent society (ILO Declaration on Fundamental Principles and Rights at Work:1998), starting from "decent work". The framework of rights-based thinking is thus extended from the pure domain of legality to the broader arena of social ethics, since these rights can be seen as being *prior* (rather than posterior) to legal recognition (Sen: 2000: 123). Indeed, social acknowledgement of these rights can be taken to be an invitation to the State to catch up with social ethics (Sen: 1999a).



Since fraud or delinquency can take place on various occasions, the competent institutions need to be more sufficient in monitoring and individuals more willing to expose a wrongdoing. In parallel though, there should also exist the respective legal protection of a whistleblower. In relation to social security area, fraud seems to be frequent in the U.S.A. as the Reports of SSA show (Inspector General O' Carroll-Social Security administration: 2013). Between October 1, 2002 and March 31, 2003, the Office of the Inspector General for the Social Security Administration (SSA/OIG) received 51,311 fraud allegations from a variety of sources, including private citizens (23,951), anonymous tips (8,782), SSA employees (7,402) law enforcement (10,120), public agencies (323), and SSA benefits recipients (726 (SSA/OIG-Semiannual report to Congress: 2003). At the same time, SSA/OIG opened 9,170 potential fraud cases and investigated and closed approximately 9,389 cases nationwide. During the same period, investigations by special agents of SSA/OIG culminated in 2,677 arrests and indictments involving Social Security fraud, which resulted in 1,008 criminal convictions.

The Title II programs of Social Security Act 1935 (OASDI Trustees report 2003) have suffered significant episodes of fraud, causing significant loss of Social Security trust funds. One who wrongfully applies for and/or receives benefits payments under any of the Title II programs may be subject to criminal liability under 42 U.S.C. § 408(a)(1)-(8), which sets forth penalties for felony fraud violations under Title II of the Act. The Social Security felony fraud statute can be used separately or in concert with general federal criminal statutes found in Title 18, to prosecute fraud in benefits programs (United States Attorney's Bulletin: 2004: 3). The felony fraud provisions of the Title II programs are found in 42 U.S.C. § 408(a)(1)-(8) of the Act, while Title II of the Act, cited as 42 U.S.C. § 408(a)(1)-(8), contains the Act's primary criminal provisions and carefully spells out the Act's restraints on fraud by specifying requirements for disclosure of specific events, and identifying facts that affect the right to payment of SSA benefits (United States Attorney's Bulletin: 2004: 4-5). The major difference between violations of federal criminal statutes under Title 18 and those in the Social Security Act (Title 42) is the criminal intent required (*U. S. v. Lichenstein*, 610 F.2d 1272, 1277/5th Cir. 1980).

Apart from the possible falsifying behavior of a social security beneficiary, the responsibility of the employer seems to be of important consequences. Similarly to the EU27, there is evidence that employers cheat the system in several ways, some of which are quite sophisticated. According to Report of the Supreme Court of New York, the simplest method is to avoid securing insurance altogether, a practice prevalent even in some of the most hazardous construction fields, while other employers understate the number of employees or the amount of their payroll (Report of the Grand Jury of the Supreme Court: 2013). Often, these employers also pay the hidden employees "off-the-books," in whole or in part, as part of the scheme and these illicit payments are sometimes made in cash, usually generated at a commercial check casher, and sometimes made from a bank account that appears on its face to be unrelated to the employer (Report of the Grand Jury of the Supreme Court: 2013: 5).

Another fraudulent practice about which evidence was heard before the Court involves phantom subcontractors or employers, who exist only to disguise the true number of the employer's own work force: the dishonest employer pays his workers with funds funneled through one or more entities and these entities may produce a certificate of insurance that insulates the true employer from liability, but will rarely provide adequate coverage for all the actual employer's employees (Report of the Grand Jury of the Supreme Court: 2013: 5). Other forms of fraud involve misclassifying employees lying about what work the employee performs, so that the deceitful employer improperly lowers his or her insurance premium (Report of the Grand Jury of the Supreme

Court: 2013: 6). In June 2013, the Fiscal Policy Institute published a study of New York City's construction industry circa 2011 estimating that New York State and New York City lost over \$420 million that year solely from the way 70,000 construction laborers were being paid off-the-books or misclassified as independent contractors (Report of the Grand Jury of the Supreme Court: 2013: 7).

The first step in reporting fraudulent claims can be calling the Social Security Administration Fraud Hotline or writing a letter to the Social Security Fraud Department or even filling up the Fraud Reporting Form found in the Social Security Administration website and then providing the Social Security Administration all pertinent information regarding the alleged fraud. Further, whistleblowing can be seen as a structure, a system or a means assisting in exposing organizations' illegal activities to the public, but also giving the employers the opportunity to find out irregularities that occur in the workplace and to rectify those mistakes in advance (Yu-Hao-Yeh: 2011).

According to SSA's guidelines, a "whistleblower" discloses information he/she reasonably believes evidences (Office of the Inspector General-SSA/website): a violation of any law, rule, or regulation; gross mismanagement: substantial risk of significant adverse impact on mission; gross waste of funds; abuse of authority; a substantial and specific danger to public health or safety. The vast majority of statutory whistleblower protection laws provide for a standard "make whole" remedy; in *Albermarle Paper Company v. Moody*, the U.S. Supreme Court held that the "purpose" of the damage provisions in Title VII cases was to "make persons whole for injuries suffered on account of unlawful employment discriminations" (Kohn: 2001: 330). But the single most important remedy to a whistleblower is reinstatement. A job represents a stream of income and benefits, which over time, can be viewed as a very valuable asset and given the difficulty many whistleblowers have obtaining comparable employment, reinstatement is the only realistic method to protect a career (Kohn: 2001: 330).

In 1946, the Supreme Court, in *Social Security Board v. Nierotko*, held that, for taxing purposes (i.e. Social Security tax), back pay "must be allocated as wages" in the "calendar quarters" of the year in which the money would have been earned, if the employee had not been wrongfully discharged"; Justice Frankfurter clearly set forth the public policy and legal analysis of the Court in reaching its conclusion: "The decisions of this court leaves no doubt that a man's time may, as a matter of law, be in the service of another, though he be inactive..." (Kohn: 2001: 345).

The holding of *Social Security Board* was affirmed by the Sixth Circuit and expanded to include taxation of wages along with taxation for social security benefits. Last but not least, it is worth mentioned that according to Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at various sections of 5 U.S.C.) ("WPA"), an employee is protected by retaliation for whistleblower activities. "The purpose of the Whistleblower Protection Act is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it" (*Spruill v. Merit Sys. Protection Bd.*, 978 F.2d 679, 690 (Fed.Cir.1992).

In the case before the United States Court of Appeals, Federal Circuit, *Rokki Knee CARR, Petitioner, v. SOCIAL SECURITY ADMINISTRATION*, Respondent. No. 98-3244. – July 30, 1999 concerning Ms. Carr who disclosed her discoveries to appropriate authorities within SSA, the Court held that under the statute, after an employee establishes by a preponderance of the evidence (*Ellison v. Merit Sys. Protection Bd.*, 7 F.3d 1031, 1034 (Fed.Cir.1993), that she made a protected disclosure, that subsequent to the disclosure she was subject to disciplinary action, and that the disclosure was a contributing factor to the personnel action taken against her, the agency must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure (2302(b)(8) (1994)) (*Social Security Administration v. Carr*, 78 M.S.P.R. 313 (1998).

Subsequently, the 2002 Judiciary Committee's report on its corporate reform proposal after the "Enron corruption scandal" found that "investors and pensioners" were being robbed by "highly educated professionals" who had spun an "intricate spider's web of deceit"; these corporations "valued profit over honesty" and had "cooked the books and tricked" the public and federal regulators (Konh and Colapinto: 2004: 1). The auditors hired by the companies were no better and "deceived the investing public and reaped millions for select few insiders". The Committee found that a corporate culture existed that discouraged and prevented employees from acting honestly or reporting wrongdoing and the problems faced employees who uncovered fraud such as Enron were documented (Konh and Colapinto: 2004: 2).

To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress passed the Sarbanes-Oxley Act of 2002 ("SOA"). Section 806 of the SOA's provisions protects whistleblowers; that provision instructed: "No [public] company (...), or any (...) contractor [or] subcontractor (...) of such company, may discharge, demote, suspend, threaten, harass, or (...) discriminate against an employee in the terms and conditions of employment because of [whistleblowing activity]" (18 U. S. C. §1514A(a)) (Supreme Court of the United States/Syllabus 571 U.S.: 2014).

The protection of employees under the previous provision seems to be further extended in view of the recent development and the respective case-law. Specifically, the letter of the law left open a very big question, if the employees of privately-owned "contractors" and "sub-contractors" of the public company were falling also under the §1514A's whistleblower protection. According to the U.S. Supreme Court in its 6-3 decision in *Lawson v. FMR LLC* (Case No. 12-3, 2014 BL 57948), the latter are also covered by whistleblower protection (Sloan: 2014).

As a result of Lawson, SOA whistleblower lawsuits are no longer a problem for large, public companies only but now, all employers — even small, private companies — who contract or sub-contract with a public company may also face SOA liability; thus, it is critical for all employers to adopt robust internal compliance procedures and to carefully and promptly evaluate all internal complaints about alleged fraud or other company wrongdoing (Sloan: 2014). It has to be noted that President signed in 2012 S. 743, the Whistleblower Protection Enhancement Act (WPEA). The legislation provides millions of federal workers with the rights they need to report government corruption and wrongdoing safely. The bill reflects an unequivocal bipartisan consensus, having received the vote of every member in the 112th Congress, passing both the Senate and House of Representatives by unanimous consent over the past couple of months (Government Accountability Project: 2012).

## 6. EU measures towards whistle-blowing protection

**R**ecently, the legislative activities in EU Member States are largely focused on introducing whistleblower protection under labour laws (European Labour Law Network, Annual Report 2013).

Specifically, in Sweden, a new Government Inquiry Report on strengthening certain aspects of the protection of freedom of expression and whistle-blowing for private sector employees employed in publicly funded businesses concerned with health care, school and care was presented on 4 December 2013 (European Labour Law Network: 2013/SOU 2013:79 Stärkt meddelarskydd för privatanställda i offentligt finansierad verksamhet). Until then, different rules-

such as constitutional provisions on freedom of expression, general principles of contract law and labour law (the duty of liberty and the principle of good labour market customs), employment protections, as well as international law (such as the European Convention on Human Rights, article 10) applied (European Labour Law Network: 2014/ SOU 2014:31 Visselblåsare. Stärkt skydd för arbetstagare som slår larm om allvarliga missförhållanden).

French Parliament adopted the Law No. 2013-316 concerning the independence of health and environment experts and the protection of whistleblowers (European Network for Legal Experts- Annual Flash report: 2013). Additionally, in Greece the Law 4144/2013 Combating Delinquency in Social Security and in the Labor Market provides that the financial police is equally competent to control undeclared employment of workers. Moreover, the Law 4225/2014 was also adopted by the Greek Parliament providing for significant increases in fines for cases of undeclared work (European Labour Law Network: 2014). The Italian government adopted Law Decree No. 145 providing also important measures to counter undeclared work (Annual Flash report: 2013). In order to address "precarious employment", the Maltese government has qualified the mandatory criteria which must be observed by contractors who participate in public procurement procedures to ensure that regulations on the condition of work are not violated- also known as precarious work (Annual Flash report: 2013: 29). The protection of the Whistleblower Act (Chapter 527 of the Revised Edition of the Laws of Malta) has been enacted to protect employees who make a disclosure to a whistle-blowing reporting officer or a whistle-blowing reports unit, and whether it qualifies as a protected disclosure or not under the Act (Article 2).

Finally, according to the Annual Flash report 2013, on 21 February 2013, the First Chamber of the Dutch Parliament adopted an amendment to the Act on Works Councils and a bill has been introduced to the Parliament to establish a 'House for Whistleblowers'. This bill aims to improve the position of whistleblowers e.g. by introducing extra protection against unfair dismissal and financial support (Annual Flash report: 2013). On 18 December 2013, the Bill on the Establishment of a House for Whistleblowers was passed by the second chamber of the Dutch Parliament, while on 19 December 2013 the Slovenian Government approved the draft for the Prevention of Undeclared Work and Employment Act (Annual Flash report: 2013).

## 7. Conclusion

**W**ithin this paper, social justice was conceived under the spectrum of fulfilling social security rights and obligations. How a social security system can be affected due to the selected form of employment was presented. The need for the citizens and the institutions to act together was also stressed. The example of U.S. was utilized to point out possible ways to cause positive participation of all the interested parties including the beneficiaries in the society's essential aims. Therefore, there is a need for the respective legal framework providing motives and legal protection to any party eager to protect social security system, thus, justice delivering. Recent evidence shows that EU countries are exemplified by the wide-spread in U.S. whistle-blowing as a mechanism to promote undertaking responsibility. The individuals as citizens or beneficiaries are involved in the social processes in different ways, by working, by being part of a society, by paying their contributions. The crucial here is that social rights can be seen as the double face of a coin on the one side of which obligations are situated. There is a need of active participation for assuring the living in a decent society.

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