

Protection of Whistle-Blowers in India: A Need?

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Abstract

A person who divulges wrongdoing, fraud, corruption, or mismanagement is known as a Whistle-blower. The individual will often be an employee, and he is the individual who becomes adept at the manipulation or fraud that takes place within a corporation or institution. Suffering the true and weak voices has been the key agenda of the political parties that have been sold and initiated as 'monetary favours' and come to power by electoral bank policies and collect political parties from Corporate Honchos. It was a unilateral equation between crooked political parties and business honchos of authoritarian greed. However, as all companies forbid the disclosure of administrative records, the whistle-blower frequently risks punishment, such as work firing and even physical injury. Whistle-blowers are the conscience keepers of the nation, who risk everything to bring the guilty and corrupt to the task. The present research aims to focus upon the concerns and problems related to the administration of the justice delivery system due to the absence of an appropriate legal mechanism to protect the Informers and Whistle-blowers in our country. Attempts have been made using doctrinal and case-study methods to understand why and under what conditions many people stay silent rather than speaking out. The paper focuses on the need for Strict Laws for the Protection of Whistle-Blowers by analysing the cases and legislation. A systematic probe in these questions has been made in the study.

Key Words: *Whistle-blower, protection, fraud, corporate crime.*

Introduction:

Where do the evils like corruption arise from? It comes from the never-ending greed. The fight for corruption-free ethical society will have to be fought against this greed and replace it with 'what can I give' spirit.

- Dr A.P.J. Abdul Kalam

If a corporation (company) wants to make sure effective Corporate Governance, it can often be done by having complete transparency in Internal as well as external dealings of the company. Transparency in the business of the organisation can be accomplished through aggressive management and strict corporate policy. To identify internal bribery and wrongdoing within the organisation and provide a fast method of dealing with the violations that are not publicly identified, a form of transparency must be used. However, if such a resolution mechanism does not exist in an organisation, it will need to address whistle-blowing in the future.

There is no standard definition of Whistle-blowing. The most recognised term in the academic sphere was set out by Near and Miceli (1985), which defines whistle-blowing as "*disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.*" The same as defined by the I.L.O. as "the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers"

The whistle-blower policy in India aims to safeguard the interest of the general public. Employees who reveal fraud, corruption or mismanagement to the senior management are called internal whistle-blower, and the employees who report fraud or corruption to the media, public or law authorities are known as the external whistle-blowers. Indian Whistle-Blowers are protected under the Whistleblowing Protection Act.

The need for a comprehensive legal system for the safety of whistle-blowers has become important as whistle-blower allegations in India are increasing. It has been made public in every leading publication and on every major network to deal with accusations from whistle-blowers from listed multinational corporations and banks. This paper analyses whether the current law system in India offers corporations and whistle-blowers sufficient transparency and protection and addresses the Whistle Blowers Law, which is prevalent in countries other than India.

Statement of Problem:

The current research needs to concentrate on the issues and problems associated with the justice delivery system's administration to protect the country's whistle-blowers. Attempts have been made using the doctrinal approach to understand why and under what conditions many people stay silent rather than speaking out. What are the different kinds of whistle-blowers? Is the current legal framework enough to protect whistle-blowers? Is there a need for Strict Law for the Protection of Whistleblowers based on case studies? The research conducted a systemic investigation into these issues. Taking into account international measures for whistle-blower protection, an effort has been made to analyse the current legal stance for whistle-blower protection in a country such as India.

Research Hypothesis:

1. The fundamental assumption of the study is that the existing safeguards are not adequate.
2. An examination of Whistle-blowers legislations of other countries would give us valuable information for the formulation of enabling whistle-blower protection legislation.
3. The concept of Whistle-blowers protection is still in the initial stage, and the law is evolving.
4. There would be novel and unexplored dimensions to Whistle-blowers protection in India. Innovative strategies have to be adopted and developed. Strengthening the whistle-blower protection mechanism will help in ensuring that the integrity of democracy is protected, cherished and upheld.

Research Methodology:

The literature survey is the methodology adopted for this paper. This paper uses information publicly available on various websites, online newspapers, newspapers, different books, case laws, and reports produced by different organisations. In the same sections, these sources and the arguments advanced through them are analysed to present an analysis to confirm or negate the hypothesis.

What is Whistle-blowing?

In general, a *whistle-blower* is defined as someone who makes a 'disclosure.' Broadly speaking, *disclosure* refers "to a concern raised in writing and in good faith by an employee or group of employees of the Company or even a third party that discloses or displays information about an unethical or inappropriate activity with respect to the Company that is based on facts and is not speculation."

There is no standard definition on whistle-blowing prevailing but certain conventions, as well as some books, defines whistle-blowing:

The United Nations Convention against Corruption lays down the definition of whistle-blowing as. "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."

Near and Miceli (1985) provide an academic definition of whistle-blowing, which describes whistle-blowing as "disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action."

Background of law relating to whistle-blowing: Indian scenario

Whistle-blowers, in simple words, is a person who discloses the illicit or corrupt practices in which the Company (corporation) is involved. In its 2001 Report, the Law Commission advised that in order to eradicate corruption from the country, a strong law protecting whistle-blowers be enacted.

In the case of the infamous murder of an NHA official in 2004, the Supreme Court directed the Central Government to establish '*administrative machinery for acting on complaints from whistle-blowers until a law is enacted.*' Following the Supreme Court's directive, the government released a Resolution titled Public Interest Disclosure and Informer Protection Resolution (PIDPIR). In addition, the Central Vigilance Commission was established to investigate complaints filed by whistle-blowers.

In its report in 2007, Second Administrative Reforms Commission also recommended that a specific law needs to be enacted to protect whistle-blowers. Similarly, the U.N. Convention on Corruption proposes that a separate law be enacted to protect whistle-blowers; India has been a signatory to the Convention on Corruption since 2005, though it has not yet been ratified.

The U.N. Convention on Corruption also provides for the safeguards against the victimisation of the whistle-blower. In order to conform to these regulations, the Government in the Year 2011 proposed the Whistle-blowers Protection Bill, 2011, which later become the Law in the year 2014. Similarly, the Companies Act of 2013 and The Regulations of SEBI also protect the whistle-blowers.

1. Companies Act, 2013:-

Companies Act came into force on August 30, 2013, and it is considered the milestone for good governance norms for all the listed and unlisted companies. Under this Act, due to an increase in cases of Whistle Blowing in India, the Companies act creates a 'vigil mechanism' for reporting 'genuine concerns' that has been made mandatory through this Act. *Section 177 of the Companies Act, 2013 covers the formation of Vigil Mechanism* and protection of Whistle Blowers. Similarly, Sections 206 to 229 of the Companies Act, 2013 incorporate Inspection, Inquiry, and Investigation rules. Section 211

of the Companies Act, 2013 establishes the SFIO (Special Fraud Investigation Office), which has the authority to apprehend someone who has committed fraud in the Company.

As a result, while the Companies Act of 2013 does not explicitly provide whistle-blower protection, it provides a mechanism through which whistle-blowers are protected.

2. SEBI (Securities Exchange Board of India) & Whistle-blowing:-

By its circulars, the Securities and Exchange Board of India has demanded that every company (listed) create a whistle-blower policy and make its employees aware of it in order to report fraud in the company. In 2019, the SEBI officially enacted legislation governing whistle-blower conduct and protection by inserting Chapter IIIA into the SEBI (Prohibition of Insider Trading) Regulations, 2015. This Chapter gives the Informant or a Whistle-Blower an option to report insider trading done by the company directly to the SEBI and there is no need to go with the internal mechanism of the company. SEBI has also introduced Clause 49 of the Listing Agreement, 2014, which mentions the Whistle-Blower's policy for the company. This agreement also mentions that the company will have to report to the SEBI that how many cases come up and how many are Resolved and Pending.

According to Regulation 30 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, listed firms are now obliged to disclose material events to the SEBI.

3. Whistle Blower Protection Act, 2011, passed in 2014:-

After dealing with numerous whistle-blower problems in the country, the government proposed the Whistleblower Protection Act, 2011, which was enacted by an act of parliament in 2014. The primary goal of the Act is to create a framework to accept complaints about any accusation of corruption or wilful misuse of power, as well as to provide appropriate protection against the victimisation of the person making such a complaint.

This Act empowers individuals, including Public Servants, to make public interest disclosures before a competent authority under the Act. This Act establishes a number of competent Authorities; for example, the Prime Minister is the Competent Authority for a complaint against any Union Minister. A complaint can be filed within 7 years from the date of the offence. This Act also makes an exception, stating that it does not apply to the Special Protection Group (S.P.G.) employees and officers established under the Special Protection Group Act of 1988. In any case, *"any person who negligently or maliciously exposes the identity of a complainant will be punished with imprisonment for a term of up to three years and a fine of up to Rs 50,000."*

"If the disclosure is made maliciously and with the knowledge that it was erroneous, untrue, or deceptive, the person will be punished with imprisonment for a term of up to two years and a fine of up to Rs. 30,000."

The Whistleblowers Act also supersedes the Official Secrets Act of 1923, allowing the complainant to make public interest disclosures before competent authorities even though they violate the latter Act but do not jeopardise the nation's sovereignty.

The Whistle-blower Protection Act, 2014, was not operationalised and then the Amendment Bill in 2015 was introduced by the Government. The suggested amendment Bill of 2015, which was moved in the Parliament suggests that whistle-blowers shall not be permitted to reveal any documents classified under the Official Secrets Act of 1923 even though the intent is to expose acts of corruption, misuse of power or criminal activities. The main purpose was that it should not override the later Act i.e. Official Secrets Act, 1923, which in turn dilutes the very existence of the 2014 Act on Whistle-Blowers' protection. Since, the Bill didn't get the assent of the Parliament, the Bill of 2015 was not passed and the Act of 2014 was not operationalised till now.

Background of Laws relating to the Protection of Whistle-Blowers in U.S.A. & U.K.

U.S.A.:

The concept of employee whistle-blower protection has a long history in the United States, and those protections and incentives for whistle-blowing will continue to expand.

- Rachel Cowen

"The U.S. government has long made protecting whistle-blowers a priority. Just seven months after the signing of the Declaration of Independence, the Continental Congress passed what Allison Stanger, author of Whistle-blowers: Honesty in America from Washington to Trump, called the "world's first whistle-blower protection law."

After the coming up of the First whistle-blower protection Law, developments have been made in but the U.S. Government and in the year 1863, a new law was passed for the protection of Whistle-blowers that was The False Claims Act, also known as the "Lincoln Law," was enacted in 1863.

"The law permitted private citizens to sue businesses and people accused of defrauding the government on behalf of the federal government. If the contractor was found guilty, the whistle-blower was entitled to half of the government's damages."

In the United States, the Sarbanes-Oxley Act of 2002 was enacted to fight corporate criminal fraud and increase corporate accountability. This Act establishes the independence of the auditor of publicly traded companies, as well as financial disclosures. The False Claims Act of 1863 has been weakened and strengthened over time, but it is still in effect today. The Whistle-blower Protection Act of 1989 is one of the most recent federal legislation designed to protect those who expose alleged corruption. The legislation was passed to protect federal workers who report waste, fraud, or misuse of power in the government from retaliation. The Whistle-blower Protection Enhancement Act of 2012 (WPEA) went into effect in the United States with several changes, extending the protection afforded to federal employees in the intelligence community and those with security clearance.

U.K.:

In the European Union, the United Kingdom is the only country with one of the most detailed whistle-blower protection laws. The Public Interest Disclosure Act of 1998, the Employment Rights Act of 1996, and the Employment Rights Act as amended by the Enterprise and Regulatory Reform Act of 2013 are the legislation related to whistle-blower protection and are in operation as well. According to U.K. law on whistle-blower protection, it is illegal for an employer to discriminate against a worker who has made a protected disclosure. Protected workers in the United Kingdom are limited to agency, freelance, seconded, and homeworkers and current and former employers.

The PIDA (Public Interest Disclosure Act, 1998) only protects certain disclosures that fall under its purview. The following are some examples of disclosures:

The commission of a felony offense.

- (i) Failure to comply with a legal duty.
- (ii) There has been a miscarriage of justice.
- (iii) A threat to any person's health or safety.
- (iv) The climate is harmed.
- (v) Willful concealment of information pertaining to any of the above.

This Act also covers disclosures made through an employer-authorized process, such as a confidential whistle-blowing hotline. Internal disclosure is only encouraged by this legislation. The law does not cover certain forms of disclosure. Disclosures banned by the Official Secrets Act of 1989 are among them. External disclosure is protected under PIDA in a number of restricted circumstances. Whistle-blowers who make disclosures to external people or bodies not included in the PIDA must meet a broader set of criteria before receiving protection, such as demonstrating that they are not acting for personal gain.

Whistle-blower protection legislation in the United Kingdom also stipulates that dismissing an employee because they made a protected disclosure is automatically unreasonable. To file a claim, the employee does not need to have worked for a certain amount of time, and compensation is theoretically unrestricted. Interim relief is available in many situations where the employee's claim is "likely" to succeed. If the interim relief action is successful, the tribunal may order that the employee's contract of employment be continued until the complaint is resolved.

The Public Interest Disclosure Act, 1998 does not specifically provide for the mechanism for the employer for handling the complaints of the Whistle-blowers.

Certain Cases of Whistle-blowing in India and at International Level:

Whistle-blowing always resulted in hardships for the whistle-blowers or Informers. It has been found in many cases all across the world where the whistle-blowers have been murdered for fighting against corruption or losing their jobs. Some prominent Example for Whistle-blowers are:

A. Indian Cases:

- (1) *Satyendra Dubey Case:* Satyendra Dubey was a civil engineer working for the NHAI in the Golden Quadrilateral Project. He was murdered on November 27, 2003 in Gaya, Bihar. He is considered a whistle-blower because he exposed some financial irregularities in the project. He wrote letters to senior officials but didn't respond, then sent the letter to PMO, but they also have not done anything and said keep his details confidential, but nothing was done. But when he exposed irregularities in the project, he was murdered later. The need for the protection of Whistle-blowers arise from that, but it was not fully operationalised
- (2) *Shanmugham Manjunath's case:* He worked as a Marketing Manager in the Indian Oil Corporation, Uttar Pradesh and he exposed corrupt practises done by the authorities regarding the adulteration of petrol. Even he was murdered in the year 2005.
- (3) *Ashok Khemka:* He was the I.A.S. Officer posted in the state Haryana. He exposed Sonia Gandhi's son-in-law Robert Vadra's D.L.F. land grab scam in Gurgaon in 2012 and came into the limelight and considered a Whistle-blower. He was transferred 51 times in 24 years by state governments after exposing corruption in the departments he was posted in.
- (4) *S.P. Mahantesh K.A.S.:* He was the Karnataka Administrative Service Officer, who exposed some controversial land allotments made by the societies and was murdered in 2012.
- (5) *Lalit Mehta Case:* He was working in the Vikas Sahyog Kendra, and he was brutally killed after he filed R.T.I., exposing the scams in NREGA. After his murder, the

National R.T.I. Forum started the Lalit Mehta Gallantry Award, honouring his contribution in exposing scams via R.T.I.

- (6) *V. Saseendran*: He worked as company secretary of Malabar Cements Limited. He exposed extensive corruption in the company; he was forced to withdraw his allegations and finally assassinated.
- (7) *Rinku Singh Rahi's Case*: He was a civil servant; he fought against corruption in sponsored welfare schemes in Uttar Pradesh. As a result, he was killed by the local mafia.
- (8) *Yashwant Sonawane Case*: He was posted as the A.D.C. in Malegaon, Maharashtra. He received the information of oil adulteration. After reaching the place, he founded some trucks standing suspiciously and when he started investigating. Then, the people involved in adulteration beat him up and set him on fire and died after reaching the Hospital.

Tabulation of Indian Whistle-blowers and the Episodes:

S. No.	Company Name	When the scandal went public	Alleged Fraudsters	Whistle Blower	"Statements found in the press"
1	Punjab National Bank	2018	Nirav Modi	Hari Prasad	"I wrote in early 2016 to all concerned agencies (E.D., C.B.I., SEBI) to urgently investigate the matter because fraud is occurring, but nobody has taken any action. Then I wrote to the Office of the Prime Minister, "these are large fraudsters and they worry me," he said.
2	Roto Mac	2017-18	Vikram Kothari	Bank of Baroda	The C.B.I. registered a case after receiving a complaint from Bank of Baroda against Kanpur based Rotomac Global Private

					Limited, its director Vikram Kothari, his wife
3	Winsome Group	2016	Jatin Mehta	Bank of Maharashtra and Union Bank of India	The C.B.I. has booked absconding diamantaire, Jatin Mehta, in two fresh cases pertaining to an alleged loan fraud of over Rs 587.55 crore on complaints from Bank of Maharashtra and Union Bank of India, officials said.
4	Maharashtra Scholarship Scam	2017	Many officials of State Government	Anjali Damania	"In her first full-fledged interview, Damania said she is aware that there will be a lot of mudslinging (in the coming days) and therefore she is braced for a vicious campaign"
5	Uttarakhand food relief scam	2015	Many officials of State Government	Ajay Bhatt	"A BJP delegation led by Leader of Opposition Ajay Bhatt met Uttarakhand Governor Krishna Kant Paul in Nainital on Monday, demanding the C.B.I. investigation into the alleged scam"

B. Global Cases:

(1) *Ernest Fitzgerald*: He was known as a government whistle-blower and the godfather of the defence movement. Since exposing cost overruns, he was discharged and later reinstated in the civil service. Fitzgerald has played a crucial part in the passage of the legislation that contributed to the landmark Whistle-blower Protection Act of 1989, which safeguards federal whistle-blowers who work with the government and expose department wrongdoing.

- (2) *Cynthia Cooper*: She was the vice-president of Internal Audit at WorldCom, now known as MCI, carried a secret investigation in the company and exposed the financial scandal in 2002 and was named the Person of the year by the Times Magazine in 2002.
- (3) *Marlene Garcia Esperat*: She worked as a chemist in the Philippines Department of Agriculture; she exposed the departmental wrongdoings in his department and as a result, was murdered in 2005.
- (4) *Sherron Watkins*: She served as an executive for the Enron Corporation when she revealed the company's financial crisis in 2002. The fiasco resulted in the collapse of one of the world's leading audit and accounting firms. After being found guilty of felony offences related to auditing, Arthur Anderson lost its permits to register as Certified Public Accountants in 2002.

The above mentioned are just a few examples of whistle-blowers from all around the world. From the examples discussed above, it becomes a necessity to protect the whistle-blowers. The country's administration must provide protection and justice to the Whistle-blowers, and there should be a proper mechanism for the protection of Whistle-blowers and the protection of their identity.

LACUNAE IN THE LAW:

Interestingly, there are no compulsory requirements for an unlisted company or private unlisted companies to adopt a policy for the whistle-blowers providing adequate protection to the whistle-blowers. However, legislation relating to such groups of the enterprise and listed firms in India must necessarily comply with a whistle-blower policy ensuring proper safeguards for whistle-blowers and the provisions that material activities be immediately disclosed in the stock market, including whistle-blowers' grievances. A lot of companies are there that have already adopted the international best practices and included the whistle-blower policies. The essence of such policies is voluntary and whether such policies were not implemented or adhered to, they would not usually have a legal effect. One of those steps to solve this problem is the creation of CARO 2020.

As the laws and the regulations are laudable, it is unclear how the inquiries are undertaken or how the investigations are carried out into whistle-blowers' allegations and how the regulations comply. For example, the criterion is ambiguous whether a report of whistle-blower lawsuits must be made before the stock exchange at or after which phase of the inquiry.

There's also ambiguity about what process or procedure should be followed while conducting an internal investigation into whistle-blower complaints. However, the Companies Act, 2013 and its regulations provide a vigil system in place, and appropriate precautions must be taken to protect whistle-blowers.

There is no prescription as to how such a system should work is necessary to perform inquiries into complaints.

"Interestingly, a former Tata Consultancy Services employee made a complaint to SEBI challenging the robustness of the vigil process itself. These instances suggest that there is a need for more clarification on the way whistle-blower policies are enforced and the way whistle-blower complaints are examined."

Despite having full-fledged specific legislation regarding the public disclosures called The Whistle-blower Protection Bill, 2011, it is unfortunate that the Central government has yet not brought the Act into force. Unless the requisite amendments are introduced to keep the issues of national security and sovereignty outside the Act's framework, the government has decided against enforcing the Whistle-blowers' Act. Another bill is pending before a Parliamentary Standing Committee to address a 'patent mistake' in the Whistleblowers Act. The problem with such delegated authority is that the Court is unable to compel or force the executive (the central government) to put the Act into force so that the executive can also annul the Act through inaction alone. Although calling for protections is against victimisation, the Bill does not describe what constitutes "victimisation" unlike other countries such as the U.S., U.K., and Canada. The Bill describes "disclosure" as a corruption-related accusation, any criminal crime or wilful abuse of influence that results in the government compromising or the public servant receiving the benefit. This definition is narrower than that recommended by the Law Commission, which involves mismanagement (any unjust action, causes undue delay or negligence, leads to waste of public funds). No punishment is levied on the public servant who can victimise the plaintiff. Although the Law Commission suggests recommendations for witness identification protection, this legislation also does not provide witness confidentiality to shield witnesses during prosecution and trial. And if punishment is levied for rendering mala fide disclosure, there is no protection of any right of appeal for the whistle-blower against the order of the competent authority.

CONCLUSION:

While the attention on the employees is increasing in due course, the whistle-blower complaints are increasing at a faster pace. However, the law that is prevailing for their protection is unclear as of now and is still being developed. Companies should prepare a policy for whistle-blowers to increase the efficiency of the Company. Relevant legislation must be enacted in order to protect the innocent whistle-blowers and the 2015 amendment proposed must be abandoned.

He who knows, does not speak; he who speaks; does not know

- **Lao Tzu**

Would enacting a comprehensive law covering both public and private sector whistle blowing help alleviate the problem? Yeah, to a degree, but this is unlikely to last. Sometimes, the problem isn't a lack of regulation but rather a lack of enforcement (of existing laws). Although specific and unambiguous laws are ideal, a whistle-blower policy with a clear tone at the top that incentivises the detection of real wrongdoings without fear of retribution is essential. Although employee vigilance is increasing, and whistle-blower complaints are on the rise, the law governing how to treat such complaints and protect whistle-blowers is murky and changing. As a result, having a strong whistle-blower policy in place is critical.

Though there is a significant increase in the awareness of the importance of Whistle-blowing practices in the workplace, many remain silent on the company's wrongdoings. Whistle-blowing will also help to reduce the white-collar crimes in India. If we need to understand the effectiveness of a whistle-blowing mechanism, it is necessary to assess the company's awareness of the grievance reporting systems. If the mechanism for whistle-blower protection is strengthened, it will help ensure the integrity of democracy is protected.

It may be challenging to balance the Whistle-blower policies. There is a probability of filing frivolous whistle-blowing complaints to harm the executives or the company. There is a strict need to create a compliance culture and focus on the importance of reporting and strengthening anti-retaliation policies. Today, there is a need to make employees' FEEL SAFE'.

After the research, it can be said that it may take time to develop a proper whistle-blowing policies regime in a country like India. India may not have adequate law, but it is getting there quickly by making amendments like the recent amendment made in CARO 2020. It is also increasing the awareness on the need of the same with the companies and employees.

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