

International Perspective of Law Relating to Protection of Whistle Blowers

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The term whistleblower comes from the whistle a referee uses to indicate an illegal or foul play. A whistleblower is a person who tells the public or someone in authority about alleged dishonest or illegal activities occurring in government department, a public or private organization, or a company.² 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.³ The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. Public and private sector employees have access to up-to-date information concerning their workplaces practices, and are usually the first to recognize wrongdoings.⁴ However, those who report wrongdoings may be subject to retaliation, such as intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. In many countries, whistle-blowing is even associated with treachery or spying.⁵ Whistleblower protection is therefore essential to encourage the reporting of misconduct, fraud and corruption. Providing effective protection for whistleblowers support an open organizational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It is also helpful in prevention and detection of bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, safeguard integrity, enhance accountability, and support a clean business environment. Whistle blowing is becoming an increasingly important issue in the workplace throughout the world. However, not all countries have the same perspective. Sometimes, it is viewed positively as a voice of conscience, other times it is viewed negatively as a disloyal act to their employer. Thus, in order to understand international perspective of whistleblowers protection, it is relevant to discuss here law relating to protection of whistleblowers in other countries and provisions relating to protection of whistleblowers in major international instruments.

LAW RELATING TO PROTECTION OF WHISTLE BLOWERS IN OTHER COUNTRIES:-

Australia, Canada, Japan, Korea, New Zealand, South Africa, the United Kingdom, and the United States are among the countries that have passed comprehensive and dedicated legislation to protect public sector whistleblowers. Whistleblowers protection is provided by various countries. These are followings:-

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² <http://en.wikipedia.org/wiki/Whistleblower> (Visited on Dec 29, 2017).

³Dr. ArchnaGadekar, "WhistleBlowerBill:ACritique",AIR177(2012).

⁴United Nations Office on Drugs and Crime, *UNAnti-Corruption Toolkit* 67 (2004).

⁵David Banisar, *Whistleblowing:International StandardsandDevelopments* 7 (2009).

UNITED KINGDOM:-

The United Kingdom is considered to have one of the most developed comprehensive legal systems, having adopted a single disclosure regime for both private and public sector whistle-blowing protection. It also covers the hybrid scheme - when public sector functions are outsourced to private contractors. The U.K. legislation provides a balanced approach with a detailed definition including exceptions. In the U.K., the Public Interest Disclosure Act, 1998 was intended to protect individuals who make certain disclosures in public interest. Here, from a legal point of view, whistle-blowing is justified if a worker has a reasonable belief that a type of wrongdoing specified in the legislation affects the public interest.⁶ The Public Interest Disclosures Act does not oblige U.K employers to have whistle-blowing procedure but provides obvious benefits to those who have them. Employers with good whistle-blowing policies and procedure are less likely to be exposed to claims under the Act.⁷ The Public Disclosure Act, 1998 of UK added Part IVA (Protecteddisclosures) in the Employment Rights Act, 1996 which contains the new sections 43A to 43L. Section 43A defines "protected disclosure". In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B defines qualifying disclosure (1) in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of sub-section (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

⁶Angie Ash, *Whistleblowing and Ethics in Health and Social Care* 38 (2016).

⁷David Lewis, *Whistleblowing at Work* 57 (2001).

(5)In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection.⁸

AUSTRALIA:-

All Australian jurisdictions, except for the Commonwealth, have stand-alone Acts that provide for the establishment of whistle-blowing schemes and some form of legal protection against reprisals.⁹ In Australia whistle blowers protection has been provided by following legislations.

- Whistleblower Protection Act of 1989.
- Queensland Whistleblowers Protection Act of 1993.
- The New South Wales Protected Disclosures Act of 1994.
- Under section 230(3) of the Employment Rights Act of 1996.
- Public Interest Disclosure Act of 1998.
- Protected Disclosures Act of 2000.
- Victoria Whistleblowers Protection Act of 2001.
- Tasmania Public Interest Disclosures Act of 2002.
- The Western Australia Public Interest Disclosures Act of 2003.
- Whistleblower Protection Act of 2004.
- Public Servants Disclosure Protection Act of 2005.
- Whistleblower Act (Act 720) of 2006.
- Act on the Protection of Public Interest Whistleblowers, 2011.
- The Australian Capital Territory Public Interest Disclosures Act, 2012.

However, providing protection to whistleblowers through specific provisions in different laws may constitute a fragmented approach and result in protection only of specific persons or for the reporting of specific offences. This may create loopholes in the legal framework and lead to legal uncertainty and ambiguity.¹⁰

JAPAN:-

Whistle blowing would appear to be an act of extreme disloyalty. But in Japan, following a series of scandals involving wrongdoing by corporations that were brought to light by whistle blowers, both the public and companies came to recognize that whistle blowing could in fact result in benefits to the corporate employer by protecting it from the consequences of the wrongful act. Needless to say the first reaction of the employers involved was to see the matter differently and to act against the whistle blowers. The whistle blowers Protection Act, 2006 of Japan seeks to bring together the loyalty obligations of the employees with the best interest of the employer by allowing employees to blow the whistle inside the company when the employee believes that an event which is reportable (i.e., criminal acts or violation of laws and regulations) so that corrective action can be taken. Even when the whistle blower is wrong in belief that there has been a violation

⁸MarekArszulowicz and Wojcieh W. Gasparski, *Whistleblowing in Defense of Proper Action* 125 (2011).

⁹Marian Sawer and Philip Larkin, *Australia: The State of Democracy* 32 (209).

¹⁰Supra note 4.

the whistle blower is protected. The whistle blower can only go outside the organization when they have more evidence of wrongdoing than a simple belief. The whistle blower who goes to entities outside the employer and government is not protected if it turns out that the belief is erroneous and is not protected if the whistle blower goes to a competing entity.¹¹ The Whistleblower Protection Act of Japan entered into force in 2006 and provided for the evaluation and review of the Act after a five year period: "Approximately five years after this Act comes into force, the Government shall examine the state of enforcement of this Act and shall take necessary measures based upon those results." A Consumer Commission, made up of representatives from academia, the business community, the legal profession, and media was established and concluded there was no need to amend the Act but that, due to the insufficiency of legislative information for the review, further research was recommended.¹²

CANADA:-

Provincial laws across Canada, and now the Canadian Criminal Code, offer some protection for employees who report dangerous workplaces, environment harm, theft or corruption and other wrongdoing in their workplace. These laws prohibit what are known as employer reprisals.¹³ The Canadian whistleblower protection law provides a comprehensive definition of possible reprisals: "Reprisal" means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33: (a) a disciplinary measure; (b) the demotion of the public servant; (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal; (d) any measure that adversely affects the employment or working conditions of the public servant; and (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).¹⁴

KOREA:-

In Korea, the anti-corruption law protects whistle blowers from 2001. The Korean Act on the Protection of Public Interest Whistleblowers provides for significant remedies to compensate the harm suffered by the whistleblower.¹⁵ Article 17 (Request for Protective Measures) states that a whistle blower who suffered retaliation (such as dismissal) as a result of disclosing information may demand to be reinstated or receive compensation. The family of the whistle blower can also demand a financial compensation for losses such as legal fees, loss of salary etc. Article 17 of Korean Act on the protection of Public Interest Disclosures further states that: When the public interest whistleblower, etc. is subjected to disadvantageous measures as a result of his/her public interest whistle-blowing, etc., the public interest whistleblower, may request the Commission to take the necessary measures to recover his/her state of life or invalidating discriminatory action against him/her (hereinafter refer to as "protective measures"). A request for protective measures shall be made within three months from the date the disadvantageous measures were taken (or the date when the disadvantageous

¹¹ Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis* 286 (2008).

¹² Guler Aras and David Crowther, *A Handbook of Corporate Governance and Social Responsibility* 525 (2016).

¹³ Brent Rathgeber, *Irresponsible Government: The Decline of Parliamentary Democracy* 4 (2014).

¹⁴ Dr. Wim Vandekerckhove, *Whistleblowing and Organizational Social Responsibility: A Global Assessment* 72 (2012).

¹⁵ Marcia P. Miceli and Terry M. Dworkin, *Whistle- Blowing in Organizations* 18 (2013).

measures ended if they remained in effect for a period). However, should the public interest whistleblower, etc. be unable to apply for protective measures within three months due to natural disasters, war, emergency or others, he/she may submit his/her request within 14 days from the date on which the cause thereof no longer exists (in cases where the request is made in a foreign country, the period shall be 30 days).¹⁶

UNITED STATES OF AMERICA:-

One of the first laws that protected whistle blowers was the 1863 United States False Claims Act, which tried to combat fraud by suppliers of the United States government during the civil war. The Act encourages by promising them a percentage of money recovered or damages won by the government and protect them from wrongful dismissal. The Occupational Safety and Health Administration Act (OSHA) require Federal agencies to post certain information about whistleblower protection in order to keep employees informed of their rights in connection with protected disclosures. Whistle Blowers Protection Act of 1989 provides statutory protections for federal employees who engage in "whistle blowing" that is, making a disclosure evidencing illegal or improper governmental activities. The protections of the Whistle Blowers Protection Act apply to most federal executive branch employees and become applicable when a personal action is taken because of a protected disclosure made by a covered employee. The Dodd-Frank Act also authorizes the Securities and Exchange Commission (SEC) to pay rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions (and certain related actions). Rewards may range from 10 percent to 30 percent of the funds recovered.¹⁷

SOUTH AFRICA:-

In South Africa, the Protected Disclosure Act, 2000 provides protection to whistle blowers. Under this Act, employees making a protected disclosure in terms of the specified procedures are protected from occupational detriment. This might include being subjected to disciplinary action, dismissed, suspended, demoted, harassed, intimidated, transferred against his or her will, refused transfers or promotion, or otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security. The Act thus prohibits an employer from subjecting an employee to an occupational detriment on account of having made a protected disclosure. Should occupational detriment occur and is found to have been linked to the making of a protected disclosure, the bona-fide whistle blower would be protected and the employer would not be allowed to dismiss or prejudice the employee for having raised legitimate concerns. This is in effect, is how the law protects whistle blowers.¹⁸

CHINA:-

¹⁶ Carmen R. Apaza and Yongjin Chang, *Whistle Blowing in the World: Government Policy, Mass Media and the Law* 33 (2017).

¹⁷ Nader, Petkas and Blackwell, *Whistleblowing* 39 (1972).

¹⁸ *Supra* note 2.

In China, a model employee may deem whistle blowing as undesirable and unethical behavior. This is because it disturbs the relationship between employees and employers, particularly since loyalty is a significant factor in this relationship. Furthermore, "Chinese virtue, which [advocates] ... social conformity and harmony," portrays whistle blowing asocially undesirable. Whistle blowing results in unfavorable outcomes, "such as the loss of employment, threats of revenge, and social isolation at work." Moreover, different legislation in different countries affects the nature of the protection afforded to individuals who blow the whistle against their employers.¹⁹

FRANCE:-

France does not have a specific legal instrument for whistleblower protection. France has been branded as 'an international oddity, having legislation that ostensibly protects employees of private companies but no law covering government workers'. While public sector employees are required to report crime to public prosecutor, the law does not confer any protection against retaliation. In France, the Commission Nationale de l'Informatique et des Libertés issued guidelines on the implementation of whistleblowing systems which include reference to the need to have clear and complete information communicated to potential users.²⁰

NETHERLAND:-

In the Netherlands, anonymous whistleblowing is not expressly permitted or prohibited. However, it is accepted in practice in certain situations. In 2001, the Netherlands approved protections for public servants. In 2006, it established a public sector ethics and integrity agency, and later expanded its National Ombudsman's Office in 2011.²¹

MALTA:-

For many years, Malta did not have a law which specifically dealt with whistleblowing. No law acknowledged or defended whistleblowers. As in other countries, Whistleblowing in Malta have generally faced great difficulties and suffered retaliation for their deeds. A few years ago, whistleblowing was acknowledged in Malta. In 2002, Malta enacted whistleblower regulations for certain employees, and in 2009, prohibited reprisal against whistleblowing public officials.²²

ROMANIA:-

In 2004, Romania became the first continental EU country to enact a law dedicated to protecting whistleblowers from reprisal, the Whistleblower Protection Act. The Act covers government employees and gives equal disclosure protection to journalists, activists, and other parties outside the workplace.²³

HUNGARY:-

In 2010, Hungary became the only other EU member state with a standalone law covering the public and private sectors. The Protection of Fair Procedures Act, however, did not create a government body where whistleblowers can make disclosures and reprisal complaints.²⁴

¹⁹ R. Vanasco, *Fraud Editing* 71 (1998).

²⁰ Nicholas Ryder and Umut Turksen, *The Financial Crises and White Collar Crimes* 124 (2017).

²¹ Gregor Thusing, *Whistleblowing- A Comparative Study* 18 (2016).

²² *Ibid* at 187.

²³ David B Lewis, *A Global Approach to Public Interest Disclosure* 126 (2010).

SLOVENIA:-

In 2010, Slovenia also passed an anti-corruption law, which included legal protections for public and private sector employees. While not dedicated whistleblower legislation, the legislation contains many internationally recognized best practices, such as confidentiality, internal and external disclosure channels, a broad range of remedies, fines for retaliators, assistance from the Commission for the Prevention of Corruption, and the burden on employers to prove that adverse personnel actions were justified.²⁵

IRELAND:-

In 2010, Ireland put in place the 2010 Prevention of Corruption (Amendment) Act and the 2011 Criminal Justice Act for whistleblowers reporting corruption and related offenses.²⁶

LUXEMBOURG:-

In 2011, Luxembourg passed an anticorruption law that includes legal protections for public and private sector employees reporting wrongdoing. The legislation is similar to the United Kingdom's PIDA as it places the burden of proof on employers, and employees may file appeals to a labor court.²⁷

AUSTRIA:-

In 2012, Austria established legal protections for government employees and measures to discipline those who commit reprisals against whistleblowers.²⁸

ITALY:-

In 2012, Italy adopted its first provision to protect public sector whistleblowers, which covers government employees who report illicit activities, if they do not commit libel or defamation.²⁹

SWEDEN:-

Although Sweden does not have dedicated whistleblower legislation, everyone, including employees, may disclose information to the media. Corporate whistleblowers can report wrongdoing to outsiders if they first alert their employers, and can only be fired for just cause. The government is prevented from attempting to learn the identity of anonymous sources.³⁰

Some EU member States have made less progress toward establishing whistleblower legislation. Denmark, for example, is the only Nordic country with no whistleblower regulations of any kind and no dedicated agency to protect whistleblowers. In Portugal, whistleblowers have no real protection and can be criminally prosecuted or be sued civilly for defaming others, particularly those in positions of power. The protections created in 2008 for public sector officials have been viewed as weak, a mere response to international pressure.³¹

²⁴ Posetti, Julie, *Protecting Journalism Sources in the Digital Age* 83 (2017).

²⁵ Wim Vandekerckhove, *Whistleblowing and organizational Social Responsibility* 29 (2006).

²⁶ Danielle Bossart, *Main Challenges in the field of Ethics and Integrity in EU* 36 (2005).

²⁷ Steve Giles, *Embedding Ethics in Corporate Culture* 44 (2015).

²⁸ Irena Georgieva, *Using Transparency Against Corruption in Public Procurement* 121 (2017).

²⁹ Clare Fleishman, *Saints and Soccer Balls: My Season in Italy* 139 (2010).

³⁰ *Ibid* at 232.

³¹ Norm Keith, Shane Todd and Carla Oliver, "An International Perspective on Whistle Blowing", *Criminal Justice, Volume 31, 5* (2016).

LEGAL PROVISIONS RELATING TO PROTECTION OF WHISTLE BLOWERS IN MAJOR INTERNATIONAL INSTRUMENTS:-

Council of Europe Civil Law Convention on Corruption (1999):-

The Council of Europe Civil Law Convention on Corruption is the first attempt to define common international rules in the field of civil law and corruption. In particular, it requires States to provide legal remedies, including compensation for damages, for persons who have suffered damage as a result of acts of corruption. Article 9 provides for whistleblower protection.³²

Southern African Development Community Protocol against Corruption (2001):-

The Southern African Development Community Protocol against Corruption is a sub-regional treaty which provides both preventive and enforcement mechanisms against corruption. Article 4 provides for whistleblower protection.³³

Organization of American States Draft Model Law to facilitate and encourage the reporting of acts of corruption and to protect whistleblowers and witnesses (2001):-

This model law provides detailed guidance on how to establish norms, procedures and mechanisms to facilitate and encourage the reporting of acts of corruption that are liable for administrative or criminal investigation and punishment and to protect public officials and any person who, in good faith, reports or witnesses these acts.³⁴

African Union Convention on Preventing and Combating Corruption (2003):-

The African Union Convention on Preventing and Combating Corruption is intended to promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect and punish corruption and related offences in the public and private sectors. Article 5(6) provides for whistleblower protection.³⁵

Recommendations of Transparency International for Whistleblowing Legislation (2009):-

Transparency International recommended draft principles for Whistle-blowing legislation. These principles were developed by Transparency International with the support of international experts and practitioners and provide guidance on how to develop an effective mechanism for the protection of whistleblowers.³⁶

Council of Europe Parliamentary Assembly Resolution on the Protection of Whistleblowers (2010):-

This resolution provides for a set of guiding principles for whistleblower protection and invites all member States to review their legislation concerning the protection of whistleblowers keeping in mind the principles.³⁷

³² USA International Business Publications, *Nicaragua Mineral & Mining Sector Investment and Business Guide* 53 (2007).

³³ Dilip K. Das and Fredric Lemieux, *Economic Development, Crime and Policing: Global Perspectives* 56 (2014).

³⁴ Stuart Casey-Masien and Andrew Clapham, Gilles Giacca, *The Arms Trade Treaty: A Commentary* 430 (2016).

³⁵ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* 77 (2014).

³⁶ Debra R. Comerand Gina Vega, *Moral Courage in Organizations: Doing the Right Thing at Work* 59 (2015).

³⁷ Katalin Ligeti and Vanessa Franssen, *Challenges in the Field of Economic and Financial Crimes in Europe* 78 (2017).

CONCLUSION:-

The enactment and enforcement of whistle-blowing legislation has in recent years become a central element in the fight against corruption. To this end, countries around the world, but particularly in Asia, Europe, and North America, have enacted whistleblower protections aimed at providing safe and reliable avenues for corporate and government employees to report misconduct. While much has been achieved in this regard, many countries still have little or no whistleblower protections. In addition, despite calls for international cooperation and legal frameworks, whistleblower legislation remains predominantly a national or regional issue. Regardless of the presence or absence of whistleblower protections in a particular jurisdiction, public and private organizations can through careful advance planning establish an organizational whistle-blowing system. Subject to applicable law, the best practices outlined above can assist in establishing a clear and effective internal whistle-blowing system. These best practices focus on six broad areas: (1) scope, clarity, and communication of internal reporting procedures; (2) protecting whistleblower identity and the contents of reports; (3) creating a culture that facilitates internal compliance; (4) establishing and enforcing anti-reprisal protections; (5) screening, investigating, and acting on credible reports; and (6) auditing the system to ensure its proper implementation and operation. By implementing these best practices and complying with applicable local law, the resulting system should encourage early and internal reporting of wrongdoing, and allow organizations to implement strategies to control legal and reputational risks.

