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Indian and Global Perspective of Whistleblowing

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ABSTRACT

“It is not every day that a Whistleblower is actually willing to be identified” -Laura Poipras. The choice to become a whistleblower is not easy. It is associated with a lot of fears such as potential loss of employment and the impact it has on one’s personal life. But when a potential whistleblower feels so much fear to act on the misconduct of his organization, it is the entire society that suffers. “Whistleblowers are invaluable in exposing corruption, fraud and mismanagement.” In this article we have covered in detail the definitions, ingredients of Whistleblowing along with the various legislations that protect the Whistleblowers across the globe and deals with various case studies of Whistleblowing. Through this article we aim to bring to light how even though there are so many efforts made to protect the Whistleblowers there is still a long way to go in empowering them to come out without fear.

Keywords: Whistleblowing, Whistleblower, reasonable grounds, Government, public interest.

I. INTRODUCTION

Every organization wants to have an honest relationship with its employees. Honesty is an indication of complete dedication to the success of the organization. Whistleblowing promotes transparent, effective and clear communication. It is the ethics of the person to do good to the society that motivates Whistleblowing. While many people view this as snitching, it is actually an act of honesty and bravery. The whistleblower chooses to stand against the organization to report perceived wrongdoing, misconduct or unethical activity within the organizations to the public or to those who are in authority. Whistleblowing is an act of free speech, a tool against corruption and a dispute mechanism of the internal management.

(A) Definition of Whistleblowing:

As per the **Council of Europe Civil Law Convention on Corruption** Whistleblowers are those who have reasonable grounds to suspect corruption and report in good faith their suspicion to

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the concerned authorities.

The **International Labour Organization (ILO)** defines it as the reporting by employees of the illegal, irregular or unethical acts of employer.

From these definitions, we can get a clear picture of the ingredients that constitute Whistleblowing. They are:

- There should exist an **employee** who works for the organization.
- He must have a suspicion of illegal or unethical activity done by the **employer**.
- The suspicion should be developed based on **reasonable grounds**.
- The employee must report such suspicion in **good faith** to the concerned authority.

As per **Boatright (2003)**, Whistleblowing is the release of information that constitutes as an evidence for illegal and immoral conduct of employer by the employee or former employee. According to **Koehn (2003)**, Whistleblowing refers to publicly announcing the inappropriate activities going on inside the organization by an employee. The US Academicians Marcia P. Miceli and Janet P. Near described Whistleblowing as a four state process:

- A triggering event occurs which involves unethical and illegal activity that makes an employee consider blowing the whistle.
- The employee thinks and decides whether the activity is illegal or no by gathering additional information and by assessing the situation.
- After assessment the employee can voice out his suspicion or can exit the organization or stay silent.
- The organizational members will react to the suspicions and might retaliate against the whistleblower.

II. TYPES OF WHISTLEBLOWERS

1. Internal:

When an employee or a stakeholder raises concern about potential misconduct internally, such an employee is known as an Internal Whistleblower. Therefore, an internal whistleblower reports the potential wrongdoings to the higher official in the organization. Such suspicions usually include improper conduct, disloyalty, disobedience etc. Most whistleblowers are internal whistleblowers. People are most likely to take action on an act that is not acceptable when the complaint system of the organization offers not only the options given by planning

and controlling organizations but also the choice of total confidentiality.

2. External:

When the employee reports the wrongdoings to the public (people who are outside the organization) like the media, enforcement agencies, public interest groups etc is known as an External Whistleblower. This option is exercised by the whistleblower based on the severity of the issue.

3. Alumni:

When the whistle blower is an ex-employee of the organization, it is known as Alumni Whistleblowing.

4. Open:

When the identity of the Whistleblower is disclosed to the public, it is called an Open Whistleblowing.

5. Personal:

When the misconduct in the organization is to affect or harm only one person, it is known as Personal Whistleblowing.

6. Impersonal:

When the misconduct in the organization is aimed to harm others, it is an Impersonal Whistleblowing.

7. Government:

When the wrongdoings of the government officials is revealed or disclosed to the public, it is called Government Whistleblowing.

8. Corporate:

When the wrongdoings of a business organization is revealed, it is known as Corporate Whistleblowing.

III. LEGISLATIONS FOR WHISTLEBLOWING AROUND THE WORLD

Ralph Nader, who was a consumer activist in the US defined Whistleblowing in 1971 as when a person believes that the public interest overrides the organizational interest he serves, and exposes the organization for its involvement in illegal, fraudulent or harmful activity. Blowing the whistle means exposing the organization for the wrong activities done by the organization. Whistleblowers are being referred to as “*canaries in the coalmine*” and are accused of

“committing the truth”³. Almost every whistleblower has a strong sense of what is right and what is wrong. They feel that it is their duty to blow the whistle and report the fraud.

1) *The Whistle-blower Protection Act 1989*

The *Whistleblower Protection Enhancement Act, 2012* was signed on 27th November 2012. This act gave people the rights to blow the whistle on the corruptions and wrongdoings of the government. This act amended the Whistleblower Protection Act of 1989 and strengthens the rights of the whistleblower. Before the amendment, the employees were not eligible for protection under the following circumstances:

- When the person is not the first to report such a misconduct
- When the misconduct is disclosed to the co-worker by the employee
- When the employee reports such a misconduct to the supervisor
- When the employer discloses consequences of a policy decision
- When the employer discloses or blows the whistle while carrying out his job duties.

However, Section 101 and 102 of the Whistleblower Protection Enhancement Act has restored the original intention of the act to provide adequate protection to the whistleblowers and protect their rights. The employee doesn't lose his protection just because someone else has already reported the misconduct or because the employee has made the disclosure off duty. The Section 101(b)(2) states that just because an employee made the disclosure while on duty does not deprive him of the protection he is entitled.

2) *The Sarbanes- Oxley Act*

This act was passed in 2002 to prevent corporate criminal fraud and to promote corporate accountability. As per this act the company must enhance financial disclosure and increase the independence of auditors of public corporations. This was enacted as a response to the fraudulent activities in the Enron Corporation⁴ and the World Com⁵. This act also provides provisions of the protection and assistance of the whistleblowers. The Section 301 of this act states that the confidential anonymous submission made by the employees to the audit committee of the board of public corporations needs to be protected. It entertains the right of the whistleblower to take legal action if they suffer losses after blowing the whistle. But the impact of this act is strictly confined to financial matters.

³ https://www.icsi.edu/media/webmodules/45th_nc/WhistleBlowing_BalancingonaTightRope.pdf

⁴ Company hid trade losses which led to accounting scandals and bankruptcy

⁵ Accounting fraud of \$11 billion and false inflation of profits which caused loss to stockholders

3) *The False Claims Act*

During the civil war, this act was passed by Abraham Lincoln to stop fraud against the government. This act provides protection to the whistleblowers by giving them 15 to 30% recovery depending on the extent of their action. This act was amended on 1986 to protect whistleblowers and to prevent harassment and retaliation against them.

4) *The Public Interest Disclosure act of 1998*

This Act became effective on July 2, 1999 as an amendment to the Employment Rights Act of 1996. This act covers both private and public employees (except police workers) and aims at not subjecting the employee to any detriment and prevent any act done to affect the employee on the ground that he made a disclosure. The disclosure can be made by any employee or authority to the employer but this act forbids disclosure to the media.

5) *Corporations Act*

This act was amended by the Australian legislature to protect officers, employees, contractors and their employees. This act protects the whistleblowers and provides them with civil rights including the right to seek reinstatement of employment which is the right to get back the job they lost if they were thrown out of employment for being a whistleblower. The act also provides protection for if they were sued for defamation, and for civil and criminal liability for making the disclosure. But, according to this act, the whistle blowers must give their name in order to receive protection under this act.

IV. WHISTLEBLOWING IN INDIA- LEGISLATIONS

The Constitution of India provides protection for whistleblowing in the form of PIL⁶ and enforcement of “Public Law Remedy” for the violation of Fundamental rights⁷. The difference between these two reforms is that the former secures and safeguards the rights of public at large whereas the latter redresses violation of fundamental rights of a person individually. The collective force of these two provides the medium of “Constitutional Whistle Blowing”. In the case, *Keshavananda Bharati v. State of Kerala*⁸ put an end to the arbitrary or unreasonable exercise of the legislature to destroy the basic structure of the Constitution which also includes the fundamental rights. When there is a matter concerning the violation of the Fundamental rights, the remedy will exist under the Public Law. The *Freedom of Information* under Article 19(1)(a) guarantees freedom of speech and expression. The Article 19(2) gives the government

⁶ Public Interest Litigation to safeguard public interest and ensure justice to socially disadvantaged people.

⁷ Guaranteed under Part 3 of the Constitution of India.

⁸ AIR 1973 SC 1461

the right to impose reasonable restrictions for the same. Therefore, the citizen has a right to receive information and also disclose information to safeguard public morale, public order etc which might be affected if such misconduct by the organization is not disclosed. But this right is available only to citizens. In order to safeguard the rights of non-citizens, Article 21⁹ is available to everyone. In the case *R.P. Limited v. Indian Express Newspapers*¹⁰ the Supreme Court observed that **Right to Know** comes under the purview of Article 21 and that it is an important ingredient of participatory democracy. Therefore, Article 21 confers to everyone the Right to Know which includes the **Right to receive information**. The scope of Article 21 is wider than that of Article 19(1)(a). Thus, the courts should expand its scope through judicial activism. In the case *P.U.C.L v. Union of India*¹¹ the Supreme Court observed that the fundamental rights have no fixed contents and that the judiciary should try to expand its ambit through judicial interpretation. When dealing with matters of whistleblowing, the courts can take into account the foreign laws so that there is no inconsistency.

The instrument of whistle blowing can be invoked easily when combined with the Information and Communication Technology (ICT). This is because ICT is fast, economical, safer and stronger. With the *Information Technology Act, 2000* transparency is being ensured to the citizens as they can now be more aware of the state's plan. The act facilitates e-governance shifting towards less of paper-based methods of communication thereby facilitating electronic filing of documents and ensuring hassle free and transparent government offices. The ICT can be used for various purposes like filing complaints, enjoying the facilities of online services and centralising the various departments of the government in order to secure proper maintenance on an agency like National Informatics Centre.

(A) Indian Citizens who were Whistleblowers:

1) Satyendra Dubey:

Satyendra Dubey was an officer in Indian Engineering Services (IES) who was appointed as the project director under National Highway Authority of India (NHAI). He was handling the construction of the Aurangabad-Barachatti section of the NH-2 (The Grand Truck Road), a highway which was a part of the major infrastructural project called the 'Golden Quadrilateral project' of former Prime Minister Atal Bihari Vajpayee at Koderma district, Jharkhand. Dubey disclosed the financial irregularities of the project which led to the suspension of three engineers. On the 27th of November, 2003 Dubey was shot dead in Gaya after he was returning

⁹ Article 21 of the Constitution of India, 1950.

¹⁰ 1988 SCC (4) 592

¹¹ 1997 (1) SCC 301

from a wedding which was held at Varanasi. He was awarded the 'Whistleblower of the Year' award by the London based group organisation Index on Censorship.

2) *IPS Narendra Kumar Singh*

In 2012, Narendra Kumar Singh an officer in the Indian Police Service (IPS) revealed a mining scam in Morena district, Madhya Pradesh which is known for its good quality of sand for construction. Despite receiving several threats, the officer kept tracking the activities of the sand mafia who constantly mined sand illegally in the district. On the 8th of March, 2012 Mr. Singh was alerted of stones which were mined illegally being dispatched in a tractor. Once he reached the spot, he was run over by the tractor and he died on the spot.

3) *Vijay Pandhare*

Vijay Pandhare worked as the Chief Engineer of the Maharashtra Water Resource Department. In 2012, he exposed the corruption involved in the irrigation projects in Maharashtra. He pointed out that Rs. 120 billion was spent on lift irrigation almost 99% of the 227 projects were not functioning.¹² This letter led to the resignation of the Deputy Chief Minister Ajit Pawar.

(B) Whistleblowing outside India:

1) *LuxLeaks*¹³

In 2014, Antoine Deltour leaked documents that exposed around 340 businesses which were avoiding tax by creating complex financial structures. They obtained billions through these measures by paying less than one percent tax on their profits. He downloaded the evidence, passed it to a French journalist, Edouard Perrin who reported it on TV. Deltour was suspended for six months and was subject to a fine of 1500 Euros in 2014. However, in 2015, he was awarded the European Citizens Award in recognition of his disclosure. In 2018, he was cleared of the accusations made on him and was recognised as a Whistleblower. After this case, the European Commission stated that those who uncover illegal activity should be brought under the purview of the EU Whistleblowing Directive.

2) *Edmund Dene Morel*¹⁴

He was an English shipping clerk. He turned into a journalist and reported the atrocities in the Congo, Africa and became an anti-slavery campaigner. His disclosures led to a huge and strong

¹² <https://www.mid-day.com/lifestyle/culture/article/six-times-indian-whistleblowers-made-news-in-the-past-23197139>

¹³ <https://blog.complylog.com/whistleblowing/examples-of-whistleblowing-in-the-workplace/>

¹⁴ https://en.wikipedia.org/wiki/List_of_whistleblowers#:~:text=On%20February%20%2C%201976%2C%20Gregory,an%20exemplary%20instance%20of%20whistleblowing%22.

campaign against Belgian King Leopold II's autocratic regime in African territory where the rubber plantations exploited slave labour.

3) *Martha Mitchell*

She was married to John N. Mitchell who was convicted in the Watergate Scandal¹⁵. She eavesdropped on her husband and learned the key details of the scandal, snooped through the documents he brought home and revealed the scandal to the press. She was then kidnapped in an effort to keep her quiet. The Nixon Campaign called her crazy and reported that she has a drinking problem. Later, John W. McCord Jr., who was convicted in the campaign supported Martha's story. In 1973, she gave testimony in a civil suit filed by the Democratic Party against the Committee for the Re-Election of the President (CRP).

V. CONCLUSION

Whistleblowers shed light on illegal acts and other bad practices in the organization but more importantly they can help in preventing bigger harm if we listen to them at an early stage¹⁶. Whistleblowing is about basic democratic values and how everyone has the right to freedom of speech and right to speak up in the place of work. They should be given adequate protection for their honesty and interest to safeguard people from misconduct. But, despite so many efforts to support whistleblowers we still have a long way to go in empowering people so much enough for them to raise concerns without fear of losing their employment or even worse, their lives itself. We still do not have a clear-cut definition on who a whistleblower is, how and when is the whistleblower to be protected. The protection differs according to the definitions. These ambiguities create challenges in understanding the concept with clarity. An important point to be noted is that the genuineness of the suspicion of a whistleblower needs to be evaluated before taking further action. If this is not done and steps are taken against the accused, it could lead to brutal violation of the fundamental rights of the person. Therefore, the accusations of the whistleblower should always be assessed.

¹⁵ It is a political scandal that in the USA involving the administration of President Nixon from 1972-74 that led to his resignation.

¹⁶ Whistleblowers for change: The Social and Economic costs and benefits of leaking and whistleblowing, Ashley Savage