

HISTORICAL PERSPECTIVE OF LAW RELATING TO PROTECTION OF WHISTLE BLOWERS

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The concept of whistle blowing may not be new but it has recently increasing attention. The term 'whistle blower' comes from the whistle a referee uses to indicate an illegal or foul play.² US Civic activist Ralph Nadar coined the phrase in the early 1970s to avoid the negative connotations found in other words such as "informers" and "snitches"³. A whistle blower is a person who tells the public or someone in authority about illegal activity occurring in government department, a public or private organization or a company.⁴ The alleged misconduct may be classified in many ways; for example a violation of law, rule, regulation or a direct threat to public interest, such as fraud, health, safety violation and corruption. Whistle blowers may make their allegations internally for example to the people within the accused organization or externally to regulators, law enforcement agencies, to media or to groups concerned with the issue.⁵

ORIGIN OF THE TERM WHISTLE BLOWER

The term 'whistle blowing' appears to have first arisen in the United States in the early 1970s where it was first used and discussed in a conference organized by Ralph Nadar. In a paper issued from the conference, "whistle blowing" was defined as,

"an act of a man or a woman who, believing that the public interest overrides the interest of the organization he serves, blow the whistle that organization he serves, is involved in corrupt, illegal, fraudulent or harmful activity"⁶.

However, the concept was not born at that time. Its roots reach back much further to legislation such as the False Claims Act, 1863, a piece of US Federal legislation passed by Congress in 1863 during the civil war as a result of fraud committed by companies selling supplies to the Union army. But substantial amendment in 1943

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² Dr. Archana Gadekar, *Whistle blower bill: A critique*, AIR177 (2012)

³ Nadar, Petkas and Blackwell, *Whistle blowing*, 112(1972)

⁴ [http://en.wikipedia.org/whistle blowing](http://en.wikipedia.org/whistle%20blower) (visited on April 25, 2015)

⁵ *Supra* note 1 at 178

⁶ Lipi Thapliyal, *Whistle blower protection in India: A Shaky Start*, available at www.legalservicesindia.com (visited on April 26, 2015)

effectively emasculated the False Claims Act, 1863 and the legislation was rarely used. However it was brought back in revised form in 1986 following a scandal including navy spending. The United States has subsequently passed other legislations aimed at protecting whistle blowers. The Civil Services Reform Act, 1978 and the Sarbanes Oxley Act 2002. The latter provide protection for an employee who calls attention to acts he or she reasonably believes to constitute an infringement of laws dealing with prevention of fraud against share-holders. The Civil Services Reform Act, 1863 provides better rewards for better performance, provide needed protection for employees and provide equal employment.⁷

PREVENTION OF CORRUPTION AND PROTECTION OF WHISTLE BLOWERS IN INDIA: HISTORICAL PERSEPECTIVE

Corruption is today a world-wide phenomenon and social evil which prevent proper and balanced social growth and economic development. Corruption is termed as a plague which is not only contagious but if not controlled, spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as royal thievery. It affects economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence shaking the socio-economic political system in an otherwise healthy, wealthy, effective and vibrating society.⁸

Whistle blowers play a very important role in providing information about corruption and mal-administration. People working in the same department best know who is corrupt but they are not bold enough to convey this information to their higher authorities as there is fear of reprisals. If adequate State protection is granted there can be no doubt that the government will be able to get more information regarding wrong doing. Whistle blowers play a very crucial role in providing information about corruption.⁹

Historical perspective of prevention of corruption and protection of whistle blowers in India can be discussed under following heads:-

i. Ancient India:

Corruption is not recent phenomenon. There are several references to the prevalence of official corruption in ancient India. Kautilya, who was a sagacious minster in the kingdom of Chandragupta Maurya, provides a

⁷ Joyce A Mitchell, *The past and future of whistle blowing*, available at www.fasken.com (visited on April 28, 2015).

⁸ State of M.P v Ram Singh, (2005) 5 SCC 88

⁹ Robert G. Vaughan, *State Whistle blower statues and the future of whistle blower protection*, *Administrative Law Review*, 581 (1999)

comprehensive list of 40 kinds of embezzlement. He has given four ways of preventing corruption in his Arthshastra. Stringent punishments were provided for corrupt practices and non- performance of duties by public officers. Kautilya also dealt with reward for informants of corruption. He said any informant (Suchka) who provided details about financial wrongdoings was entitled as an award of one sixth of the amount in question. If the informants to be a government servant (bhritaka), he was given only one twelfth of the total amount.¹⁰ The former's share was more because exposing corruption while being outside the system was more challenging. But in cases of government servant, striving for a corruption free administration was considered more of a duty"¹¹.

Kautilya also warned at the same time about providing wrong information or not being able to prove the accusations. He advocated either monetary or corporeal punishments for such informants so that the tool could not be misused for setting personal scores and harassing genuine officials. If an informant himself were to back track an the assertions he made against the accused, Kautilya suggested death penalty for him.¹²

ii. Medieval India:

In medieval India corruption was at its peak during the Sultanate and Mughal administration. The invention of bakhshis (tip) as a practice of rewarding government employees even for routine tasks and favours legitimized corruption in the Mughal era. In past Akbar period civil services become highly corrupt. The tradition of corruption in Mughal administration was inherited by the East India Company.¹³

iii. British India:

The East India Company expanded its operation its officials amassed wealth as well as power. In 1765 Lord Clive, the Governor General of the East India Company described the servants of the company as corrupt. Even Governor General of India Warren Hastings, was impeached in Britain for his misdeed in India. Just before the end of the 18th Century every servant of East India Company was involved in scandals.¹⁴ The first legislative measure to tackle with the problem of corruption was introduced by the British rulers in 1860 only in the form of sections 161 to 171 of Indian Penal Code, 1860¹⁵ The legislature preferred to make both giver and taker of the bribe criminally

¹⁰ R. Shamastry, Kautilya's *Arthshastra*, 126 (2005)6

¹¹ Tarun Kumar, *Corruption in Administration: Evaluation the Kautilya's Antecedents*, 5(2012) available at [mercury.ethz>files>.ISN>.IB](http://mercury.ethz.ch/files/.ISN>.IB) (visited on April 30,2015)

¹² *Supra* note 9 at 126

¹³ S.N. Mishra and Anil Dutta Mishra, *Public Governance and Decentralisation: Essays*, 107 (1995).

¹⁴ *Ibid*

¹⁵ Act NO 45 of 1860

liable.¹⁶

So far as the law relating to protection of informants of corruption is concerned, criminal law in India during British rule was codified by British government with the sole purpose of facilitation repression of Indians and to prevent the natives from acting against the colonial masters. Within this scheme of things a witness or informant perspective would have been a misfit.¹⁷ Although there are informers in British India But they were not protected by any law. Maharaja Nand Kumar was the revenue officer under the Nawab of Bengal. In 1775, Maharaja Nand Kumar made allegations that Governor General Warren Hastings accepted bribes from Nawab and others. Hastings said that Nand Kumar himself paying bribes to others, to malign Hasting's image. The company officials arranged a 'puppet' Indian to file a forgery case against Nand Kumar. A British Judge awarded death renitence to Nand Kumar. Edmund Burke, Lord Macaulay and other eminent Britishers described Nand Kumar's hanging as a Judicial murder.¹⁸

iv. Independent India:

Various laws are enacted in independent India to eradicate corruption. After noticing inadequacy of Indian Penal Code, 1860, the Prevention of Corruption Act, 1947¹⁹ was enacted which created a new offence; criminal misconduct in discharge of official duty, punishable by 1 to 7 years imprisonment. The unique feature of it was that it gave immunity to complainant/bribe giver thinking that without which no one will come forward to complain. To check corruption rampant in country, the Prevention of Corruption Act 1988²⁰ was enacted deleting previous Act of 1947 and provisions relating to the prevention of corruption in India Penal Code, 1860 (e.g. Sections 161 to 171). Then the Benami Transaction (Prohibition) Act, 1988²¹ was enacted with a view to prevent and prohibit corrupt practice of purchase of property in false name of another person. The Foreign Exchange Management Act, 1999²² was passed with an object to prevent corrupt practice of middleman who take huge commission for brokerage deals. In order to prevent another corrupt practice, the Parliament enacted the Prevention of Money Laundering Act

¹⁶ K.D. Gaur, *The text book on the Indian Penal Code*, 271 (2009).

¹⁷ Uma Soumya, *Towards a legal regime for protecting the rights of victim and witness*, Combat Law, Vol. 2(2004).

¹⁸ Whistle Blower Maharaja Nand Kumar, available at mrunal.org(visited on April 30, 2015).

¹⁹ Act No. 2 of 1947.

²⁰ Act No. 49 of 1988.

²¹ Act No. 45 of 1988.

²² Act No. 42 of 1949.

2002²³. And recently paving the way for appointment of country's first national anti-corruption ombudsman and to protect whistle blowers, the Lokpal and Lokayukta Act, 2013²⁴ and the Whistle Blower's Protection Act, 2011²⁵ are enacted. Apart from these anti-corruption laws and Acts, five anti-corruption Bills are pending in the Parliament. The Judicial Standards and Accountability Bill, 2010,²⁶ requires judges to declare their assets, lays down judicial standards and provides a process for the removal of judges of Supreme Court and High Courts. The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievance Bill, 2011²⁷ seeks to create a mechanism to ensure timely delivery of goods and services to citizens by Central and State public authorities. The prevention of Bribery of Foreign Public Officials and Officials of Public International Organization Bill, 2011²⁸ provides a mechanism to deal with bribery among foreign public officials and criminalizes both the giving and taking of bribes. The Public Procurement Bill 2012²⁹ seeks to regulate and ensure transparency in procurement by the Central government. The Prevention of Corruption (Amendment) Bill, 2013³⁰ expands the scope of the offences relation to a public servant being bribed. The bill covers the offences of giving a bribe and soliciting and accepting a bribe through an intermediary.

Besides legislative measures, some executives measures have also been initiated by the government to prevent and combat corruption. In the Five Year Plan 1952 it was realized that, there must be continuous war against corruption within administration as well as public life. In the year 1955 an Administrative Vigilance Commission was created with responsibility to provide direction and co-ordinate the various efforts of the ministries to deal with corruption. In 1962 the Committee on Prevention of Corruption headed by K. Shantham was created, which gave its report in 1964. In its report the Committee recommended for creation of commission headed by a commissioner independent of the executive. The government accepting the recommendation set up a Central Vigilance Commission. In addition to these the First Administrative Reforms Committee in 1969 recommended the establishment of a Lokpal to oversee the conduct of Ministers and Members of Parliament.

²³ Act No. 15 of 2008.

²⁴ Act No. 1 of 2014.

²⁵ *Supra* note 5.

²⁶ Bill No. 136 of 2010.

²⁷ Bill No. 131 of 2011.

²⁸ Bill No. 26 of 2011.

²⁹ Bill No. 58 of 2012.

³⁰ Bill No. 43 of 2013.

WHISTLE BLOWER PROTECTION IN INDIA-HISTORICAL BACKGROUND

A bill for whistle blower protection was first initiated in 1993 by Mr. N. Vittal (then Chief Vigilance Commissioner). Then the Law Commission of India³¹ in 2001 had recommended that in order to eliminate corruption a law to protect whistle blowers is essential. It recommended formulation of a specific legislation titled, "The Public Interest Disclosures (Protection of Informers) Bill, 2002 to encourage disclosure of information regarding corruption or maladministration by public servants and to provide protection to persons making such complaints. The second Administrative Reforms Commission has also recommended formulation of legislation for providing protection to whistle blowers.³² On 10 August, 2010, the union cabinet of India approved" Public Interest Disclosures Bill, 2010. The Public Interest Disclosures and Protection of Persons Making Disclosures Bill, 2010 was renamed as the Whistle Blower's Protection Bill, 2011 by the Standing Committee on Personal, Public Grievance, Law and Justice. The Whistle Blower's Protection Act, 2011³³ was passed by the Lok Sabha on 27 December 2011. The Act was passed by Rajya Sabha on 21 February 2014 and received the President's assent on 9 May 2014.

Whistle Blower's Protection Act, 2011 provides a mechanism to investigate alleged corruption and misuse of power by public servants and also protect anyone who exposes alleged wrong doing in government bodies, projects and offices. The wrong doing might take the form of fraud, corruption or mis-management. The Act will also ensure punishment for false or frivolous complaints.³⁴ According to the provisions of this Act any public servant or any person including a nongovernmental organization may make such a disclosure to competent authority.³⁵ Every complaint has to include the identity of the complainant. The competent authority shall not disclose the identity of the complainant. Those who reveal the identity of the whistle blower will be held liable and penalized.³⁶

CONCLUSION

Corruption is a social evil which prevents proper and balanced social growth and economic development. One of the impediments felt in eliminating corruption in the government and public sector is lack of adequate

³¹ 179th Report of Law Commission on *the Public Interest Disclosures and Protection of Informers*, 2001.

³² 4th Report of Administrative Reforms Commission on *Ethics in Governance*, 2007.

³³ Act No. 17 of 2014.

³⁴ Section 17 of the Whistle Blowers Protection Act, 2011.

³⁵ Section 4(1) of the Whistle Blowers Protection Act, 2011.

³⁶ Section 16 of the Whistle Blowers Protection Act, 2011.

protection to the complainants reporting the corruption or willful misuse of power, discretion which causes demonstrable loss to the government or commission of a criminal offence by a public servant. There have been multiple instances of threatening, harassment and even murder of various whistle blowers due to which there was crying need of legislation in this area arises. Whistle blowers can play a very important role in providing information about corruption and mal-administration. Good faith whistle blowers represent the highest ideals of public service and challenge abuse of power. They test loyalty with the highest moral principles but place the country above loyalties to persons, parties or government. Public servants working in the same department know better as to who is corrupt in their department but unfortunately, they are not bold enough to convey the said information to higher authorities for fear of reprisals by those against whom complaints are made.

There is a very close connection between the public servant's willingness to disclose corruption in his organization and the protection given to him and his/her identity. If adequate statutory protection is granted, there can be no doubt, that the government will be able to get more information regarding corruption and mal-administration. Whistle blower protection laws have been enacted globally to protect employees of either government agencies or private corporations, who report to the public or those in authority regarding mismanagement, corruption, illegality or any wrongdoing within their place of employment. In past employees, who act as whistle blowers are often subject to retaliation by their employers, hence there is need for whistle blower protection legislation and proper enforcement of legislation relating to protection of whistle blowers.