

Blowing the Whistle

Abstract: Corruption has become a global malaise and for its eradication, "Whistle Blowing" laws have been enacted by U.K., U.S.A. and Australia. Corrupt practices violate human rights and basic freedom and affect the development of a Nation. This Article examines the definition of whistle blowing, discusses legislations protecting whistleblowers enacted by various countries and finally offering some suggestions regarding the proposed whistle blowing law in India in context of recent specific cases of whistle blowing exposing corruption.

Introduction

"There is no law, no system, no set of regulations which can more effectively hold governments to account than the conscience of man. Opposition parties, the public and the press rely on individuals, not systems, to tell us what those who rule over us would like us not to know. We call them "whistleblowers" because, like referees, they seek to keep the players in our political system in check."

The menace of the corruption has not only crippled our economy but also widened the gap between the various segments of the society. Anna Hazare warned that in last 62 years gigantic corruption has become so rampant in country that it has become a bigger threat than Pakistan. The people in India live in a state of despair as they believe that no one can change the current situation. However, there are valiant few, who think that the menace of the corruption can be eradicated and blew the whistle exposing the corruption, corrupt elements and their corrupt practices but they had to pay heavy price for their bravery. The murder of Satyendra Dubey, an IIT Kanpur alumnus and, National Highways Authority of India (NHAI) engineer who exposed corruption in the national highway building program is still fresh in public memory (Indian psyche). The issue of protection of whistleblowers first caught the attention of the entire nation with the gruesome murder of Dubey after he wrote a letter to the office of then PM A B Vajpayee in November, 2002 detailing corruption in the construction of highways. In the said letter, he had also specifically requested that his identity be kept secret, but the letter was circulated to various government departments without masking Dubey's identity. The Government apathy in shielding the identity of Dubey resulting into his murder uniquely galvanized nation-wide protest, which forced the government to take some concrete steps towards drafting a full-fledged law to protect whistleblowers.

Who is whistleblower?

Whistleblowers have been called 'canaries in the coalmine'. They have been accused of 'commit[ting] the truth'ⁱⁱ. A whistleblower is defined as someone who exposes wrongdoing, fraud, corruption or mismanagement. In many cases, this could be a person who works for the government who would report misconduct within the government or it could be an employee of a private company who reports corrupt practices within the companyⁱⁱⁱ.

Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues). There is some reason to believe that people are more likely to take action with respect to unacceptable behavior, within an organization, if there are complaint systems that offer not just options dictated by the planning and controlling organization, but a choice of options for individuals, including an option that offers near absolute confidentiality. However, external whistleblowers report misconduct on outside persons or entities. In these cases, depending on the information's severity and nature, whistleblowers may report the misconduct to lawyers, the media, law enforcement or watchdog agencies, or other local, state, or federal agencies^{iv}.

Difference between Whistleblower and Informers

Often the term Whistleblower is confused with the term Informer who have generally a bad reputation, and known as “Mukhbir” popularly. The most important distinction between the two terms is the liability of the person disclosing the information. Informants are often themselves involved in some sort of unethical enterprise and are using the disclosure of information as a means to reduce their liability, either voluntarily, or due to coercion. They are in a subordinate place to the body or person they are disclosing to and must follow their orders or face sanctions. In comparison, whistleblowing laws do not affect the liability of those that are involved in criminal enterprises. Another difference is that the informants often seek favours or remuneration for their disclosures but the same is not true in case of whistleblowers. However, a few type of anti-corruption laws do allow for rewards to be given to those that disclose, typically a part of the money recovered in corruption cases.

What is whistleblowing?

There is no globally accepted definition of ‘whistleblowing’. Among other things, it can be an act of free speech, an anti-corruption tool, and an internal management dispute mechanism. One of the first modern definitions of whistleblowing was given by US consumer activist Ralph Nader in 1971 who described it as “An act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.

US Academics Marcia P. Miceli and Janet P. Near defined ‘whistleblowing’ as, “the disclosure of organizational member’s (former or current) disclosure of illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action. They describe whistleblowing as a four state process:-

1. A triggering event occurs, involving questionable, unethical, or illegal activities, and this leads to an employee to consider blowing the whistle.
2. The employee engages in decision making, assessing the activity and whether it involves wrongdoing, gathering additional information, and discussing the situation with others.

3. The employee exercises voice by blowing the whistle; alternatively, the employee could exit the organization, or remain silent out of loyalty or neglect.
4. Organization members react to, and possibly retaliate against the whistleblower.

Other academics have focused on whistleblowing as mostly an element of free speech and the right of individuals to express dissent.

An expansive view of whistleblowing can be taken which treats whistleblowing as a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms.

Major Whistleblowing Legislations around the World

Many countries have devised and adopted a variety of laws and procedures for protecting and encouraging whistleblowing as discussed below:

The United States

The US has dozens of whistleblower laws at the state and federal level, as well as separate clauses in legislation designed to achieve other health, safety or welfare objectives. The three principal acts, however, are the Whistleblower Protection Act 1989, the Corporate and Criminal Accountability Act (Sarbanes-Oxley Act), and the False Claims Act.

(A) The Whistleblower Protection Act 1989

Initiated with the whistleblower protection provisions in the Civil Service Reform Act of 1978, this Act was revised in 1989, and again in 1994. Initially, for most forms of retaliation, federal workers were to be supported by the Office of the Special Counsel (OSC), but this agency proved to be ineffective. Until passage of the Whistleblower Protection Act in 1989, OSC conducted only one hearing to restore a whistleblower's job. Also created was a Merit Systems Protection Board, of which the OSC was part, designed to protect against retaliatory discrimination in promotion, but it was no more effective than the OSC. They were considered, however, largely symbolic. Thomas M. Devine, legal director of the not-for-profit Government Accountability Project (GAP) asserts:

'Whistleblower protection is a policy that all government leaders support in public but few in power will tolerate in private.'

Public sector employees are required to disclose wrongdoing to their employer first. This is a weakness if the whistleblower believes that he or she will not get a fair hearing from the employer. They cannot go around an employer that they know will not be receptive to their complaints. It also has no confidentiality clauses. Its major weakness, is that the principal initiative lies with the whistleblower. Essentially, the whistleblower must sue whoever makes the threats or carries out the intimidation.

(B) The Sarbanes-Oxley Act

The Sarbanes-Oxley Act was passed in 2002 to combat corporate criminal fraud and to strengthen corporate accountability. It was a legislative response to the fraudulent activities exemplified by World Com and Enron Corporation. The Act provides for enhanced financial disclosures and auditor independence of publicly held corporations. Section 301 of the Act requires that audit committees of the boards of public corporations establish procedures for ‘the confidential, anonymous submission by employees’ of complaints regarding internal accounting controls or auditing matters.

The Act provides some protections and assistance for the whistleblower. Employees are not required to complain to their employers first, but may complain to a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee. It does entertain the right of the whistleblower to take legal action if they suffer retaliation. Those found guilty of retaliation are liable to up to ten years in prison. The Sarbanes-Oxley Act is new, however, and it is possibly too soon to make any judgments. Its impact, however, is primarily limited to financial matters.

(C) The False Claims Act

Designed to stop fraud against the government, this act was passed during the US civil war under the administration of Abraham Lincoln. Regarded as the single most successful whistleblowing legislation in the country, the False Claims Act works by providing the whistleblower between 15 and 30 per cent of the government’s total recovery, the percentage depending on the extent to which the whistleblower took the action that enabled the recovery to take place. It was amended in 1986 to establish protections for whistleblowers, and to prevent harassing and retaliation against them. The Bill, which permits an anonymous disclosure, has been copied by a number of states in the US.

The United Kingdom

In UK legislation to protect whistleblowers was enacted in the wake of well-publicized scandals and disasters that occurred in 1980s and early 1990s. These included the collapse of Bank of Credit and Commerce International (BCCI), the drowning of four children at Lyme Bay, and the Clapham Rail crash.

The Public Interest Disclosure Act of 1998

The Public Interest Disclosure Act (PIDA) became effective on July 2, 1999, in England, Wales and Scotland, as an amendment to the Employment Rights Act of 1996. PIDA covers both private and public employees (except police officers), and provides that “a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done on the ground that the worker has made a protected disclosure.” Under the PIDA, whistleblowers must

use prescribed channels for making disclosures in order to retain the Act's protection. The disclosure can be made to the employer itself or an appropriate authority, and forbids the disclosure to media. As is clearly apparent, the UK's scheme is materially different from that of the United States, which does not require employees to use any particular channel to raise their concerns.

Canada

Canada has very few laws which pertain directly to whistleblowing. The federal government enacted the Public Servants Disclosure Protection Act in 2007. The intent of this act is to protect most of the federal public service from reprisals for reporting wrongdoing. However, this Act has been extensively criticized as setting too many conditions on whistleblowers and for protecting wrongdoers.

Several provinces also have legislation which protects whistleblowers to an extent:

- Section 28 of the New Brunswick Employment Standards Act, Chap. E-7.2, provides specific protection for those reporting wrongdoing.
- In Ontario, the Environmental Protection Act, R.S.O. 1990, c. E.19 and the Environmental Bill of Rights, S.O. 1993, c. 28 provide protection.
- Saskatchewan's Labour Standards Act provides protection, although the reporting must have been done to a lawful authority.

A number of other acts provide narrow protections to individuals reporting wrongdoing under those acts.

Whistleblower legislation in India

The need of Whistleblower legislation in India need not be emphasized. The need was felt in view of the glaring cases of corruption to draft a suitable legislation for encouraging and protecting honest persons to expose corrupt practices on the part of public functionaries. The Law Commission in its 179th Report had recommended that in order to eliminate corruption, a law to protect whistleblowers was essential. The commission in its report referred to the evil of corruption among public servants and maladministration and the adverse effects thereof to the country, then to the options available for eradication of corruption, the right to freedom of expression and the right to know and the limitations of the right to privacy, then to the protection afforded to whistle blowers in various countries by the judiciary and in particular by the English Courts, the European Court and by the American Courts. The commission in the said report discussed the salient features of various laws protecting whistleblowers in UK, Australia, New Zealand and USA and finally recommended a draft bill for protection of whistleblower which was appended to the said report. *In 2004, in response to a petition filed after the murder of Satyendra Dubey, the Supreme Court directed that a machinery be put in place for acting on complaints from whistleblowers till a law is enacted. The government notified a resolution in*

2004 that gave the Central Vigilance Commission (CVC) the power to act on complaints from whistleblowers^v.

Based on the 179th report of the Law Commission the legislature first drafted “The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010”, then the Protection of whistle blowers and the Public Interest Disclosure and Protection of Persons Making Disclosure Bill, 2010 (Whistleblower bill) and finally, the Anti Corruption, Grievance Redressal and Whistleblower Protection Bill, 2011.

Freedom of Speech, Right to Know and Right to Privacy^{vi}

Before discussing the aforesaid bills for whistleblowing enabling public servants to provide information about corruption or mal-administration in their department, it is necessary to refer to the Constitutional provisions relating to Freedom of Speech, Right to Know and the Right to Privacy as the whistleblowing one way or the other touches these freedoms guaranteed by the constitution.

Freedom of speech and expression is guaranteed by sub clause (a) of Article 19(1) of the Constitution of India. This right is, however, subject to Article 19(2) which permits law to be made for the purpose of imposing reasonable restrictions in the interests of the sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Our Supreme Court had occasion to deal with the exposure of the conduct of government through the media or otherwise. In one of the earliest cases in **S. Rangarajan vs. P. Jagjivan Ram, 1989 (2) SCC 574**, the Supreme Court held that criticism of government policies was not prohibited though there should be a proper balance between freedom of expression and social interests. But courts cannot simply balance the two interests as if they are of equal weight. The court’s commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest will be endangered. The anticipated damage should not be remote, or conjectural or farfetched. It should have proximate and have a direct nexus with the expression.

The legal foundation for exposure of corruption, misconduct or mal-administration by public servant was laid down by the Supreme Court in R. Rajagopal vs. State of Tamil Nadu, (1994) 6 SCC 632. The case involved the publication of serious misconduct of public servants by a convict who was serial-killer. The case squarely deals with the right to know and the limits of privacy of public servants. The Supreme Court referred to the judgments of the American Court in New York Times vs. Sullivan, already referred to and another judgment of the House of Lords in England reported in Derbyshire vs. Times Newspaper Ltd., 1993(2) WLR 449. The Supreme Court held that while decency and defamation were two of the grounds referred to in Clause (2) of Art. 19, still any publication against any person will not be objectionable if such publication was based on ‘public record’. In addition, in the case of ‘public official’, the right to privacy or

for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the public official establishes that the publication was made with reckless disregard for truth. In such a case, it would, however, be enough for the person who published the news to prove that he reacted after a reasonable verification of the facts. It is not necessary for him to prove that what he has published is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, damages can be awarded. In a very recent case of *Sri Bhardwaj Media Pvt. Ltd. V. State*, it was held by the court that when corruption of individuals in the institution is exposed, it gives an opportunity to authorities to take action against those who indulge in corruption and to clean its stables. Instead of expressing gratefulness to the persons who exposes corruption, if the institutions start taking action against those who expose corruption, the corruption is bound to progress day and night. India is already placed very high in the index of corruption and is considered one of the most corrupt countries of the world.

Recently, the Supreme Court has drawn the genesis of the citizens 'right to know' from their right to freedom of speech and expression. The Court observed in **Dinesh Trivedi vs. Union of India, 1997 (4) SCC 306** that in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. To ensure that the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof. The Court was dealing with the Vohra Committee Report and stated that though it was not advisable to make public the basis on which certain conclusions were arrived at in that Report, the conclusion reached in that Report should be examined by a new body or institution or a special committee to be appointed by the President of India on the advice of the Prime Minister and after consideration with the Speaker of the Lok Sabha.

In the light of the above judgment of the American and English Courts and our Supreme Court, on the question as to the scope of 'free speech', the Commission is of the view that a statute enabling complaints to be made by public servants, or persons or NGOs against other public servants and the grant of protection to such complainants is perfectly valid and will not offend the right to privacy emanating from sub-clause (a) of clause (1) of Art. 19. The right to privacy has to be adequately balanced against the right to know. Both these rights emanate from same sub-clause in Article 19.

The Indian Whistleblowing legislation and its origin

In the past, the various committee's & commissions have submitted their report recommending the setting up of mechanism or bill to encourage whistle blowing as a tool or eradicating corruption. The earlier efforts in this regards can be traced to:-

- The Santhanam Committee Report, 1963
- The Administrative Reforms Commission Report 1967
- Vohra committee Report
- 129th Law Commission Report

The Legislature as stated has drafted three legislations for the protection of whistleblower but finally the Anti Corruption, Grievance Redressal and Whistleblower Protection Bill, 2011, popularly known as Lok Janpal bill is introduced in Rajya Sabha as on 5th August, 2011. Section 2 (n) in the Definition Clause of the Bills defines “Whistleblower”.

“whistleblower” means any person who faces threat of (i) professional harm, including but not limited to illegitimate transfers, denial of promotions, denial of appropriate perks, departmental proceedings, discrimination or (ii) physical harm or is actually subjected to such harm; because of either making a complaint to the Lokpal under this Act or for filing an application under Right to Information Act, 2005.”

Thus, the definition assumes that the whistleblower may face threat of professional harm or physical harm. Further, the protection is available under the act only if the complaint is made to the Lokpal under the proposed Act or if one files an application under the RTI Act, 2005. Thus, the draft bill do not makes any provision for the protection of the whistleblower if the disclosure is outside the purview of the proposed act or not under the RTI Act, 2005. Thus, if the disclosure about the corruption is made to the media and there is an imminent threat to the life of the whistleblower, then the protection under the draft bill cannot be claimed by the whistleblower. (See Section 2 (n) read with Section 20 of the Draft Bill.

The Act provides for the protection from threat of physical or professional victimization. The protection can be sought from the Lokpal (See Section 20 of the proposed bill) who will take immediate steps for the protection of the victim whistleblower as mentioned in the section 20 of the said draft bill. The said Section also provides that if requested, the identity of the complainant shall be kept secret.

ⁱ [Editorial in *The Independent of London*](#), on the arrest of Tory M.P. Damian Green for suspicion of leaking documents November 29, 2008

ⁱⁱ Research Note no. 31 2004–05; Whistleblowing in Australia—transparency, accountability ... but above all, the truth (Available at <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn31.htm>)

ⁱⁱⁱ http://articles.timesofindia.indiatimes.com/2010-03-29/india/28135662_1_public-interest-disclosures-cvc-protection

^{iv} Indirect Tax Practitioners Association vs. R.K. Jain, AIR2011SC2234

^v Source: PRS Legislative Research

^{vi} Source: 179th Law Commission Report