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The need for stringent whistle-blower Protection Laws in India

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The author has tried to approach the lack of whistleblower protection laws in India by presenting a comparative analysis of the laws surrounding this issue in countries of the United States, United Kingdom, and South Africa. The legislation in India, enacted to tackle the issue of whistleblower protection is analysed and once a dearth of structure is proved, an attempt has been made to encourage the filling of this lacunae by taking inspiration from the other structures of whistleblower protection laws, in effect, in other jurisdictions, as described below. This structure has been brought into light by discussing the major legislations of each country that focus on this issue and hence an attempt has been made to present various models of whistleblower protection laws that India can imbibe from and enact in its legal landscape.

Keywords: *whistleblower, company, SEBI, whistleblowers.*

INTRODUCTION

The word ‘whistleblower’ was coined by Ralph Nader, a civil activist¹. A simple understanding of the word can be thought of as a disclosure that is made in the larger interest of the public. Whistle-blowers are people who are blessed with a very acute sense of right and wrong and who are capable to see beyond themselves to think of the greater good of the

¹ Arup Barman, ‘System of Whistle Blowing in India’ (2015) 4(7) Int J Sci Res

society but ironically, an act as ethical and good intentioned as whistleblowing, is not an easy road to walk since whistleblowers are often frowned upon and considered to have a duplicitous personality. This often leads them to stand at crossroads where they have to face the looming danger of losing their livelihood, reputation, and isolation from society. While protecting the whistleblowers from such hostile conditions is of prime importance, it is also imperative for each country to take the responsibility of trying to uphold the practice of whistleblowing to maintain a healthy check over the government as well as the people of the country.

WHISTLEBLOWER PROTECTION IN INDIA

The journey of whistleblower protection laws in India can be mapped from the infamous killing of Satyendra Dubey who was an Indian Engineering Services officer, holding the position of Project Director at the National Highway Authority of India, Koderma. Officer Dubey had blown the whistle on the corrupt practices involved in the Golden Quadrilateral Highway Network project which was a very impassioned project of the Government, connecting the four major metro cities of India. Even though three people were convicted for killing Officer Satyendra, the family of the deceased always suspected those three to be a part of a story to hide the real culprits of the corruption case. It is a common and accepted belief that he was a victim of unprotected whistleblowing and his life was cut short due to a lack of protection and heed given to the whistleblowers of India, in exchange for their valour and honesty. This case touched several hearts and created an uproar throughout India, igniting the people to put up a strong fight against the menace of corruption. A London-based company Index on Censorship² posthumously awarded Officer Satyendra Dubey with the prestigious Whistleblower of the Year Award. After this incident of 2003, India's progress in protecting the whistleblowers of the country is analysed below.

² 'Freedom of Expression Awards 2004' (*Index on Censorship*, 2004)

<<https://www.indexoncensorship.org/2004/03/awards-2004/>> accessed 10 August 2021

THE COMPANIES ACT 2013

The Companies Act 2013, under its Section 177,³ makes it compulsory for the companies-

1. who are listed,
2. or companies who accept deposits from the public or
3. who has borrowed an amount from banks/ financial institutions which exceeds Rs. 50 crores are required to have a mechanism in place to take note of whistleblowing concerns.

This provision of the Companies Act 2013⁴ when read with Rule 7(4) of the Companies (Meetings of Board and its Powers) Rules, 2014, points out that the mechanism being promoted would only protect the employees against being victimized. The biggest obstacle in implementing this law is the sheer absence of the meaning of “vigil mechanism” as mentioned in the Companies Act 2013. The mechanism which seems to be the subject of this legislation is left to the discretion of the company, affecting the overall quality in the implementation of this law. While there are provisions to protect the employees from any sort of victimization in the form of removal or unfairness, the protection provided under this act becomes unreliable due to the unclear subject of the protection being promised.

SEBI (LODR) Regulation, 2015⁵

- SEBI LODR is consequential legislation in India aimed to increase the transparency in the listed companies of India by promoting disclosures.
- As per Regulation, 4(2)(d)(iv) of SEBI (LODR), 2015⁶ makes it compulsory for the companies that are listed in India to have a mechanism in place that enables the

³ The Companies Act 2013, s 177

⁴ The Companies Act 2013, s 177

⁵ SEBI (LODR) Regulation 2015

⁶ SEBI (LODR) Regulation 2015, r 4(2)(d)(iv)

employees, the stakeholders, and their representatives to feel free when it comes to voicing out their concerns in the organization.

- Under Regulation 30 of the SEBI (LODR), 2015⁷, the listed companies need to disclose every important piece of information to the Stock exchange, as soon as they can.
- The haziness of this law continues to grow dense when what information qualifies as important or not is again left at the discretion of the company and no such clear guidelines are given by the SEBI.

Whistle-Blowers Protection Act, 2014⁸

While the proper implementation of the Act is still under works, its unclear provisions are not successful in doing a lot for India. It has been enacted to aid the public companies and the government and offers them a mechanism to keep a check on the voices of concerns that involve information about misuse of power or any such relevant failure in a business entity or government body.

Some of the major pitfalls of the act include:

- The need for the whistleblower to reveal his identity while making the disclosure.
- This Act offers disclosure to the limited group of public employees only while the private corporations are not under any sort of check and have not been given any sort of guidelines to facilitate 'whistleblowers' protection.

The amended Whistle Blowers Protection Act, 2015 is still stuck in the legislative procedures due to the sudden lapse of the Rajya Sabha in 2019. As per a 2018 article of Economic Times, one-third of companies registered at Nifty, an Indian Stock Market Index that portrays the fifty largest companies of India, on an average basis, reported a hike in the number of whistleblowing complaints in the last financial year of their financial calendars.⁹This foretells a

⁷ SEBI (LODR) Regulation 2015, r 30

⁸ Whistle Blowers Protection Act 2014

⁹ Kiran Kabtta Somvanshi, 'Whistle-blower complaints on the rise in India Inc' (*ET Prime*, 2018)

<<https://economictimes.indiatimes.com/news/company/corporate-trends/whistle-blower-complaints-on-the-rise-in-india-inc/articleshow/66540004.cms?from=mdr>> accessed 15 August 2021

growing need for a solid regime to assure the whistleblowers of India, strong protection and safeguards so that they do not face any hostile treatment in their area of work or livelihood.

WHISTLEBLOWING POLICIES IN THE INTERNATIONAL SPECTRUM

A 2016 report published by the Organisation for Economic Co-operation and Development, titled, *Committing to Effective Whistleblower Protection*, summarized the importance of whistleblower protection, immaculately, when it said, “Whistleblower protection is the ultimate line of defence for safeguarding the public.”¹⁰ Whistleblowers who risk substantial areas of their lives to put up a fight against corruption and other such evils of the society, rightly deserve protection and a genuine assurance from the legal landscapes of their respective countries. The way for this assurance can be paved through increased understanding about the need for a hard-line approach towards acts, policies, and endeavours that offer superior protection to our whistleblowers.

Internationally, there is levitation in the number of countries that are putting whistleblowing protection laws into place but the effectiveness of these laws differ from country to country. While some countries have garnered a reputation for handling the issue, in all earnest, others are seen grappling with limiting protection policies for the whistleblowers. A report released by the International Labour Organization titled, “*Law and practice on protecting whistle-blowers in the public and financial services sectors*”¹¹ back the above claim by way of their research pointing out the fragmented whistleblowing policies of various countries.

THE UNITED KINGDOM

The United Kingdom is known to have a panoptic approach regarding its legislations centered around the protection of whistleblowers in its domain. The governing legislation in the United

¹⁰ OECD, ‘Committing to Effective Whistleblower Protection’ (*Anti-Corruption & Integrity Hub*, 2016) <<https://www.oecd.org/corruption-integrity/reports/committing-to-effective-whistleblower-protection-9789264252639-en.html>> accessed 11 August 2021

¹¹ Iheb Chalouat and others, ‘Law and Practice on Protecting Whistle-Blowers in the Public and Financial Services Sectors’ (*International Labour Organization*, 2019) <https://www.ilo.org/sector/Resources/publications/WCMS_718048/lang--en/index.htm> accessed 11 August 2021

Kingdom for the protection of whistleblowers is the Public Interest Disclosure Act 1998¹² (hereinafter referred to as PIDA). This Act has been constituted to shield the employees who blow the whistle on the malefactions in a particular organization from vengeful dismissal, any pernicious steps that can be taken towards them, ignoble acts consisting of refusal to offer promotions, requisite training, and other such opportunities. The PIDA¹³ is contingent and limited by specific types of disclosures from which the employees are granted protection. The disclosures that are covered under PIDA¹⁴ are as follows-

- A criminal offence being committed/about to be committed
- A person failing/failed to comply with legal obligations.
- miscarriage of justice occurred/about to occur
- health or safety of a person is in danger/about to be in danger
- damage caused/about to be caused to the environment
- A deliberate covering up of any of the above-mentioned offences.

Another thing to keep in mind for the whistleblowers is the authority to whom they can disclose the wrongdoing, is also limited under the provisions of this act. Section 43C¹⁵ of PIDA limits qualifying disclosure to be made, in good faith only to-

- i) the employer of the employee
- ii) to the person who the employee feels is either the main reason/subject behind the failure or to a person other than the employer who has the legal responsibility for the failure

If the employee discloses such information to anyone other than the prescribed person, as mentioned above, there are numerous other conditions they need to fulfill then, to seek protection under the PIDA.¹⁶

¹² Public Interest Disclosure Act 1998

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ Public Interest Disclosure Act 1998, s 43(c)

¹⁶ Public Interest Disclosure Act 1998

Studying the PIDA¹⁷, one can gather that the act is mostly compensatory since most of its provisions underline the protections an employee can receive to safeguard themselves against any injustice meted out to them, once they have blown the whistle on a particular infringement. Another demotivating facet of the PIDA¹⁸ is the burden of proof falling on the whistleblower himself as he needs to The PIDA¹⁹ does not ask or set any mandatory guidelines for organizations to have a deliberate plan of action to work on issues of abuse and corruption to eliminate the need for whistleblowing. The compensatory nature of the Act can sometimes discourage the whistleblowers from taking on a perilous responsibility for the collective good of all. A classic example of this can be the unfortunate accidents of the Herald of Free Enterprise disaster and the Clapham Junction rail disaster where the fear of whistleblowers was rejected and not acted upon or the whistleblower was too apprehensive of what the future would hold for him once he blew the whistle. These incidents led to the enactment of the PIDA²⁰, to ameliorate the environment of hesitation around whistleblowing.

NATIONAL HEALTH SERVICE AND THE FREEDOM TO SPEAK UP-

The Mid Staffordshire NHS Foundation grabbed the headlines in 2009 when a grotesque picture of some doctors with a derelict sense of duty, surfaced and shocked the whole of the United Kingdom. Around 400- 12000 patients had succumbed to death in fifty months²¹. The conditions in the hospital were unimaginably obdurate. To date, it is often remembered as the worst healthcare scandal of all time.

What appears to be a classic case of clinical negligence is furthermore a case of lack of whistleblower protection. Following this exposure, a barrister and strong advocate of eliminating clinical negligence, Sir Robert Francis, undertook independent research on the case in 2010. The disquiet about the loneliness of the whistleblowers in the NHS was far from over. The 2015 report by Sir Robert Francis has titled the Freedom to Speak Up. It focused heavily on

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ Public Interest Disclosure Act 1998

²¹ Denis Campbell, 'Mid Staffs Hospital Scandal: The Essential Guide' (*The Guardian*, 2013)

<<https://www.theguardian.com/society/2013/feb/06/mid-staffs-hospital-scandal-guide>> accessed 12 August

the inability and difficulties faced by the NHS whistleblowers to correct the wrongs, visible to them. Being a public enquiry, Sir Robert Francis, in his report, sought out the experiences of many employees and people who work in the NHS. To quote the summation of his findings

“Many described a harrowing and isolating process with reprisals including counter-allegations, disciplinary action, and victimisation. Bullying and oppressive behaviour were mentioned frequently, both as a subject for concern and as a consequence of speaking up. They also spoke of lack of support and lack of confidence in the process.”²²

Even though the Public Interest Disclosure Act 1988 ²³has been in effect for a long time, there is still a long way to go and a lot of provisions to reconsider and rethink. The whistleblowers are still not confident enough of the protection they are being promised since the Public Interest Disclosure Act 1988²⁴ clearly lacks the external push and unconditional protection that they require.

THE UNITED STATES

The United States has always been looked at as a paragon when it comes to enacting effective legislation to safeguard our whistleblowers. The world’s first whistleblower protection law is said to be enacted in the United States, as early as around 1777²⁵. To analyse the current scenario in the United States, concerning effective legislation aimed at protecting the whistleblowers of the country, we need to focus on the major legislation, implemented for this issue.

THE WHISTLE BLOWER PROTECTION ENHANCEMENT ACT, 2012²⁶

(Hereinafter referred to as the WPEA)

²² Sir Robert Francis QC, ‘An Independent Review into Creating an Open and Honest Reporting Culture in the NHS’ (*Freedom to Speak Up*, 11 February 2015) <<http://freedomtospeakup.org.uk/the-report/>> accessed 13 August

²³ Public Interest Disclosure Act 1998

²⁴ *Ibid*

²⁵ Christopher Klein, ‘US Whistleblowers First Got Government Protection in 1777’ (*History Stories*, 26 September 2019) <<https://www.history.com/news/whistleblowers-law-founding-fathers>> accessed 13 August

²⁶ Whistle Blower Protection Enhancement Act 2012

This is the main legislation enacted to protect the federal workers of the USA, who blow the whistle on abuse and fraud. This act is known to offer an excellent standard of protection to the federal whistle-blowers of the United States by covering all the pitfalls that were presented to the people of the country under the provisions of the Whistleblower Protection Act of 1989²⁷(hereinafter referred to as the WPA)

Under the WPA, the whistle-blowers' protection was limited by the following conditions-

- i) If they were not the first person to disclose the relevant failure
- ii) the disclosure was made to a co-worker
- iii) the disclosure was made to a supervisor
- iv) the disclosure was made while the employee was on duty

The improved legislation of 2012, The WPEA,2012 got rid of all the above barriers in Section 101²⁸ and Section 102²⁹ which clearly state that none of the disclosure will lose protection under the WPEA 2012³⁰ because of the above-stated limitations of the WPA,1989³¹. In terms of providing the whistleblowers with a sense of motivation and assurance, the United States guarantees money rewards to the whistleblowers under another very successful law called the False Claims Act.

FALSE CLAIMS ACT³²

It was enacted in 1863 by the then-American President Abraham Lincoln. It has gone through tremendous advancements and amendments but its whistleblower protection legislation has always been one of its most powerful aspects. It follows the *qui tam*,³³ which allows anyone to register a suit against any failure or wrongdoing and blow the whistle on the same, on the behalf of the government.

²⁷ Whistleblower Protection Act 1989

²⁸ Whistle Blower Protection Enhancement Act 2012, s 101

²⁹ Whistle Blower Protection Enhancement Act 2012, s 102

³⁰ Whistle Blower Protection Enhancement Act 2012

³¹ Whistle Blower Protection Act 1989

³² False Claim Act 2010

³³ *Ibid*

The United States False Claims Act³⁴ equips the whistleblowers to receive 15-30% of the total amount, which is decided based on their involvement in the successful investigation of the cases involving fraud committed against the government itself. This Act has proved to be highly successful in terms of effectiveness and bringing about a positive impact in the whistleblowing scenario of the country. The United States further offers a great sense of protection to the whistleblowers, against detrimental practices of bullying, demotions, and harassment, etc. by putting in place, bodies of great power and authority like the Office of the Special Counsel which plays a huge role in aiding the whistleblowers and protecting them against any form of retaliation. They further have a secure implementation and resolving system in place which allows the employees to stay anonymous while making a disclosure.

In FY 2019 (October 1, 2018, to September 30, 2019), the US Securities Exchange Commission received its second-largest number of whistleblower tips in a year and made its third-largest award to date – a \$37 million award to the whistleblower.³⁵ Even in times of the Covid-19 pandemic, as reported by Bloomberg that covers various facets of news of the United States of America, the U.S. Securities and Exchange Commission has paid out around \$330 million in awards, including an eye-popping \$114 million to a single tipster in October, thus incentivizing whistleblowing to the maximum.³⁶ As one can figure out from the above statistics, the United States has been making great headway in terms of its protection policies for whistleblowers which in turn has resulted in a common belief that whistleblowing policies, implemented by the United States, are truly working as an asset for the country.

SOUTH AFRICA

South Africa is regularly considered as a country with a broad-gauged whistleblower protection policy, in place. It is often lauded for having protection policies for whistleblowers,

³⁴ *Ibid*

³⁵ Divya Rajagopal, 'Why Whistleblowing works in USA' (*The Economic Times*, 23 November 2019) <<https://economictimes.indiatimes.com/news/company/corporate-trends/why-whistleblowing-works-in-usa/articleshow/72202106.cms?from=mdr>> accessed 14 August 2021

³⁶ Bloomberg, 'Whistleblowing soars 31% to record with Americans working from home' (*The Orange Country Register*, 12 January 2021) <<https://www.ocregister.com/2021/01/12/whistle-blowing-soars-to-record-with-americans-working-from-home/>> accessed 14 August 2021

irrespective of them being private or public employees. We will see how South Africa has several legislations, divided categorically, to extend protection to the whistleblowers. The major legislation for the protection of whistleblowers in South Africa is The Protected Disclosures Act (PDA)³⁷ and the Labour Relations Act³⁸.

The Protected Disclosures Act 2017³⁹ (hereinafter referred to as the PDA)

This Act was enacted in 2001 but was recently amended in the year 2017. Having a wide ambit, it shields both private and public employees not only for a safe disclosure but also protects them from any detrimental aftermath of whistleblowing. The PDA⁴⁰ safeguards the employees who make a “protected disclosure” which by the meaning of the Act, is constituted by-

- i) the disclosure should contain information about impropriety
- ii) the disclosure should be made to the right person i.e. a legal advisor, the employer, a public protector, auditor general, member or minister of the Executive Council, any other person in good faith, and only because the employee felt the disclosure could not have been made to the employer.

The major focus of the PDA⁴¹ lies in protecting the whistleblower from the adversities that might lie ahead for him. Once a whistleblower is subjected to any kind of injustice or detrimental treatment in terms of his employment, the rectifiers can range from availing the aid of the Labour Court or approaching the Commission for Conciliation, Mediation and Arbitration to even getting a transfer to another workplace with no loss in the quality of work and working conditions.

THE LABOUR RELATIONS ACT 1995 (LRA 1994)⁴²

³⁷ Protected Disclosures Act 2017

³⁸ Labour Relations Act 1995

³⁹ Protected Disclosures Act 2017

⁴⁰ *Ibid*

⁴¹ Protected Disclosures Act 2017

⁴² Labour Relations Act 1995

This Act has been put in place by the government of South Africa to offer another layer of protection to its whistleblowers under any form of retaliation that a whistleblower might face once he has blown the whistle on the relevant failure. Sections 186(2)(d)⁴³ of the act deals with any sort of unfair labour practice and Section 187(1)(h)⁴⁴ deals with unfair dismissal of the employee. Section 191(3)⁴⁵ of the act further equips the whistleblowers to handle the disputes that originate from the practice of an employer doing acts that lead to any sort of occupational detriment to the employee.

THE CURRENT SCENARIO IN SOUTH AFRICA

While the laws put in place in South Africa are comprehensive and ever-improving, the country of South Africa still grapples with the awareness around the stigma associated with whistleblowing who are often mistreated and isolated from society. A 2020 set of data from the Gordon Institute of Business Science (GIBS) Ethics Barometer suggested that whereas 45% of respondents witnessed at least one of 18 types of misconduct – like bullying in the workplace or gender discrimination – over the past 24 months, less than a third reported it.⁴⁶

CONCLUSION

India as a country, like every other country is fighting its own battle against corruption and abuse. Corruption, like evil, is one of the most deep-settled evils of our society that has found a firm place for itself as the passage of time evolved. While it is a collective job of the government of the country and its people to protect themselves and their fellow men from the seed of corruption and gradually throw it out of the system, it is often some set of people who take on greater responsibility than the others to tackle a social evil. In the case of corruption and abuse, whistleblowers are our heroes who take it upon themselves to make a stronger

⁴³ Labour Relations Act 1995, s 186(2)(d)

⁴⁴ Labour Relations Act 1995, s 187(1)(h)

⁴⁵ Labour Relations Act 1995, s 191(3)

⁴⁶ Theresa Onaji Benson, 'Whistle-blowers in South Africa are treated as Pariahs in spite of their moral courage' (*The Conversation*, October 23 2020) <<https://theconversation.com/whistle-blowers-in-south-africa-are-treated-as-pariahs-in-spite-of-their-moral-courage-144974>> accessed 15 August 2021

attempt to throw away the seed of corruption out of our systems. We should make the road easier for them and a primary way to do that is by way of stronger legislation.

The gap in clarity of legislations between India and other countries, as discussed in this article is strikingly clear and it makes one feel saddened for the actual state of whistleblowers in India. The disparity between public and private employees, without any explanation, is one of the biggest contributors to a thousand voices being shushed and the mistreatment of the whistleblowers. India can take inspiration from the imperfect yet progression-oriented whistleblower legislation of the United States, the United Kingdom, and South Africa. Picking and imbibing the best provisions of law that India feels will bring in new hope for it, should be encouraged.