



Whistling in the Dark?

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Abstract

History is witness that there have always been informers who reveal inside information to others. Ancient Greeks talked about whistleblowing centuries before. Lykourgos, the Athenian orator, in his speech against Leokratis said: "Neither laws nor judges can bring any results, unless someone denounces the wrongdoers." The term whistleblowing probably arises by analogy with the referee or umpire who draws public attention to a foul in a game by blowing of the whistle which would alert both the law enforcement officers and the general public of danger. The term 'whistle-blowing' is a relatively recent entry into the vocabulary of public and corporate affairs although the phenomenon itself is not new. Whistleblowers often pay a heavy price for exposing what they perceive to be organizational wrongdoing. This paper tries to find know about the concept of whistle blowers and provisions related to them. It focuses on the protection of whistle blowers.

Keywords: informers, fraud, corruption, whistle-blowing, ethics, corporate governance

Introduction

Did you ever wonder about some big scandal: "Why did no-one speak out and reveal the truth about this?" even though hundreds of people must have known what was going on? The reason is simple: this is a very dangerous thing to do, and few people have the courage required.

Anyone can find themselves in a position of having to choose between their conscience and what they are being told to do by their boss – most of us are just fortunate that this has never happened to us around an important issue. Most whistleblowers don't start out intending to take a heroic stance or to confront the powers that be – they simply feel that they cannot 'go along' with some course of action that seems wrong to them. Then one thing leads to another... Only later do they discover that it's not just their immediate boss or a colleague that they are up against, but perhaps an entire department, perhaps an entire government, desperate to avoid bad publicity. The reflex to deny and cover up can cause people in positions of power to overlook, condone and perpetuate all kinds of wrongdoing: incompetence, neglect and even criminal acts – all to avoid the spotlight of the media and public opinion.

There was one movie, where Al Pacino stood in the rain with only a folded newspaper to shield him from the penetrating downpour. He was portraying the controversial television producer Lowell Bergman in the popular firm "The Insider". Visiting the home of a former tobacco executive, Pacino as Bergmann aggressively tried to persuade him to appear on *60 Minutes* as a whistleblower.

A sizable number of people in power have been heard these days saying that people must be willing to give up a degree of personal privacy in exchange of security and safety. But, the moot question is: how much? The revelations by a former CIA employee Edward Snowden and by WikiLeaks editor Julian Assange raise many pressing and unnefrving questions, for

everybody across the world, whether or not connected to the World Wide Web.

Few years ago, the world began to learn the vast scope of the National Security Agency's reach into the lives of hundreds of millions of people in the United States and around the globe, as it collects information about their phone calls, their email messages, their friends and contacts, how they spend their days and where they spend their nights. The public learned in great detail how the agency has exceeded its mandate and abused its authority, prompting outrage at kitchen tables and at the desks of Congress, which may finally begin to limit these practices.

The revelations have already prompted two federal judges to accuse the N.S.A. of violating the Constitution (although a third, unfortunately, found the dragnet surveillance to be legal). A panel appointed by President Obama issued a powerful indictment of the agency's invasions of privacy and called for a major overhaul of its operations.

All of this is entirely because of information provided to journalists by Edward Snowden, the former N.S.A. contractor who stole a trove of highly classified documents after he became disillusioned with the agency's voraciousness. Snowden is now living in Russia, on the run from American charges of espionage and theft, and he faces the prospect of spending the rest of his life looking over his shoulder.

Considering the enormous value of the information he has revealed, and the abuses he has exposed, Snowden deserves better than a life of permanent exile, fear and flight. He may have committed a crime to do so, but he has done his country a great service. It is time for the United States to offer Snowden a plea bargain or some form of clemency that would allow him to return home, face at least substantially reduced punishment in light of his role as a whistle-blower, and have the hope of a life advocating for greater privacy and far stronger oversight of the runaway intelligence community.

Nestled among the delicious exposé of secretive diplomacy, the WikiLeaks phenomenon has provided us with a glimpse of what life is like for a whistleblower. And it isn't friendly.

The brutal vilification and viciousness inflicted upon Julian Assange's quest for truth has displayed on a grand scale what employees experience when they reveal the unethical conduct in their organisation. The only difference? They don't have the infectious support of millions of people who rally in their defense.

When one hears the name of another whistleblower Erin Brockovich, one is immediately inclined to think about Julia Roberts' Academy Award winning role in the eponymous movie released in 2000. Brockovich is known for helping to build the case against the US West Coast energy corporation, Pacific Gas and Electric Company, proving them responsible for the groundwater contamination in Hinkley, a small town in California. Or perhaps, the most famous whistle-blower of all, Deep Throat, who exposed criminal activity within the Nixon administration.

Background

While discussing whistleblowing very fundamentally, one should have a thorough knowledge regarding corporate governance and its history. It has grabbed an amassed attention in the global scenario.

At first, let us analyse the words corporate and governance. According to the Webster Dictionary Corporate means a body having the nature of corporation. A corporation means a legal entity that exists independently of the person or persons who have been granted the charter creating it and invested with many of the rights given to the individual. The word governance derived from a Greek work Gubernare means to rule or steer and the Webster dictionary defines it as the act of exercising the authority.

Sir Adrian Cadbury, who chaired the UK's Committee on the Financial Aspects of Corporate Governance which reported in 1992, stated that corporate governance as 'the system by which companies are directed and controlled' ^[1]. A wider definition was given by the Organisation for Economic Cooperation and Development (OECD 2004). It defines Corporate Governance as a set of relationships between a company's management, its board its shareholders, and other stakeholders. It also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.' Corporate governance is a philosophy by which companies are directed, monitored, managed and controlled ^[2]. These two definitions clearly show the significance of corporate governance and its relevance in managing a company as a whole unit.

Though the concept of corporate governance is complex the principles based on it are very simple. The basic principles of corporate governance are –transparency, fairness, accountability and responsibility.

¹ Mallin, Christine A, *Corporate Governance Developments In The UK, in Handbook On International Corporate Governance Country Analysis 3*, Christine A Mallin ed., 1990.

² Mehta, G S, "Dharma In Corporate Governance", *The Chartered Accountant*, December 2003,pp. 677-678.

Advisory Board of National Association of Corporate Directors (NACD), New York defines "Corporate governance ensures that long term strategic objectives and plans are established and that the proper management structure (organisation, systems and people) is in place to achieve those objectives, while at the same time making sure that the structure functions to maintain corporation's integrity reputation and responsibility to its various constituencies ^[3]

Thus corporate governance mainly consists of two elements:-

- a. Long-term relationship, which has to deal with checks and balances, incentives of managers and communications between management and investors.
- b. Transactional relationship involving matters relating to disclosure and authority ^[4].

According to World Bank, Corporate Governance is ^[5].

1. Blend of law, regulation and appropriate voluntary private sector practices
2. Which enable the corporation to attract financial and human capital, perform efficiently, and
3. Perpetuate itself by generating long term economic value for its shareholders,
4. While respecting the interests of stakeholders and society as a whole.

Best practices of corporate governance will broadly include- a definition of practices that define good governance; a code of best practices covering the constitution of the board, its various committees, defining their goals and responsibilities, exploring preferred internal systems and disclosure requirements ^[6].

The real seeds of corporate governance lie in the business scams in India and abroad. The junk bond fiasco in USA and the failure of Maxwell, BCCI and Polypeck in UK resulted in Treadway Committee in USA and Cadbury Committee in UK on corporate governance. Satyam scam in India was an incident which made a really great breakthrough in India regarding corporate governance.

Whistle Blowing and Whistle Blower – Meaning and Definition

The term whistleblower was first discussed by Doggett, J., in the case of *Winters v. Houston Chronicle Pub. Co.* It has its origin in United Kingdom. The term can be attributed to the action of the 'English bobbies (police constables)' who blew their whistle when they noticed the commission of a crime. The purpose behind whistle blowing is always to make the public as well as the authorities alert regarding the illegal activity or crime i.e to safeguard the public good.

The term *whistle-blower* comes from the whistle a referee uses

³ Diwan, Dr. Parag and Sarkar, A.N., "Energy Security", Pentagon Press, 2009, p.281.

⁴ Bhayana, Sanjay, *Corporate Governance Practices In India*, Regal Publications, 2007.

⁵ Maasen, Gregory F., *An International Comparison of Corporate Governance Models: A Study on the Formal Independence and Convergence of One-tier and Two-tier Corporate Boards of Directors in the Unites States of America, the United Kingdom and the Netherlands*, Corporate Governance, 1999, p.12.

⁶ Agarwal, Sanjiv, *Corporate Governance: Concept And Dimensions*, Snowwhite Publications, 2003.

to indicate an illegal or foul play. US civic activist Ralph Nader is said to have coined the phrase, but he in fact put a positive spin on the term ^[7] in the early 1970s to avoid the negative connotations found in other words such as “informers” and “snitches” ^[8].

Wikipedia defines Whistle-blowing as “The act when a person tells the public or some public authority about an alleged dishonest or illegal activity occurring in a government department, a public or a private organisation or a company.”

The reported activity can be a violation of a law, rule, regulation and/or a direct threat to public interest. It can also be a fraud or corruption. It can be internal i.e. to other in the organisation, or externally i.e. to regulators, law enforcement agencies, to media or to a group concerned with the issue.

In other words, whistle blowing can be defined as an act of disclosure of information by people within or outside an organisation and that which are not otherwise accessible to public, generally of activities of organisation that are against public interest.

A whistle-blower is defined as someone who divulges wrongdoing, fraud, corruption or mismanagement. Mostly the person could be an employee because he is the person who becomes adept in about the corruption or frauds which takes place inside a company or organisation because they carries the privacy of the organisation. And so they would be the first persons who will come to notice all the illegal activities inside the walls. Thus the objective of a whistleblower is to put out all those malpractices, corruption or any other frauds inside a company and thereby safeguarding the public interest.

Whistle blowing can be classified into two i.e., internal whistle blowing and external whistle blowing. Internal whistleblowers are those who report the mismanagement or misconduct to superior officers within the company while external whistleblowers are those who report the same to law enforcement authorities or media. Internal whistle blowing is often helpful to company because it helps them to correct their differences internally and save themselves from mortification before the public.

However, since all organizations restrict publishing institutional information the whistle-blower often faces retaliation like dismissal from employment and even physical harm. What really happen with the whistleblowers are always harassments and other kind of victimisation including assaults and death threats.

Historical Background of Whistle Blower Protection

Whistle blowing has been in existence since time immemorial. In point of fact, the roots of whistle blowing go back well over a century and it initially arose not in connection with corporate malfeasance, but in the federal government’s False Claims Act, 1863. It was established to offer incentives to individuals who reported companies or individuals defrauding the government and it also imposed monetary penalties on bogus whistleblowers. It lays down that the whistleblower can share in up to 30% of the proceeds of the lawsuit. This Act has resulted in more than \$17 billion dollars of recoveries for the

U.S. government since 1986.

The second phase was the Whistle Blower Protection Act, 1989 which got amended in 1994. Under this act federal employees are protected from workplace retaliation when disclosing waste and fraud and purpose of the Act and subsequent amendments were to reinforce the protections available to federal employees. Whistle Blower Enhanced Protection Act was approved by House of Representatives in 2007.

In 2002, Sarbanes-Oxley Act was introduced through which a series of subsequent to this was the Sarbanes-Oxley (SOX) Act of 2002, in which Congress brought together a series of corporate governance initiatives into the federal securities laws. Earlier, the federal regime consisted of disclosure requirements only. The corporate governance was not mandatory and those were governed by state corporate laws. Federal courts had, moreover, enforced such a view of the regime’s limits, by characterizing efforts of the Stock Exchanges to extend its domain into substantive corporate governance as beyond its jurisdiction.

In 1996, India initiated the first step regarding corporate governance and its objective was to develop and promote a code for Corporate Governance. It was directed that the code should be adopted and followed by the private Sector, the public Sector, banks or financial Institutions, all of which are corporate entities. It also concentrated on listed companies because these companies are largely indebted to public and in the code the preference was largely given to the shareholders and creditors. During this time there were no separate or perfect provisions either to define the act of whistle blowing or to impart protection to whistleblowers. Satyam scam opened the eyes of authorities and initiated Company Bill 2009. The Companies Bill, 2009 which has been divided into 28 Chapters consisting of 426 Sections, as opposed to the 658 Sections of the existing Companies Act, 1956. The Bill, inter alia, reinforces shareholders democracy, facilitates e-Governance in company processes, recognizes the liability of Boards, directors and senior management personnel of companies, provides for a new scheme for penalties and punishment for non-compliance or violation of the law, harmonizes corporate regulation with action by sectoral regulators, incorporates a new framework for mergers and amalgamations of companies and provides an extensive Insolvency Code based on the latest principles recommended by the United Nations Commission on International Trade Law (UNCITRAL) ^[9]. This was a major breakthrough regarding protection of shareholders.

Whose disclosures are protected?

Many international whistleblower laws fall far short of the ideal, and there is a large variation amongst various threshold tests of who can make a protected disclosure. Some protected disclosures are limited to disclosures by employees only ^[10]. Others extend protection of disclosure by an employee to

⁷ Nader, Ralph, Petkas, and Blackwell, *Whistleblowing*, Penguin Books, 1974.

⁸ Ibid.

⁹ Available at <http://www.legalserviceindia.com/article/I397-Companies-Bill,-2009.html>.

¹⁰ See, eg, under Employment Rights Act 1996 (UK) pt IVA, see David Lewis and Stephen Homewood, “Five years of the Public Interest Disclosure Act in the UK: are Whistleblowers Adequately Protected?”, (2004) *Web Journal of Current Legal Issues*, Vol 5, 18 August, 2008.

related classes such as full time, part-time, permanent and temporary staff, as well as to external consultants, contractors and secondees. In order to avoid ‘loopholes’ in whistleblower legislation, protection should also extend to applicants for employment, contracts and funding (especially important in the case of blacklisting) ^[11]. It should also include those who are formerly employed, unemployed or otherwise blacklisted. Some whistleblower laws are limited to providing whistleblower protection to disclosures in the public sector and often contain loopholes ^[12], while others provide private sector protection. Still others take a hybrid approach and provide public sector disclosure protection of matters in the private sector. Public sector whistleblowers are important to maintain transparency in government, but difficulties always arise in relation to the scope of whistleblowing by law enforcement and intelligence agencies.

Public sector functions may be outsourced to a ‘contractor’, a person not under public service conditions and controls, who carries out government functions. This contractor is the equivalent of a government official – many third parties would not know the difference – and should be the subject of protected disclosures ^[13]. Best practice, as exemplified by the UK, is to extend employment law by giving the contractor whistleblower protection ^[14]. Under section 230(3) of the Employment Rights Act 1996 (UK), a worker includes an employee and an independent contractor who himself provides services other than in a professional/client or a business/client relationship. In contrast, the South African Act excludes the independent contractor from whistleblower protection ^[15].

Another type of contractor is the third person who contracts with government and government agencies. This contractor may have evidence of being asked for kickbacks, bribes and sweeteners in order to be awarded a potentially lucrative government contract. It is therefore important to maintain integrity in the contracting process by ensuring that whistleblower laws especially encourage contractors to disclose corrupt conduct.

The heroes or traitors dichotomy crystallises with the question of anonymity. On the assumption that anonymity may make the whistleblower unaccountable, and may attract cranks, timewasters and the querulents, many jurisdictions exclude anonymous whistleblower disclosures and provide that they

will not be acted upon ^[16]. Only rarely does legislation accept and protect anonymous disclosures ^[17], as it is certainly better than not disclosing at all. However, as a matter of policy, anonymous whistleblowing should be seen as a last resort. Requiring whistleblower identification may introduce some accountability, but it may also discourage disclosure. Best practice aims to maximise the flow of information necessary for accountability and to provide reliable protected channels for anonymous disclosures.

Trend of Whistleblowing

Most whistleblowers are internal whistleblowers, who report misconduct on a fellow employee or superior within their company. One of the most interesting questions with respect to internal whistleblowers is why and under what circumstances do people either act on the spot to stop illegal and otherwise unacceptable behavior or report it ^[18]. There are some reasons 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 control organization, but a *choice* of options for absolute confidentiality ^[19]. External whistleblowers, however, report misconduct to 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. In some cases, external whistleblowing is encouraged by offering monetary reward.

Common Reactions

Whistleblowers are sometimes seen as selfless martyrs for public interest and organizational accountability; others view them as “traitors” or “defectors”. Some even accuse them of solely pursuing personal glory and fame, or view their behavior as motivated by greed in *qui tam* cases. Some academics (such as Thomas Alured Faunce) feel that whistleblowers should at least be entitled to a rebuttable presumption that they are attempting to apply ethical principles in the face of obstacles and that whistleblowing would be more respected in governance systems if it had a firmer academic basis in virtue ethics ^[20].

¹¹ Tom Devine, International Best Practices for Whistleblower Policies at Intergovernmental Organizations (2007) Government Accountability Project [5], 18 August, 2008, citing, eg, United Nations Secretariat, Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorised Audits or Investigations (2005) United Nations 8, 18 August, 2008, which protects whistleblowing by ‘a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the United Nations’ (‘UN Policy’).

¹² The US Act is not a ‘no loopholes’ statute as there is no whistleblower protection for whistleblowers in agencies like the CIA, FBI, Defence Intelligence Agency, Justice Department, Transportation Security Administration, and the National Security Agency: *Homeland and National Security Whistleblower Protections: the Unfinished Agenda* (2005) Project on Government Oversight, 18 August, 2008.

¹³ Public Interest Disclosure Bill 2006 (ACT) s 10(1)(a)(ii).

¹⁴ Employment Rights Act 1996 (UK) c 18, s 43K.

¹⁵ Protected Disclosures Act 2000 (South Africa) s 1(ii)(a).

¹⁶ See, eg, Public Interest Disclosure Act 1994 (ACT) s 16; under the Public Interest Disclosures Act 2002 (Tas) s 34(2), anonymous reports are not reported to the Ombudsman.

¹⁷ See, eg, Public Interest Disclosures Bill 2007 (Cth) cl 10; Whistleblowers Protection Act 1994 (Qld) s 27(1); Public Interest Disclosures Act 2002 (Tas) s 8; Whistleblowers Protection Act 2001 (Vic) s 7; Bjorn Rohde-Liebenau, *Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions* (2006) European Parliament, 16 at 18 August 2008.

¹⁸ Rowe, Mary, Wilcox, Linda, Gadlin, Howard, “Dealing with—or reporting—“unacceptable” behavior (with additional thoughts about the “Bystander Effect”, *Journal of the International Ombudsman Association*, Vol.2, Issue.1, 2009. Available online at ombudsassociation.org

¹⁹ Mary Rowe, “Options and choice for conflict resolution in the workplace” in Hall, Lavinia (ed), *Negotiation: Strategies for Mutual Gain*, Sage Publications, Inc., 1993, pp. 105–119.

²⁰ Faunce, T.A., “Developing and Teaching the Virtue-Ethics Foundations of Healthcare Whistle Blowing”, *Monash Bioethics Review*, 2004, Vol. 23, Issue.4, pp.41–55; Faunce, T.A. and Jefferys, S., “Whistleblowing and scientific misconduct: Renewing legal and virtue ethics foundations”, *Journal of Medicine and Law*, 2007, Vol. 26, Issue.3, pp.567–84.

It is probable that many people do not even consider blowing the whistle, not only because of fear of retaliation, but also because of fear of losing their relationships at work and outside work ^[21].

Persecution of whistleblowers has become a serious issue in many parts of the world:

“Employees in academia, business or government might become aware of serious risks to health and the environment, but internal policies might pose threats of retaliation to those who report these early warnings. Private company employees in particular might be at risk of being fired, demoted, denied raises and so on for bringing environmental risks to the attention of appropriate authorities. Government employees could be at a similar risk for bringing threats to health or the environment to public attention, although perhaps this is less likely ^[22].

There are examples of “early warning scientists” being harassed for bringing inconvenient truths about impending harm to the notice of the public and authorities. There have also been cases of young scientists being discouraged from entering controversial scientific fields for fear of harassment.

Whistleblowers are often protected under law from employer retaliation, but in many cases punishment has occurred, such as termination, suspension, demotion, wage garnishment, and/or harsh mistreatment by other employees. For example, in the United States, most whistleblower protection laws provide for limited “make whole” remedies or damages for employment losses if whistleblower retaliation is proven. However, many whistleblowers report there exists a widespread “shoot the messenger” mentality by corporations or government agencies accused of misconduct and in some cases whistleblowers have been subjected to criminal prosecution in reprisal for reporting wrongdoing.

As a reaction to this many private organizations have formed whistleblower legal defense funds or support groups to assist whistleblowers; three such examples are the *National Whistleblowers Center* ^[23] in the United States, and *Whistleblowers UK* ^[24] and *Public Concern at Work (PCaW)* ^[25] in the United Kingdom. Depending on the circumstances, it is not uncommon for whistleblowers to be ostracized by their co-workers, discriminated against by future potential employers, or even fired from their organization. This campaign directed at whistleblowers with the goal of eliminating them from the organization is referred to as mobbing. It is an extreme form of workplace bullying wherein the group is set against the targeted individual ^[26].

²¹ Rowe, Mary & Bendersky, Corinne, “Workplace Justice, Zero Tolerance and Zero Barriers: Getting People to Come Forward in Conflict Management Systems”, in Thomas Kochan and Richard Locke (eds), *Negotiations and Change, From the Workplace to Society*, Cornell University Press, 2002.

²² “Late lessons from early warnings: science, precaution, innovation: Full Report”, European Environment Agency, 23rd Jan, 2013, p. 614.

²³ “whistleblowers.org”. whistleblowers.org. Accessed on 08/10/2016.

²⁴ “whistleblowersUK.org”. whistlebloweruk.org. Accessed on 07/10/2016.

²⁵ “pcaw.co.uk”, pcaw.co.uk. Accessed on 08/10/2016.

²⁶ Matthiesen SB, Bjorkelo B, Burke, RJ, “Workplace Bullying as the Dark Side of Whistleblowing” in *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice*, 2nd ed, CRC Press/Taylor & Francis Group, Boca Raton, Florida, 2012, pp 301-324.

However, the Internet has given whistleblowers like Snowden a bigger platform and reach. How should an act of whistle blowing be treated? Should it be treated like an act of treason? Is some people right in calling for Snowden’s execution? Should criminal charges be filed against whistleblowers like him? Should he be sent to jail for as long as possible, as some are suggesting? Do whistleblowers breach sacred trust of their employers by reporting the latter’s misdeeds? Are there better and legitimate alternatives for reporting fraud of people and organisations in power? Are such acts motivated by greed and a desire for fame?

It is ironic, though not surprising, that the views of the government are usually in contrast to that of their subjects at large. Ironic because the former is expected to reflect and understand the views of the latter, and not surprising because it is quite commonplace. Many people are calling Snowden a ‘hero’, just like Assange was. Many pardon petitions have already started, and so have fundraising activities. So, what is the rationale for these diametrically opposite perceptions and interpretations? Who is right – the government or the people? Does not a whistleblower like Snowden deserve a special and a fair hearing? Why does it always happen that the whistleblowers themselves become the target of ridicule by the very people in whose interest they made certain revelations?

“If there was greater transparency, we probably wouldn’t need whistleblowers in the first place,” says Peter Bennett, the national convenor of the newly-formed Whistleblowers Information Centre and a former national president of Whistleblowers Australia ^[27].

Whistleblowers face conflicting ethics. An employee who witnesses wrong doing on the part of their employer must weigh decisions carefully. On one hand the infractions of their employer have negative impacts on the public interest. On the other hand the employee, constrained by confidentiality policies, face disciplinary action and retaliation from their employer if they expose the wrong doing. This ethical dilemma is not an easy issue to grapple with. Confidentiality clauses, written policies, are expressly agreed to by the employee. The conscious agreement creates a powerful motivation to keep one’s word. Then, when factoring in the added possibility of retaliation or disciplinary action employees have a hard decision to make. State and Federal laws passed provide protection for whistleblowers but vary greatly in those protections depending on jurisdiction.

“Most whistle-blowers believe the system works,” says Brian Martin, an associate professor in science, technology, and society at the University of Wollongong. “So when they find a lapse in their organization, their instinct is to go to their boss or through the regular grievance process. And then they are shocked when bad things start to happen ^[28].

Martin cited that people don’t collect enough evidence of the problem they are trying to expose, don’t build support among

²⁷ “The Lonely Life of A Whistle-Blower”, *Sydney Morning Herald*, 10th December, 2010.

²⁸ Martin, Brian, *The Whistleblower’s Handbook: How to Be an Effective Resister*, Jon Carpenter Publishing, 1999.

colleagues and others, and don't wait for the right opportunity to come forward ^[29].

Whistleblowing in India

Whistle blowing as a legitimate activity is little known in India. Yet in less corrupt jurisdictions it is routinely given legal legitimacy and protection. A whistleblower is a person who exposes wrongdoing and is protected by the government for doing this service to the nation. India does not have a whistleblowers protection law yet. However, since the Public Interest Disclosure and Protection of Informers Bill, 2002 is still being examined, the centre agreed to making the Central Vigilance Commission, the sole authority in protecting future whistleblowers.

But the Satyam scam opened the eyes of authorities and drafted Companies Bill 2009 to prevent further corporate frauds. Did Satyendra Dubey die for nothing? The honest and upright young Deputy General Manager of the National Highways Authority of India, was killed last November 2003 in Bihar's Gaya district after he had complained to the Prime Ministers Office alleging huge irregularities and corruption in the then Prime Ministers pet project ^[30]. Dubey knew the risk he was taking. He knew he was a vulnerable and an easy target He knew he was fighting the powerful construction mafia. He knew he had to be afraid. In his letters he begged that his name be kept secret, but the careless bureaucracy didn't bother to honour his request.

The death of the young IIT graduate generated widespread public protest and after some unseemly dilly-dallying the Vajpayee government ordered a Central Bureau of Investigation probe. This instilled some hope in the eyes of a cynical public too used to seeing little come of probes and commissions.

Manjunath was an IIM graduate working for the Indian Oil Corporation who had sealed off two petrol pumps when he discovered that they were selling diesel adulterated with petrol. When these opened a month later, he decided to do a surprise raid. Manjunath was found murdered three days later in November, 2005 ^[31].

Whistleblower and witness protection is a duty of India that it has miserably failed to fulfill. However, India alone is not the only nation to do so. There are other nations as well who have failed to do the needful. What would citizens do if their nations do not care about their honesty, integrity and fight against corruption? Perhaps they must use technology to fight corruption. Sound promising but does it holds good? Definitely, yes.

Mature democracies of the West have long ago acknowledged the importance of dissent and whistle blowing nurturing their polity. The US passed the first of its many protective laws for whistleblowers back in the civil war era. The story isn't very different in Western Europe. This culture of respecting and protecting the courage to expose the dark truth was the reason why some of the most sensational pieces of information, with

the power to change history, emerged thanks to the fearlessness of whistleblower. The Pentagon Papers, Watergate, and several other scams surfaced because whistleblowers scooped critical information which would have otherwise suppressed by the powerful bureaucracy of the State. Democracy, in that sense, is a constant struggle between individuals and the State, between the free flow of information and the State's attempt to monopolise it. When the State itself becomes the enemy of democracy, it is the whistleblower, who carries on with the lonely task of protecting it. This acknowledgement of the whistleblower, and the value of healthy dissent, is repeatedly reiterated in many landmark cases in the West. The latest is the case of Dinesh Thakur, who blew the lid off the goings-on at the US subsidiary of Ranbaxy ^[32] The company ended up paying \$500 million after pleading guilty to the sale of adulterated drugs manufactured in India in 2005-06 ^[33]

The Indian scenario is in complete contrast. The culture of institutional appreciation of whistleblowers that existed in the early years of free India is now being eroded. If the media didn't celebrate him he would, in all probability, have met a terrible end. Whether it was S Manjunath, who took on the oil adulteration racket in Lucknow, or Satyendra Dubey, who confronted corruption in the National Highways Authority of India in Bihar, the story of many whistleblowers have ended tragically. Powerful mafias have managed to triumph most times. Ironically, whistleblowers in India are only celebrated after they attain some kind of 'martyrdom'.

Across India there are innumerable stories of whistleblowers, RTI activists and other social enthusiasts being victimised by a corrupt state and its organs, or being hounded by business-political establishments. Activists have recorded over 100 instances of RTI activists being killed, assaulted or harassed since the path-breaking law, a key tool for whistleblowers in India, came into existence.

Following the two deaths of Manjunath and Dubey, there were cries for justice in India and abroad (owing to the IIT, IIM status of the victims). Pressure mounted on the government to introduce a law to protect those who wished to uphold justice and, thus, in April 2006 India became the fifth country in the world (after UK, USA, Australia and New Zealand) to introduce the law to protect whistleblowers who give information on corruption in public life. The Chief Vigilance Commission (CVC) was authorized to receive all complaints regarding corruption in public life that would affect the Central Government ^[34]. Leakage of the name or details of a whistleblower was made illegal. The CVC was empowered to carry out preliminary investigation into the complaint and initiate the necessary actions against the concerned government employees.

²⁹ Ibid.

³⁰ "Truth Silenced" pages on Satyendra Dubey Murder case", Rediff.com, 27th November 2009.

³¹ "Manjunath case: court commutes death sentence", The Hindu, 12th December, 2009.

³² Dinesh Thakur, who in 2003 was a director in Ranbaxy claimed that senior company executives in India had ordered destruction of evidence when they were alerted to data fudging, misbranding and adulteration in drugs. After reporting the fraud to the management, Thakur quit Ranbaxy in 2005 but continued to help the US FDA for the next two years to expose the fraud and file a lawsuit to hold Ranbaxy accountable.

³³ "Ranbaxy fined \$ 500 mn for selling adulterated drugs made in India", IBN Live, 14th May, 2013.

³⁴ "Whistleblowers to get protection against threat to life", Daily News Analysis, 5th September, 2013.

When I had worked as a reporter in Ahmedabad, Gujarat, I had covered a story relating to the RTI activists being targeted for seeking information to “promote transparency and accountability in the working of every public authority” in India. From the people I interviewed, I found that many face serious physical assaults on a regular basis. Those who seek information from their village panchayat and other local administration also face social ostracisation. Attacks on RTI activists do not make news (anymore). There are several such cases. Activists are targeted frequently for seeking information. Those under most danger are the ones who seek information on land issues. Petitioners quizzing the government on the implementation of the public distribution system (PDS) and other government schemes as well as those who challenged powerful wrongdoers are also hounded.

Since 2010, at least 28 RTI activists have been murdered for seeking information to “promote transparency and accountability in the working of every public authority” of India. The Congress-ruled Maharashtra tops the list with six killings, followed by the BJP-ruled Gujarat with five. An RTI activist heading an NGO, Citizen Resources and Actions Initiatives (CRANTI), Bharatsinh Zala, claimed, “RTI activists are being attacked, killed for exposing the illegal activities in the state which are being run with connivance of politicians. RTI activists are not safe in any state and there is no protection from the state government”^[35].

RTI activists are the most vulnerable human rights defenders (HRDs) of India. Unlike other HRDs, a large majority of the RTI activists are not necessarily part of any organisation or group. They often act alone, moved by outrage against corruption and other illegal activities. RTI activists are extremely vulnerable as they live in the same areas as the corrupt public authorities, political leaders and mafia who do not want information about their illegal activities to be disclosed. The lucky ones come to the media attention only when killed, maimed or battling for life. When complaints are made by RTI activists, the law enforcement personnel, who are usually hand in glove with those threatening the RTI activists, do not take necessary action. The Right to Information Act, 2005 provides no protection. The Central Information Commission and the State Information Commissions are not mandated either to deal with such threats or attacks or to provide protection when needed.

Psychological impact

“Problems usually happen in successful times,” says Sherron Watkins, who is widely known as the “Enron whistleblower.” That was the case at Enron Corporation, where Watkins served as a vice president. Fortune named it the “Most Innovative Company in America” six years in a row from 1996 to 2001. For Ms. Watkins, whistleblowing is fraught with dangers and risks. Whistleblowing sits at the vortex of a corporate officer’s fiduciary duties of care and loyalty. She has to use a great deal of thought to whether and how she may want to blow the whistle.

There is limited research on the psychological impacts of whistle blowing. However, poor experiences of whistleblowing can cause a prolonged and prominent assault

upon staff well being. As workers attempt to address concerns, they are often met with a wall of silence and hostility by management.³⁶ Some whistleblowers speak of overwhelming and persistent distress, drug and alcohol problems, paranoid behavior at work acute anxiety, nightmares, flash backs and intrusive thoughts.³⁷ Depression is often reported by whistleblowers, and suicidal thoughts may occur in up to about 10%^[38].

The stresses involved in whistleblowing can be huge. As such, workers remain afraid to blow the whistle, in fear that they will not be believed or they have lost faith in believing that anything will happen if they do speak out^[39]. This fear may indeed be justified, because an individual, who feels threatened by whistleblowing, may plan the career destruction of the ‘complainant’ by reporting fictitious errors or rumours^[40]. This technique, labelled as ‘gaslighting’ is a common, unconventional approach used by organizations to manage employees who cause difficulty by raising concerns.⁴¹ In extreme cases, this technique involves the organization or manager proposing that the complainant’s mental health is unstable.⁴² Organizations also often attempt to ostracise and isolate whistleblowers by undermining their concerns by suggesting that these are groundless, carrying out inadequate investigations or by ignoring them altogether. Whistleblowers may also be disciplined, suspended and reported to professional bodies upon manufactured pretexts^[43]. Where whistleblowers persist in raising their concerns, they increasingly risk detriments such as dismissal^[44]. Following dismissal, whistleblowers may struggle to find further employment due to damaged reputations, poor references and blacklisting.

The social impact of whistleblowing through loss of livelihood (and sometimes pension), and family strain may also impact on whistleblowers’ psychological wellbeing. Whistleblowers may also experience immense stress as a result of litigation regarding detriments such as unfair dismissal, which they often face with imperfect support or no support at all from unions. Whistleblowers who continue to pursue their concerns may also face long battles with official bodies such as regulators and government departments

³⁶ Drew, D, “Francis NHS whistleblower report: a new beginning?”, *The Guardian*, 29th January, 2015.

³⁷ Peters, K., Luck L, Hutchinson M, Wilkes L, Andrew S, Jackson D. “The emotional sequelae of whistleblowing: findings from a qualitative study”, *Journal of Clinical Nursing*, Vol.20, 2011, p.14.

³⁸ Farnsworth, CH, “Survey of Whistleblowers finds retaliation, but few regrets”, *The New York Times*, 22nd February, 1987; Lennane J., “Whistleblowing: A Health Issue”, *British Medical Journal*, Vol.307, 11th September, 1993, pp.667–670.

³⁹ Sprinks J, “Survey highlights slow progress in increasing staff whistleblowing”, *Nursing Standard*, Feb 12-18, Vol.28, 2014, pp.14-15.

⁴⁰ De Silva, P, “Tackling psychopathy: a necessary competency in leadership development?”, *Progress in Neurology and Psychiatry*, September/October 2014.

⁴¹ Lund, CA, Gardiner, AQ, “The gaslight phenomenon: An institutional variant”, *The British Journal of Psychiatry*, Vol.131, 1977, pp.533–4.

⁴² Lennane, J, “What Happens to Whistleblowers and Why Classics in Social Medicine”, Vol.6, No.4, May 2012, pp.249-258.

⁴³ Bousfield, A. “21 Ways To Skin An NHS Whistleblower”, *Medical Harm*, 9th December, 2011.

⁴⁴ Public Concern at Work, “Whistleblowing: The Inside Story - A study of the experiences of 100 whistleblowers”, Research Report, University of Greenwich, 2013.

³⁵ Interview with Bharatsinh Zala on 9th October, 2016.

[45] Such bodies may reproduce the “institutional silence” by employers, adding to whistleblowers’ stress and difficulties [46]. In all, some whistleblowers suffer great injustice that may never be acknowledged or rectified [47]. Such extreme experiences of threat and loss inevitably cause severe distress and sometimes mental illness, sometimes lasting for years afterwards. This mistreatment also deters others from coming forward with concerns. Thus, poor practices remain hidden behind a wall of silence, and prevent any organization from experiencing the improvements that may be afforded by intelligent failure.

Consequences of Whistle-Blowing

Camerer indicated that the ethnicity of the organisation decides whether the whistleblower will be contemplated as a wrongdoer, or as a do-gooder, irrespective of whether the whistle has been blown through internal channels or through external channels as a last resort [48]. Dellaportas cited examples in history where whistleblowers were punished for their activities by some form of persecution, lower performance assessments, downgrading, retaliatory transfers and removal from office. Whistleblowers also face banishment by management and co-workers as menaces, which in turn hampers prospective employment prospects [49]. Nelson and Trevino warned employees on determining how to bring up moral worries in order to prevent being branded as somebody with weak assessment [50]. Other dangers the whistleblower may encounter are disciplinary investigations for disobedience, claims of unfaithfulness, and allegations of whistleblowing for personal profit, damage to friendships and demise of respect for the culture in whose concern the whistleblower acted (Naude, 2005) [51]. According to Westman and Modesitt (2004), whistle-blowers may face fierce resistance and extreme levels of disapproval inside the organisation when they attempt to expose unethical and suspicious behavior [52]. According to Carroll and Buchholtz, whistle-blower studies have found that 90% of them experience negative outcomes, and more than half lose their jobs [53]. Many end up taking prescription medicine to ease the stress, while others even cogitate about suicide. In spite of this, Dellaportas advise that employees should be encouraged to blow the whistle internally and to resolve the problem

⁴⁵ Ibid.

⁴⁶ Public Accounts Committee Report of Inquiry into Whistleblowing, Ninth Report of Session 2014–15.

⁴⁷ Lennane, J., “What Happens to Whistleblowers and Why Classics in Social Medicine”, Vol.6, No.4, May 2012, pp.249-258.

⁴⁸ Camerer, L., “Ethics and the Professions: Blowing the Whistle on Crime,” African Security Review, vol. 5, no. 6, 1996, pp. 48–54.

⁴⁹ Dellaportas, S., Gibson, K., Alagiah, R., Hutchinson, M., Leung, P. and Homrigh, D.Van, Ethics, governance and accountability: A professional perspective, John Wiley & Sons, Ltd, Australia, Aug. 2005.

⁵⁰ Nelson, K., and Trevino, L., “Managing organization ethics: straight talk about how to do it right,” Vol. ED-4, John Wiley and Sons, Sydney, Aug. 2007.

⁵¹ Naude, J.P., “Organisation ethics: an orientation,” Unpublished organisation ethics study guide, Nelson Mandela Metropolitan University, Port Elizabeth, 2005.

⁵² Westman, D.P. and Modesitt, N.M., “Whistleblowing: The Law of Retaliatory Discharge,” BNA Books, vol. ED-2, Bureau of National Affairs, Washington D.C., Dec. 2004.

⁵³ Carroll, A.B., and Buchholtz, A.K., “Organization and society,” ED-4, South Western College, Mason, 2000.

before it becomes a public scandal [54]. If the employees remain silent they could be labelled accomplices if the wrongdoing is later revealed.

Cases of Whistle Blowing In India

Case 1: Satyendra Dubey, an IIT Kanpur graduate in his mid thirties was supervising construction of the golden quadrilateral project in the Koderma division of Jharkhand. He had a reputation for being an honest and upright officer. He was promoted as project director and was likely to be posted there. Dubey exposed mishandling of funds by three of his engineers which led to the suspension of the contractor. He had written to the National highway authority of India (NHAI) and to the prime minister’s office (PMO) describing the financial irregularities in the project. Dubey was shot dead on November 26, 2003. He had arrived at Gaya railway station from Varanasi. He did not find his driver at the Gaya station. When he called up his home he was told that the vehicle has some mechanical problem. He asked his driver to stay at home and took a rickshaw. When he did not reach home, the driver went at looking for him, and found dead near AP colony in Gaya.

Case 2: The incidence of murder of Manjunath Shanmugham, an IIM graduate and a sales manager of the Indian Oil Corporation on November 19, 2005 once again shocked India. He got killed for exposing the racket of adulteration of petrol and the mafia behind it.

Legal Protection for Whistleblowers

Employees are often reluctant to report suspected misconduct because they fear retaliation from those that are engaged in the misconduct. This often prevents companies from discovering employee-related fraud at its early stages. While employer surveillance can go a long way to discovering wrongdoing in the workplace, employees are in a better position to know what their colleagues are doing and employers should have mechanisms in place to encourage their employees to report wrongdoing.

In the United States, there is fairly broad legal protection for whistleblowers. The *Sarbanes Oxley Act* imposes criminal sanctions on employers for retaliation against employees who inform law enforcement officials of corporate wrongdoing, as well as gives employees the right to initiate civil claims against their employers. In 2010, the United States enacted the *Dodd-Frank Act* which goes one step further by rewarding employees who blow the whistle on wrongdoing to the Securities Exchange Commission.

In Canada, whistleblowers have some protection under the *Occupational Health and Safety Act*, *Environmental Protection Act*, and the *Employment Standards Act*, but this protection is limited to employees who raise issues or concerns of wrongdoing that are specific violations under those respective pieces of legislation and not general wrongdoing. In addition, under the *Employment Standards Act*, the protection is limited to situations where the employee brings the complaint to the Ministry of Labour or an

⁵⁴ Dellaportas, S., Gibson, K., Alagiah, R., Hutchinson, M., Leung, P. and Homrigh, D.Van, Ethics, governance and accountability: A professional perspective, John Wiley & Sons, Ltd, Australia, Aug. 2005.

employment standards officer. As such, even under the *Employment Standards Act*, whistleblowing on fraud occurring within the company would not be protected.

In the UK, the Public Interest Disclosure Act 1998 provides the framework of legal protection for whistle blowers from victimisation and dismissal.

Regulations in India do not mandate companies to set up whistle blowing framework and provide protection to whistle blowers who voice concerns in good faith whereas in developed economies, there are well defined regulations that encourage whistle blowing practice to enhance corporate transparency.

The Central Vigilance Commission has a policy for whistleblowers and entertains complaints from them. However, it doesn't seem to have generated enough momentum to nurture the culture as an integral part of Indian democracy.

A comprehensive legislation, the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 is still pending. And many have pointed out serious lacunae with the proposed legislation, key being the fact that it keeps the private sector out of its ambit. In a country where robber barons are as much a threat to the democratic institutions as the corrupt politicians and officials, it is a surprising and demoralising move.

In late August 2010, India's Union Cabinet approved the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, which aims to protect the identity of whistleblowers and to prevent disciplinary action from being taken against them^[55]. Besides Dubey and Manjunath, as many as eight Indian whistleblowers have been killed in 2010, each of whom was seeking information from the Indian government through "right to information" or RTI^[56].

Although the draft bill is regarded as a positive development, legal observers note that the proposed legislation does not address measures that would be taken in the event that a whistleblower's identity is revealed, and further express concern that the entity which is empowered to enforce whistleblower protection—the Central Vigilance Commission—is comprised of former government officials and has heretofore failed to enforce its anti-corruption powers^[57]. The bill further provides that persons making false allegations will pay a fine of 50,000 rupees (approximately USD \$1,000), or could face a jail sentence of up to three years^[58].

The Government of India has been considering adopting a whistleblower protection law for several years. In 2003, the Law Commission of India recommended the adoption of The Public Interest Disclosure (Protection of Informers) Act, 2002. In August 2010, The Public Interest Disclosure and Protection

of Persons Making the Disclosures Bill, 2010 was introduced into the Lok Sabha, lower house of the Parliament of India and got approved by the cabinet in June, 2011. It was renamed by the Standing Committee on Personnel, Public Grievances, Law and Justice as The Whistleblowers' Protection Bill, 2011. The Whistleblowers' Protection Bill, 2011 was passed by the Lok Sabha on 28 December 2011 and now it is awaiting the assent of Rajyasabha. V. Narayanasamy, Minister of State for Parliamentary Affairs introduced the bill in Rajya Sabha on 29 March 2012.

The primary purpose of any Whistleblowers Bill is to prevent the victimization of individuals who make a disclosure against their organization in public interest. So, naturally the first question that a potential informant will ask is what actions is he/she protected against? What constitutes 'victimization'? Does it include only suspension and transfer or also indirect forms of retribution like denial of promotion, dilution of powers, withholding increments and adverse remark in the service record? Against all logic, the Bill provides no definition of 'victimisation' even though a comprehensive definition of this term was provided in the Law Commission's version of the Whistleblowers Bill.

What is the end result of this long-drawn process? If the Vigilance Commission is convinced that there was a bonafide case against a public servant, it can merely recommend corrective action to the relevant public authority. It is like asking the head of a family to punish its erring child. Data collected by PRS Legislative Research indicates that between 2004 and 2008, the Central Vigilance Commission received 1354 complaints. In as many as 946 cases (70 percent) the concerned department did not comply with its recommendations on penalty. An alert citizenry is crucial for a healthy democracy.

Need For Building a Whistleblower Policy

Whistleblowing in the current global scenario has gained a lot of cognizance because of various cases, Pentagon Papers, Julian Assange and Edward Snowden being the major ones. Daniel Ellsberg, a former United States Military analyst blew the whistle in 1971 by leaking the top-secret Pentagon study, known as Pentagon Papers, of the U.S. government's rationale behind its decisions during the Vietnam War to The New York Times, The Washington Post and other American newspapers. The papers revealed the expansion by U.S. with bombing of Cambodia and Laos, Coastal raids on North Vietnam. Also, the government knew that the war could most likely not be won, and continuing the war would lead to many times more casualties. Ellsberg was charged with espionage, theft and conspiracy which later on was dismissed. [1] The United States Department of Justice prosecuted Julian Paul Assange, the editor-in-chief and founder of WikiLeaks, who collaborated with Bradley Edward Manning, a United States Army Soldier to blow the whistle by stealing and publishing U.S. Military and diplomatic documents in 2010 as a result of which, Manning has been arrested in Iraq since then. Assange will be repatriated to Sweden by the British government under the European Arrest Warrant for questioning in relation to a sexual assault investigation. Since 19 June, 2012, Assange has been granted Diplomatic Asylum inside the Ecuadorian Embassy in London.

⁵⁵ Akhtar, Shabina, "A Safety Net for Crusaders", 25th August, 2010. Available at http://www.telegraphindia.com/1100825/jsp/opinion/story_12852916.jsp.html.

⁵⁶ Ibid.; "RTI Activist Who Exposed Corruption in Maharashtra Found Dead", The Times of India, 29th August, 2010. Available at <http://timesofindia.indiatimes.com/india/RTI-activist-who-exposed-corruption-in-Maharashtra-founddead/articleshow/6456957.cms.html>.

⁵⁷ Akhtar, Shabina, "A Safety Net for Crusaders", 25th August, 2010, http://www.telegraphindia.com/1100825/jsp/opinion/story_12852916.jsp.html.

⁵⁸ Ibid.

Conclusion

To quote Michael Moore, “there is at least one disgruntled person in every workplace- and at least double that number with a conscience. Hard as they try, they simply can't turn their heads away from an injustice when they see one taking place”. In India, unfortunately, whistle blowing is an exception, not the norm. This is because there is a very high premium for speaking the truth- one must risk their reputation, employability and life. And if you are lucky enough to survive all this, you still get branded as a ‘snitch’ for the rest of your life.

People like Snowden and Assange should have legitimate outlets for exposing fraudulent activities by the people and organisations in power; with no fear of being hounded for life by the government, with a sense of security for their personal lives, with no fear of losing out on a career, and with no fear of living safely in their home country. Can the governments across the world promise this? Can the next Snowden dare to come out in the open? The answer is an emphatic ‘yes’ because a Snowden came out inspite of seeing the plight of an Assange. But, equally sad is the fact that only a few will stick their neck out as most will just get cowed down by the system and the societal pressures. Sad indeed!

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