CRITICAL ANALYSIS OF LEGAL PROTECTIONS FOR WHISTLEBLOWERS IN INDIA

By Onish Kumar[1]

ABSTRACT

The act of 'whistleblowing' elicits different responses from different people. Some consider it a potent tool to ferret out corruption and wrongdoings while others may see it as an act of tell-tale or snitching. The actors 'blowing the whistle' are often subjected to ill-treatment and persecution at the workplace as well as in the society. In countries like USA and South Korea, whistleblowing as an activity is not only protected but also promoted to further transparency and accountability in public and private establishments. The idea of whistleblowing itself is not unknown to India also. Here too, whistle blowers have played a key role in revealing corruption in public and private establishments over the years. But the protective measures for whistleblowers against exploitation and harassment are found to be lacking in the absence of a strong legal regime with teeth. In this background, this paper argues that whistleblowing is an aspect of freedom and speech and expression and therefore, must be protected and promoted zealously. Effective measures to protect whistleblowers from harassment shall be put in place. This paper traces the origin of idea of 'whistleblowing', its utility as an anti-corruption tool, and its stature as a human right. It critically looks into the prevailing legal regime for avenues of whistleblowing and protection of whistleblowers in India and argues that these measures are inadequate and something more is needed to be done to promote and protect this aspect of the cherished ideal of freedom of speech and expression.

Keywords: Whistleblowing, Transparency and Accountability, Anti-Corruption, Freedom of Speech

WHISTLEBLOWING AS AN ANTI-CORRUPTION TOOL AND A HUMAN RIGHT

The metaphor 'whistleblowing' is one among the many labels which a person may attract when he or she discloses information to the public and defies the expectations of observing blissful silence. Rat, snitch, tell-tale, traitor, spy, squealer etc. are some of these labels which a person making a disclosure of the acts of corruption, wrongdoings, or other unethical acts having bearing on public interest in an institution may be metaphorically branded as. Therefore, when one tries to define an act of disclosure by an agent, he or she is inevitably making a value judgment about the agent. Using his or her own moral compass, the person seeking to define an act of public disclosure might arrive at different conclusions which conforms to his or her moral convictions regarding the nature of the act of disclosure. The consequent outcome of this value judgment might compel him or her to define the act of disclosure either as an act of heroism or as an act of treason.

[1] LLM, *National Law University, Delhi*.

The discourse on whistleblowers and providing them effective protections under the law from persecution and exploitation is not a novel one. The phenomenon of whistleblowing is often traced back to an ancient Greek practice[2] of free speech called "Parrhesia" which was a core feature of democratic values which prevailed in ancient Greece[3] around 5th century BC. The term referred to the act of speaking the truth freely and honestly to those who held power. However, in order to have the desired effect, the practice required the speaker to possess certain moral virtues. The speaker, while addressing the powerful (a person, authority, organisation, or majority), said what he or she believed to be the truth without using any kind of rhetoric in their speech. The speech usually had critical overtones towards the powerful implying that a misconduct or misdeed was perpetrated by it. Parrhesiastes, like whistleblowers, almost always were in less powerful positions. Parrhesia, like whistleblowing, could also lead to retaliation and often the speakers had to pay a heavy price. Parrhesia was seen as an act of courage meant to serve the general good.

In its modern iteration, whistleblowing has been reduced to a mere anti-corruption[4] tool. Whistleblower protection legislations across the nations focus on disclosure of governmental fraud and corruption in particular. This limited scope of protections means that those who expose violation of human rights by the powers that be in the name of "security of the state" or "national interest" find themselves without appropriate institutional mechanisms and at the mercy of the state. But there are those who believe that whistleblowing is an aspect of "freedom of speech and expression"[5] and an act of civil dissent[6]. Freedom of expression[7] is, although a qualified human right, an instrumental one in realisation of cherished goal of human dignity. Political freedom of speech in a democracy is not a mere lip service but way to allow dialogue between the representative government and those who are represented by it. In this larger human rights context, enactment of whistleblower protection laws simpliciter is insufficient to do justice to the whistleblower, whether civic or political. Even the political whistleblowers, shall be provided avenues to disclose the arbitrary actions of the state and appropriate protections from legal sanctions therefor. National security and national interest are valid concerns but their purpose is not to shield the arbitrary actions of the state from public scrutiny. Lackadaisical attitudes of law-makers as well as law-enforces in protecting them is cause of concern worldwide. Although some nations do provide them appropriate protections, the overall picture is not rosy. In some countries, the cause of whistle-blowers' protection has been reduced to a mere public relations exercise to give an impression

[2] Daniele Santoro & Manohar Kumar, *Speaking Truth to Power* 14 (2018).
[3] Ancient Greek Democracy, *available at:* https://www.history.com/topics/ancient-greece/ancient-greece-democracy (last visited on January 20, 2020)
[4] Wim Vandekerckhove, "Freedom of Expression as the "Broken Promise" of Whistleblowing Protection" *Centre de Recherches et d'études sur les Droits Fondamentaux* 3 (2016).
[5] *Ibid*.
[6] *Supra*.
[7] Universal Declaration of Human Rights, Article 19.

that the concerned state is transparent, accountable, and open to public scrutiny. Indian whistleblowers protection law is a case on point enacted by the ruling party riding on the back of anti-corruption movement but refuses to operationalise[8] it now citing protection of official secrets as the cause.

FREEDOM OF SPEECH AND EXPRESSION: AN ANTI-CORRUPTION PERSPECTIVE

Free flow of ideas, views, and opinions not hindered due to fear of sanction, punishment, or retribution for expressing them is a quintessential aspect of democracy. In his Gettysburg Address, Abraham Lincoln famously used the phrase "government by the people, for the people, and of the people"[9] to define a democracy. In a democracy, it is the people who are supreme. They have stakes in the government's decision-making and therefore, their role cannot be relegated to a mere subject to government's will. But there cannot be a government by the people if people are, not alive of, or apathetic towards, the key issues which require deliberations in order to arrive at a mutually-agreeable solution. Any deliberative process contemplates that arguments are put forward both in favour and against the object under consideration on the basis of accurate information and not mere conjecture. A public opinion moulded by information is a characteristic of healthy democracy.

But this is just one aspect of a liberty much cherished in the post-colonial era i.e., freedom of speech and expression. Such is its standing in the modern politico-civil consciousness that it is enshrined and zealously protected as a human right[10]. It is an inalienable part of modern democratic constitutions. In Indian Constitution, it finds its place among fundamental rights enshrined in Part III thereof. It is akin to a stem of a tree from which many other freedoms branch out and among them 'right to know'[11] is one. Existence of an informed citizenry is contingent upon having proper information upon which the state usually enjoys a monopoly. 'Right to know' was born out of necessity to have access to this information in order to create an informed citizenry. Of course, it is not an absolute right and limitations upon it have been placed in the Constitution[12] itself. Corresponding to 'right to know', there is a duty on the state and its officials to be transparent and accountable in their day-to-day business. That is a given that it may not be possible for the state to be transparent and accountable in all its dealings, such as, public disclosure of information related to defence intelligence may have adverse ramifications for the national security. But acts of corruption, negligence in performing one's duties, and wrongdoings do not fall among the ilk of those. On the contrary, corruption breeds in secrecy. It is when no one is watching bribes change hand, negligence in performing

[8] Editorial, "Do not Shoot the Messenger", *The Hindu*, Jul. 31, 2017
[9] Richard A. Epstein, "Direct Democracy: Government of the People, By the People, and For the People" *34th Harvard Journal of Law and Public Policy* 819, 819 (2011).
[10] Universal Declaration of Human Rights, Article 19.
[11] Dinesh Trivedi v. Union of India 1997(4) SCC 306.
[12] Constitution of India, art. 19 cl. 2.

official duties manifests, and public office is abused to make a fortune. Individual citizens having access to requisite information may help in keeping a vigil on such acts of corruption when other institutional watch dogs fail to do so. When implemented in letter and spirit and exercised responsibly, freedom of speech can be a potent tool to fight corruption.

According to Tom Devine[13], "whistleblowing is freedom of speech"[14] to blackwash those who abuse powers vested in them and are desperate to make sure that nobody finds about it because once exposed, this abuse cannot continue and they will no longer be able to harness private gains from such abuse. The Indian Supreme Court has not directly dealt with this issue. However, it has observed in a number of cases that in a democracy, citizenry is entitled to know and decide upon the actions taken up by their representatives and public functionaries. Accountability to its citizens is essential if a democratic government wishes to legitimise its actions, and in the absence of accountability, such a government cannot survive[15]. Accountability demands information about the functioning of the government. Secrecy is justified so long as public security[16][17] may be put into peril by disclosure of information, but beyond that putting routine governance and policies behind veil of secrecy is not conducive in public interest. This implies that if disclosure made does not impact public security negatively but rather, serves the larger public interest, the person making the disclosure is within his rights to do so irrespective of the official nature of the information. Subjecting him to harassment or mistreatment before or after such disclosure is tantamount to preventing him from exercising his constitutionally protected rights the responsibility of upholding which lies on the state.

UNITED NATIONS CONVENTION AGAINST CORRUPTION

Gravity of the threat that corruption poses to social, political, and economic stability of a polity is a globally recognized fact. Moreover, after the dissolution of Soviet Union, the integration of world order has also been taking place allowing for greater movement of ideas, people, businesses, etc. However, the effect of this phenomenon called "globalisation" has not been wholly optimistic. The world has become a common marketplace courtesy to globalisation. But it has also made corruption a cross-border problem. This mandated the need for a global response to the problem of cross border corruption driven by the collective efforts of international community. Efforts on this front materialized with the adoption of United Nations Convention Against Corruption in October, 2003 by the United Nations general assembly. Presently, it boasts of 187

[13] Government Accountability Project, *available at*: https://whistleblower.org/our-team/tom-devine/ (last visited on Feb. 10, 2020).
[14] Whistleblower Protection and the Truth: Linked Intimately, *available at:* https://www.youtube.com/watch?v=WXUrYlFEZ08 (last visited on Feb 10, 2020)
[15] S. P. Gupta v. Union of India (1981) Supp SCC 87
[16] State of Uttar Pradesh v. Raj Narain (1975) 4 SCC 428
[17] *Ibid*.

nations as its members and has the distinction of being the "only legally binding multilateral treaty pertaining to corruption"[18]. The treaty enjoins the nations, who are party to it, to make provisions in their domestic laws for the protection of those persons[19] from any unjustified treatment who report to competent authorities that some fraud, misdemeanour, or any other act of corruption is being perpetrated. The treaty also recognises the important role of civil societies and non-governmental organisations in member countries in maintaining a vigil on corruption. The convention recognises the fact that mere state action is insufficient to address corruption and vigilant citizenry as a prerequisite cog if any machinery to eradicate corruption were to succeed. One such civil society organisation is Transparency International in collaboration with whom the UNCAC coalition of civil societies in 2013 drew attention of member countries towards lack of legal provisions in their respective domestic law to protect whistleblowers and also presented model guidelines[20] for such legal measures. Interestingly, the Transparency International, in its report to UN at Vienna, remarked that protecting anonymity of whistleblower simpliciter is not an effective protection[21] because it shifts focus from substance of information to the identity of whistleblower, and implored member countries to provide more holistic measures to protect them. In 2011, in the backdrop of consecutive corruption scandals and popular movement[22] against it, India ratified[23] the treaty in May that year.

WHISTLEBLOWING AND WHISTLEBLOWER SAFEGUARDS IN INDIA

Watershed Moments For Whistleblowing In India- A Case Study

Bureaucratic corruption and stubbornness of bureaucracy to not come out of the colonial mould, elected officials who, treat public funds as a bounty for their electoral victories, misuse discretion to accrue benefits for oneself or for their kith or kin, an economic regime which promotes a culture of evasion due to its approval centric approach are few of the ways in which corruption is creeping into organisations in India irrespective of their public or private character. What is even more concerning is the fact that in the absence of effective checks (procedural as well as substantive), these attitudes are becoming endemic[24] within organisations

[18] United Nations Office on Drugs and Crime, https://www.unodc.org/unodc/en/corruption/uncac.html (last visited on May 5, 2020).
[19] United Nation General Assembly, *United Nations Convention Against Corruption,* GA Res 58/4, UN GAOR, UN Doc A/58/422 (December 9, 2003 and December 14, 2005), article 33.
[20] Transparency International, *available at:* https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf (last visited on June 10,2020).
[21] Transparency International, "Whistleblower Protection and the UN Convention Against Corruption" 12 (2013).
[22] Pardeep K. Taneja, "India's Anti-Corruption Movement" *ResearchGate* (Sept. 1, 2011), *available at:* https://www.researchgate.net/publication/338450542_India%27s_anti-corruption_movement (last visited on June 12, 2020)
[23] United Nations Convention on Drug and Crime, https://www.unodc.org/southasia/en/frontpage/2011/may/indian-govt-ratifies-two-un-conventions.html (last visited on Jun.12, 2020).
[24] Federation of Indian Chambers of Commerce and Industry, "Bribery and Corruption: Ground Reality in India" 5 (2013).

denigrating the ethical backbone of the society. People are becoming accustomed to a morality in which aforesaid activities are perceived as normal. But there has been a countermovement too against this proliferating culture of corruption in which whistleblowers have been playing a central role. This movement has grown from within organisations and from outside as well.

SATYENDRA DUBEY- A STRUGGLE FOR ACCOUNTABILITY AND TRANSPARENCY WITHIN AN ORGANISATION

When one talks about the internal whistleblowers in India, one name comes at the top- Satyendra Dubey. Born in 1973 in a village Shahpur, Bihar, Satyendra Dubey hailed from a humble background. His father worked in a sugar mill and provided for a family of ten. Satyendra, a meritorious fellow, went on to join Indian Institute of Technology in Kanpur and later did postgraduation from IIT-BHU Kanpur. In the year 2002, he was appointed on deputation to National Highways Authority of India and in the month of July of that year, he was sent to Koderma, Jharkhand as Project Manager to oversee the construction of Golden Quadrilateral Corridor Project, an initiative of then Prime Minister Atal Bihari Vajpayee to construct a network of highways connecting four major metro cities in the country, namely, Delhi, Kolkata, Chennai, and Mumbai.

While working on Golden Quadrilateral Corridor Project at Koderma, he discovered that the construction work being carried out was shoddy and did not meet the minimum standards set by National Highways Authority of India. When inquiring into the causes behind it, he found out that the procurement process of Contractors had been hijacked by influential contractors. They were also manipulating the process by subletting the construction contracts to petty contractors who lacked expertise to do quality work as per the specifications. This had been going on in collusion with officials involved in the construction of this project who expected him to overlook these activities. He got some of those contracts cancelled and even compelled the contractors to suspend three engineers on account of certain irregularities. On one occasion, he compelled the contractor to re-construct a whole stretch of the highway.

To his frustration, his efforts did not bear effective results, and this compelled him to write a letter directly to the Prime Minister in which he disclosed the specific details of rampant corruption going on in then-PM's pet-project. He annexed his bio data with the letter because otherwise his letter would not have received the attention that it required. PM receives so many letters in a day. He cannot be expected to act on one unless it is backed by a credible source. He also made a request to keep his identity anonymous because he was taking a huge risk by bypassing the chain of command. The Prime Minister's Office unscrupulously forwarded the letter to Ministry of Road Transport and Highways of India and in total disregard for Satyendra's request to keep his identity anonymous, revealed his identity as well by forwarding the biodata with the letter. The letter was circulated throughout the corridors of bureaucracy with his biodata and ultimately came to the hands of

NHAI officials. He was chided by his seniors at National Highways Authority of India for violating the decorum by writing directly to the Prime Minister and not getting his concerns addressed through appropriate in-house channels.

This young man was assassinated in the early hours of November 27, 2003 allegedly at the behest of construction mafia. In life, he was an ordinary and upright man who carried out his duties with integrity and sincerity, in death, he became an echo of long-standing demand for protecting those who disclose wrongdoings in public bodies. He was not the first and certainly he was not the last. Historically, whistleblowers have exposed corruption in government bodies and government dealings. But usually, their tragedies are buried in the reverse side of newspapers. But, Satyendra's case was different, perhaps because it was the influential IIT alumni community which sprang into action after his death. Others before Satyendra Dubey were not so fortunate. However, such instances of whistleblowing have remained diffused and scattered.

MAZDOOR KISAN SHAKTI SANGATHAN: A STRUGGLE FOR ACCOUNTABILITY AND TRANSPARENCY AT THE GRASSROOT LEVEL

A more visible and expansive anti-corruption campaign has been spearheaded under the aegis of right to information movement in India. The right to information movement itself is often traced to a grassroots level movement led by farmers and peasants demanding socio-economic justice and accountability from those who were involved in implementation of various socioeconomic policies such as enforcement of minimum wages, relief for farmers, reforming the Public Distribution System (PDS). Mazdoor Kisan Shakti Sangathan[25], an organisation based in Rajasthan which worked for the cause of workers and farmers, played a central role in this right to information campaign. Unlike in internal whistleblowing where whistleblower usually have access to information, a civic whistleblowing of the kind organisations like MKSS indulged in required access to information and documentation which were not available in the public domain. This veil of secrecy provided a cover for the nexus of corrupt officials, leaders, and mafia to thrive. Thus, such an access was critical to provide a common ground to achieve mass mobilisation against the corruption which plagued bureaucratic and local governing structures. In the absence of such access under the law, the MKSS relied on bureaucratic sympathies to acquire such information and held "Jan Sunwais"[26] (public hearings) wherein incriminating information derived from documents so acquired were discussed in an open assembly of peasants and farmers. Through these efforts, everyday misappropriation of funds and resources which were originally meant for socio-economic good of peasants and labourers were discovered, crosschecked in "Jan Sunwais" of peasants

[25] Rob Jenkins & Anne Marie Goetz, "Accounts and Accountability: Theoretical Implications of Right-to-information Movement in India", *20th Third World Quarterly* 603, 604 (1999).
[26] *Ibid*.

and labourers who were then mobilised through public protests and demonstrations against the corruption and other inequities suffered by them.

However, in the absence of a law providing an entitlement to acquire such information, and hurdles posed by Official Secrets Act, 1923 obstructed their anti-corruption endeavours. Further, powerful elected leaders and mafia also employed intimidation and coercion to harass MKSS activists. But by and large MKSS was successful in making its presence felt and it catalysed a movement across India for right to information which culminated into the enactment of Right to Information Act, 2005 which enabled citizens to acquire certain official information and eased the rigour of Official Secrets Act, 1923. It proliferated into an era of RTI activism whereunder the "veil of secrecy", behind which acts of corruption, wrongdoings, abuse of discretion and other malfeasance by public officials took refuge, is being dismantled through the efforts of citizens. However, it has also led to persecution of RTI activists who have consistently faced threats to life and limb[27] due to their crusades against corruption. This prompted MKSS and its sister-organisation, the National Campaign for People's Right to Information (NCPRI) to campaign for a whistleblower protection law to provide preventive and protective measures to people to bring to light corruption and wrong doings. The cases of Satyendra Dubey and MKSS are two of the landmark moments when some solidarity was felt among activists, civil societies, and academia that protection shall be provided to these people who often put their lives at stake in their fight against corruption and secrecy.

WHISTLEBLOWERS PROTECTION ACT, 2014: A DEAD LETTER

Their efforts bore fruit when Whistleblowers Protection Bill, 2011 received presidential assent in 2014. The objectives of "The Whistleblowers Protection Act, 2014" (hereinafter referred as WBP) were two-fold- to lay down a mechanism for receiving and hearing complaints of alleged corruption as well as to provide safeguards to the complaints against mistreatment and exploitation for making such disclosure. The Act has been mired in controversies such as ambiguities in its language, limited scope of the Act, and central government's apathy[28] in operationalising the same. Although named as such, the Act does not define who shall be considered as a "whistleblower". While the Act punishes "frivolous and vexatious"[29] whistleblowing, there is no reward if actual wrongdoing or corruption is discovered because of it. Instead of inculcating an attitude of vigilance to check corruption, minutia and procedural intricacies of Act seem to hinder it.

[27] Attack on RTI users, *available at:* http://attacksonrtiusers.org/ (last visited on Aug. 3, 2020).
[28] Shemin Joy, "Why Whistleblowers Act Not Operationalised", *Deccan Herald* (Feb. 22, 2019), *available at:* https://www.deccanherald.com/national/why-whistleblowers-act-not-719682.html (last visited on June 20, 2020)
[29] Whistleblowers Protection Act, 2014, s. 17.

For a whistleblower to be considered for protection under this Act, he or she shall make the disclosure to the concerned competent authorities. The substance of disclosure which is allowed under this Act is defined in narrow terms which considerably limits the scope of its protections. The substance[30] of the disclosure shall pertain a wrong by public servant which would amount to an offence under Prevention of Corruption Act, 1988, or a voluntary abuse of discretion causing a "demonstrable loss"[31] to the government, or any other offence. The act exhaustively lays down a list of persons, under the services of central or state govt. or any society, corporation, a board, university or any other institution established under either of the said governments, against whom a disclosure can be made under this Act as well as the corresponding authority to whom the disclosure shall be made. Judiciary has been partially included as the Act allows[32] making of a disclosure against a judge, not being a judge of the Supreme Court or High Court, to the High Court. Private bodies and companies, and judges of Supreme Court and High Courts have been kept out of its purview. Furthermore, the Act is ambivalent as to the inclusion of armed forces.

Except for certain high functionaries, Central Vigilance Commission (hereinafter referred as CVC) and respective State Vigilance Commissions (hereinafter referred as SVC) have been vested with the power to accept complaints under this Act. This raises question of efficiency and efficacy of inquiry to be conducted upon the disclosure for reasons which shall be discussed later. A complainant, who can be any person including a public servant or non-governmental organisation, may make a disclosure, referred as "Public Interest Disclosure"[33], to the appropriate authorities under this Act within[34] a period of 7 years from the date of alleged wrongdoing. The choice of imposing a limitation period of seven years to make a disclosure seems particularly superficial given the fact that it may disclose commission of an offence, say, under Prevention of Corruption Act, 1988. While this will not bar the cognizance of the offence, this most certainly will deprive the whistleblower of a crucial avenue of disclosure and leave him vulnerable in the absence of statutory safeguards. The substance of such a disclosure can be in derogation[35] of provisions of Official Secrets Act, 1923. There is an express prohibition on anonymous[36] disclosures, but the Act imposes an obligation on the recipient competent authority to maintain confidentiality[37] with respect to the identity of complainant, and if its revelation is desired in the interest of inquiry in the alleged wrongdoing, it shall be revealed with the "written consent"[38] of the complainant. But, this requirement of consent is applicable only when the disclosure

[30] *Ibid*., s. 3(d).
[31] *Ibid*., s. 3(d)(ii).
[32] *Ibid*., s. 3(b)(v).
[33] *Ibid*., s. 4(1).
[34] *Ibid*., s. 6(3).
[35] *Ibid*., s. 4(1).
[36] *Ibid*., s. 4(4) & (6).
[37] *Ibid*., s. 5(1)(b).
[38] *Ibid*., s. 5(4).

of identity is to be made to the Head of Department. Generally, a discretion[39] lies with the competent authority to determine when his identity shall be revealed. A mala fide revelation of identity will attract penal[40] action under the Act.

Whereas the Act lays down statutory safeguards against "victimisation", it does not define what it means to be victimised. However, it leaves wide discretion with the central government and concerned competent authority to pass such directions as the situation demands to redress the matter including the power to restore "status quo ante"[41]. But protection under this Act is available to those whistleblowers who, firstly, have raised the complaint with the authorities declared competent under this Act, and secondly, the complaint fits into the four corners of disclosure requisite[42] under this Act. Thereafter, if the whistleblower is subjected to any kind of ill treatment at the workplace or otherwise, the right to seek protection from victimisation accrues in his favour and can be availed by making an application[43] to the concerned competent authority. The burden of proving that there was no retaliation against the whistleblower for making a disclosure would lie on the public authority from whose action protection is sought. The Act also enables the competent authority to issue directions to police and other such authorities to provide protection[44] to the whistleblower and the witnesses in need of protection. This provision would have been especially useful for RTI activists, as they are most vulnerable to threats from mafia and hired goons, had it not been mandatory for them to make a complaint under this Act. They are often subjected to persecution and exploitation for seeking information in the first place. The Act remains inoperative on account of certain proposed amendments[45] which seek to further limit the scope of disclosures allowed under the Act.

PRESENT LEGAL FRAMEWORK FOR WHISTLEBLOWING IN INDIA

Higher Courts As Avenues Of Whistleblowing: Role Of Public Interest Litigation

In the absence of a legislative framework articulating the manner in which disclosure of wrongdoings and corruption shall be made, and how and by whom their makers shall be protected from retaliation, the phenomenon of whistleblowing has evolved largely through the efforts of Supreme Court to play a more proactive role in securing socio-economic justice and tackle social issues by the means of Public Interest Litigation (PIL). Adopted after the 1977 emergency, the PIL jurisprudence revamped the way how higher

[39] *Ibid*., s. 13.
[40] *Ibid*., s. 16.
[41] *Ibid*., s. 11(4).
[42] *Supra*.
[43] Whistleblowers Protection Act, 2014, s. 11(2).
[44] Ibid., s. 12.
[45] PRS Legislative Research (PRS), *available at*: https://www.prsindia.org/sites/default/files/bill_files/Whistle_Blowers_%28A%29_bill%2C_2015_1.pdf (last visited on Aug. 6, 2020).

courts of the country operated in terms of procedures while addressing issues which have bearing on larger public interest. Some of PIL's noteworthy features are that the rule as to who should have "locus standi"[46] to bring a legal action was relaxed if the action to be brought pertained to public interest issue. Higher courts could act "Suo motu" as well. Additionally, formalities pertaining to filing of petition were made simpler, adversarial procedure was done away with, gleaning of evidence could be done by a court-appointed commission. At the conclusion of hearing on petition, the court could pass orders enjoining reliefs of widest amplitude and supervising the implementation thereof.

In 1990s, the continuous rise and fall of coalition governments created an atmosphere of political uncertainty and policy paralysis. The Supreme Court stepped in to fill this void. Simultaneously, civil societies and NGOs started approaching the apex court with complaints of corruption and abuse of discretion which the court dealt with. Thus, a kind of "anti-corruption litigation" came to being. Tools like "continuous mandamus"[47] were involved by the apex court to supervise authorities to ensure efficacious implementation of its orders. Due to these developments, the apex court has emerged as an avenue for the whistleblowers to make the disclosures of wrongdoing, corruption, and abuse of discretion. The court also provides them protection from retaliation and persecution. Those whistleblowers who feel apprehensive about coming out with their identity to approach the apex court often share the incriminating information with members of civil societies to take up the cause before the apex court.

In response to government's unwillingness to operationalise the Whistleblowers Protection Act, 2014, more organisations[48] working for the cause of public interest are taking up upon themselves to provide avenues to make disclosures of wrongdoings, corruption, and abuse of discretion. Some of the biggest frauds and corruption scandals in the last two decades, which the apex court pursued actively, were brought to light due to the efforts of whistleblowers[4950]. However, there are limitations to this approach of higher courts of the country as avenues for whistleblowing. Firstly, higher courts are already overburdened with arrears of cases due to the relaxed norms of "locus standi". Secondly, most of the cases taken up by them involve high profile corruption, i.e., those cases wherein either the perpetrator is a top functionary involved in governance, or the

[46] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India*, 2 (2017).
[47] Vineet Narain And Other v. Union of India and Another (1998) 1 SCC 226.
[48] Press Trust of India, "Prashant Bhushan Launches Citizens' Whistleblowers Forum", *The Indian Express*, Feb. 7, 2017.
[49] E. Kumar Sharma, "Who is P. C. Parakh?" *Business Today* (Oct. 17, 2013), *available at:* https://www.businesstoday.in/lifestyle/off-track/who-is-p.c.-parakh-coal-block-allocations-scam-cbi-fir/story/199731.html (last visited on August 6, 2020)
[50] Priyamvada Grover, "As 2G Scam Verdict is Announced Today, Meet Those Who Allegedly Executed & Exposed It", *The Print* Dec. 21, 2017, *available at:* https://theprint.in/report/2g-scam-verdict-announced-meet-who-executed-exposed-it/23869/ (last visited on August 6, 2020)

extent of wrongdoing, corruption, or abuse of discretion is monumental. Thirdly, maintaining confidentiality of whistleblower to ensure protection from retaliation becomes difficult.

CENTRAL VIGILANCE COMMISSION AS AN AVENUE OF WHISTLEBLOWING

After the assassination of Satyendra Dubey, the discontent voices were raised in unison by social activists, anti-corruption NGOs, the civil society, and the IIT alumni demanding that special measures be laid down to protect honest and upright officers like Satyendra Dubey. The apex court, in response to a PIL[51] filed before it, issued directive to the central government to consider enacting a statute laying down the mechanism and legal safeguards for the whistleblowers, and in the meantime, provide some mechanism to protect them from retaliation and persecution. The central government responded[52] by authorising Central Vigilance Commission (CVC) to receive complaints of corruption and abuse of discretion in public bodies and companies under the central government[53] only.

The mechanism, officially called as Public Interest Disclosure and Protection of Informers Resolution, 2004 (hereinafter referred as PIDPI resolution), enabled the CVC to inquire into the disclosures so made while keeping the identity of complainant confidential. The regulation does not expressly lay down as to who can make a complaint. There is a strong implication that it can be an insider as well as an outsider. Anonymous disclosures are not entertained by the CVC. Complaints against bodies and organisations under the state government are also not entertained. In the course of its inquiry into the complaint, the CVC may request the Central Bureau of Investigation (CBI) to provide assistance in the inquiry. But CVC has no power to proceed against the erring officials. Rather, it can only make a recommendation to concerned organisation or department suggesting what action shall be taken against such official. In practice, complaints are entertained by Vigilance Officers, who are appended with various organisations and departments and act as an extended arm of CVC. The onus is partly on the complainant to ensure that there is no disclosure of identity to any person or authority from his side. If the person is subjected to persecution and retaliation, he may approach the CVC for remedial action. The regulation is ambiguous in terms of language and does not prescribe the consequences and remedies if its mandate is violated. Other than the defects in the regulation, CVC itself remains a controversial institution for a plethora of reasons. Even though it is the highest anti-corruption watchdog in the country, it lacks autonomy (limited vigilance power and wall of sanctions)[54] which inhibits its supposed goal of inhibiting corruption. The CVC has no investigative power and is dependent on its sister

[51] Rakesh Uttamchandra Upadhyay v. Union of India and Ors. Writ Petition (Civil) No. 539/2003
[52] Central Vigilance Commission, https://cvc.gov.in/sites/default/files/371_4_2013-AVD-III-16062014_0-7-13_1.pdf (last visited on Aug. 7, 2020).
[53] *Ibid*.
[54] Jessica Jones, "India Versus the United Nations: The Central Vigilance Commission Act Does Not Satisfy the U.N. Convention against Corruption", *22th Emory Int'l L. Rev.* 799, 802 (2008).

organisation, the Central Bureau of Investigation (CBI) upon which it maintains a nominal superintendence[55] for the purpose of investigation into offences under Prevention of Corruption Act, 1988. However, investigation[56] as well as prosecution[57] under this Act requires previous sanction from the appropriate government. CBI's independence itself remains disputed. Due to these reasons, CVC has proved to be lacking teeth to deal with corruption in public departments and organisations. Therefore, it is not efficacious as an avenue of disclosure for a whistleblower.

CONCLUSION

While it may not be possible to eradicate corruption in its entirety, the state shall strive to keep it to the minimum for its own longevity. Once it becomes endemic within the institutions of the state, or becomes a cultural phenomenon (e.g., chaebol's patronage) it gets difficult to control it without radical measures which may have their own ramifications. Therefore, it is vital to nip corruption in the bud. But it is easier said than done because, as is discussed in the body of this essay, corruption breeds in concealment and silence when those who have been entrusted with power exercise it to pursue such objectives which are in direct conflict with those desired objectives for the realisation of which the power was actually entrusted. Thus, when the entrustment is of a public power, such a desired objective is the pursuit of public interest. Cronyism, bribery, embezzlement etc., to accumulate personal gains is a violation of public interest. Corruption can have far reaching consequences for the society such as weakening of the rule of law, loss of trust in institutions, and in extreme cases the state may lose its popular legitimacy. Ethos of transparency and accountability subserves the goal of weeding out corruption by making those who hold power answerable for their actions. Such an answerability can be sought only by an informed citizenry. Whistleblowing ensures this flow of information needed for larger public scrutiny of the actions of those who hold power. Often being described as freedom of speech and expression, right to know, civil dissent, civic obligation, and anti-corruption and vigilance instrument, whistleblowing has been playing a key role in exposing political corruption and advancing the goal of a responsible governance.

Whistleblowing has been here for as long as corruption. Its traces can be seen in Athenian democracy and Chanakya's teachings. But those who practice it, called the whistleblowers have continued to face threat and persecution. Persecution has been especially severe when there is asymmetrical power relationship between the whistleblower and person, institution, or organisation against whom whistle was blown, i.e., whose wrongdoings were publicised in order to bring about a course correction therein. With time, their importance

[55] Central Vigilance Commission Act, 2003, s. 8.
[56] Prevention of Corruption Act, 1988, s. 17A.
[57] *Ibid*., s. 19.

as anti-corruption watchdogs is being recognised globally and this has brought forth the issue of protecting them from retaliation which might be inflicted upon them for speaking out against an alleged wrongdoing. But developments on the front of whistleblowers protection have been slow and for a long time, US was the only country with laws which not only protected whistleblowers but also promoted whistleblowing. Post the cold war, just as world started moving towards cosmopolitanism, new problems came to fore such as terrorism, international crimes, and transnational corruption each of these invoking a different response from nation states. In case of transnational corruption, UNCAC was adopted by the nation states in unison. The treaty enjoins member states to protect whistleblowers from unjustified treatment. But different countries have approached the issue in their own manner. For instance, US has, historically, protected whistleblowers and encouraged whistleblowing too because of its initial success with the phenomenon. United Kingdom, with its common law tradition, saw it as an aberration justified only if it subserves public interest. But eventually it accepted and provided whistleblowers protection under the law howsoever weak it is. In South Korea, whistleblowing's adoption was necessitated to prevent futures financial crisis due to political corruption and cronyism.

In India, a serious legal discourse on providing legal safeguards to whistleblowers started in the mid-1990s amidst growing demands for transparency and accountability in the conduct of public functionaries, in implementation of socio-economic welfare policies, and reforms in public institutions. However, an impetus was given to this demand for legal safeguards by a grassroot level movement for right to information ushered by MKSS and assassination of Satyendra Dubey, an honest and upright officer of government of India. While MKSS succeeded in its demand for a law providing for right to information, the aftermath of it showed that something more was desired to protect those who used this right to fight corruption. Prodded by the Supreme Court, the government finally gave in and notified PIDPI guidelines designating CVC as the appropriate authority to make the disclosure of wrongdoing, corruption, etc. until a law in enacted to establish statutory avenues to make the disclosure and to protect the whistleblowers from victimisation within an organisation as well as from external threats. These guidelines have not been very effective partly because the institution which is deputed as the appropriate authority possess limited vigilance power, bound by requirement of single directives in prosecution, and lacks autonomy to take act directly against erring persons. The other reason for their ineffectiveness has been their general and ambiguous nature. There two factors create a hindrance in implementation of PIDPI guidelines. However, PIDPI guidelines cannot take the place of a specialised law. There is also a need to strengthen the Central Vigilance Commission if it were to be an effective anti-corruption watchdog. Bodies and departments under state government shall be brought under its jurisdiction. The requirement of single directive shall be abrogated and CVC shall be established as an autonomous body as per the mandate of UNCAC