



An Indian Perspective on Whistleblowing

Compliance and Ethics



"To see a wrong and not to expose it is to become a silent partner." — Dr. John Raymond Baker

Whistleblowing is the act of exposing a wrongdoing, typically a fraud or an illegality, in a government agency or a private enterprise. Whistleblowers are that rare breed of people who demonstrate exemplary courage, often at tremendous risk to their life and reputation, to unearth serious

wrongdoings within their organizations and communities. Many recent corporate frauds would not have come to light without the disclosure from an insider whistleblower.

Whistleblower protection

Compared to the United States or the European Union, whistleblowing is still a work-in-progress in India. Available data suggests that this reluctance to report wrongdoing within organizations or communities primarily stems from a fear of retribution. This concern is not entirely off the mark, especially within the public sector. Some exceptionally brave souls have unearthed corruption and fraud in the top echelons of power.

However, these rare acts of courage have come at a price. Many whistleblowers have been harassed, intimidated, and even murdered for their disclosures. The cases of Satyendra Dubey and Manjunath Shanmugam immediately come to mind. Both Dubey and Shanmugam paid the ultimate price for daring to expose corruption in the public sector.

Satyendra Dubey, an Indian Engineering Services officer, was serving as a project director for the National Highway Authority of India. He was responsible for managing the Grand Trunk Road, a section of National Highway II, which was part of the ambitious Golden Quadrilateral project initiated by then-Prime Minister Atal Bihari Vajpayee. The project aimed to connect many of India's major cities by four-lane limited access highways at an overall cost of over US\$10 billion.

As project director, Dubey exposed serious financial irregularities by one of the contractors. On November 27, 2003, he was murdered while returning home in a rickshaw after attending a wedding. While the documented reason for his murder was an attempted robbery gone wrong, it is widely speculated that the murder was carried out by killers hired by the powers connected to the contractor. Several fellowships and honors were established in Dubey's honor.

Manjunath Shanmugam was a sales officer for the Indian Oil Corporation. While working for the company, he found that two petrol pumps were selling adulterated fuel and ordered them closed. When he heard that the pump was still operating, he conducted a surprise raid in November 2005. During the inspection, he was shot dead. The Manjunath Shanmugam Trust was established to improve governance in Indian public life.

More recently, the series of suspicious deaths in the wake of the infamous Vyapam disclosures has put the spotlight once again on the dangers facing whistleblowers in India. The Vyapam disclosures pertained to the manipulation in the selection process for government colleges and jobs conducted by the Madhya Pradesh Professional Examination Board (MPPEB) known by its Hindi acronym, Vyapam. Dr. Anand Rai, an ophthalmologist in Indore in the Indian State of Madhya Pradesh (MP), is the brave heart responsible for exposing Vyapam.

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— *Madhu Sivaram Muttathil, Corporate Counsel, Avaya India Pvt. Ltd.*

When he was a medical student in 2003, Rai was privy to a disturbing pattern of students from affluent and politically influential families sailing through competitive exams without putting in the mandatory attendance in college. Though concerned at the time, he chose not to pursue the matter any further. However, his subsequent investigations revealed an unholy nexus between politicians,

senior bureaucrats, doctors, and businessmen who contrived to let undeserving candidates clear entrance tests in exchange for bribes.

The scam got murkier with the series of unnatural deaths following the disclosures. According to a report by the leading Indian newspaper [The Times of India](#), a special investigation team appointed in 2013 by the MP government has unearthed about 32 deaths, all under mysterious circumstances, of people between 25 to 30-years-old. Some estimates put the death toll at 40. Among the deceased were the son of the MP governor, a television journalist, the dean of a government run medical college, a police constable, and several students who gained admission after allegedly gaming the system.

The majority of the deceased was reportedly either involved in or benefited from the scam except the intrepid TV journalist who was pursuing a few leads at the time of his death. The cause of at least some of the deaths raised eyebrows. There is still no clarity on how such large-scale deaths occurred almost in succession.

As I write this, the Central Bureau of Investigation, India's premier investigative agency, has filed charge sheets against 490 people allegedly involved in the scam. Hopefully, the truth will emerge sooner. Meanwhile, Rai continues to dodge the curveballs thrown at him by the establishment understandably cross with his revelations.

Does this mean that whistleblowers are ploughing a lonely furrow in this country with barely any protection? That's not quite accurate. We have come a long way in whistleblower protection. If whistleblowers like Rai have survived, despite multiple ordeals, to tell their story, it is in fact a testament to the efficacy of our whistleblower protection.

Legal framework

For the longest time, India did not have any official mechanism to enable whistleblowing and protect whistleblowers. In fact, it was Dubey's murder in 2003 that galvanized the government, with some prodding from the Honorable Supreme Court of India, to initiate steps to redress this anomaly.

What followed was the Public Interest Disclosure and Protection of Informers Resolution (PIDPIR) in 2004. Its purpose was to provide a mechanism to receive written complaints or disclosure on any allegation of corruption or the misuse of office by any employee of the federal government or of any corporation or agency controlled by the federal government. The Central Vigilance Commission (CVC), an authority designated by the government, was empowered to receive complaints and disclosures in this regard. The designated authority was to keep the identity of the complainant confidential except in cases where the informant chooses to disclose his/her identity.

The PIDPIR (including the amendments thereto) was meant to be a stopgap arrangement until a specific law was enacted on whistleblowing. In 2011, the new law was enacted with the introduction of The 2011 Whistleblowers Protection Act (WBPA). The WBPA seeks to establish a mechanism to allow public interest disclosures on any allegation of corruption, or the willful misuse of power or discretion against any public servant, and to inquire or cause an inquiry into such disclosure, and provide adequate safeguards against victimization of the person making such disclosures.

It is interesting to note that though cleared by a section of the parliament in 2011, the WBPA received presidential assent and therefore the status of law only in 2014, presumably because the political parties across the spectrum were concerned over the potential impact of such a trailblazing

legislation.

The WBPA was significant in that it provided, for the first time, a sound statutory framework for bringing whistleblower complaints against public servants and also afforded protection against victimization of whistleblowers. While the whistleblower is required to disclose his or her identity at the time of submitting complaints, the CVC (the authority empowered to accept complaints) is obliged to ensure his or her anonymity and protection against any potential harassment.

In addition to the WBPA, Clause 49 of the Listing Agreement by the Securities and Exchange Board of India (Listing Agreement) makes it mandatory for all Indian-listed companies to establish a vigil mechanism to report any unethical behavior or any violation of the company's code of conduct, any actual or suspected fraud. The mechanism should also provide adequate safeguards against victimization of whistleblowing employees.

The Companies Act, 2013 (CA 2013), a key legislation on corporate governance in India, goes further and extends the scope of vigil mechanism to all companies accepting deposits from the public and also to companies that have accepted loans from banks and public financial institutions exceeding INR 50 crores (approximately US\$8 million).

Notwithstanding the foregoing legal strides, there is a widely held perception that current laws lack sufficient teeth to encourage whistleblowers to report wrongdoings freely. There is some merit in this perception because the whistleblower still lacks complete control when it comes to keeping his or her identity anonymous. It's worth noting that under the WBPA, it's the CVC that has the discretion to decide whether the identity of the complainant is to be disclosed or not. Though the CVC is obliged not to disclose the identity if there are compelling reasons against such disclosure, it's indeed strange that the CVC is vested with this discretion rather than the complainant or whistleblower who should logically have this discretion.

Further, neither the Listing Agreement nor CA 2013 prescribes whether the identity of the whistleblower should be kept confidential. It is a notable lacuna especially considering that the lack of anonymity has turned fatal for some whistleblowers. Dubey might still have been alive if his identity was not callously disclosed by the then prime minister's Office (PMO). It is indeed poignant that Dubey, who wrote to the PMO with the details of irregularities, had specifically requested for his identity to be kept confidential.

However, his request went unheeded when his letter was forwarded to multiple government departments thereby exposing his identity, which ultimately led to his murder. It was the apex court that struck a blow for whistleblower anonymity when it ruled in a 2013 case investigated by the Anti-Corruption Bureau (ACB) of the State of Maharashtra that it's not essential for a fair trial to reveal the identity of the whistleblower. The verbatim quote from the honorable judge who wrote the judgment reads:

"Situations are many where certain persons do not want to disclose the identity as well as the information/complaint passed on by them to the ACB. If the names of the persons, as well as the copy of the complaint sent by them are disclosed, that may cause embarrassment to them and sometimes threat to their lives."

While the judiciary endeavors to be progressive in upholding whistleblower's rights, the executive appears to turn the clock back if the proposed amendments to WBPA are any indication. A bill to

amend the WBPA introduced in 2015 seeks to keep disclosures concerning issues of national importance outside the ambit of WBPA.

For instance, the bill seeks to prohibit disclosures that impact the security, sovereignty, and integrity of India, the scientific or economic interests of the country, friendly relations with foreign states, cabinet proceedings, and any disclosures specifically prohibited by law or that would endanger a person's life. While it is acknowledged that the laws of several countries prohibit disclosures in the interest of national security, one fails to understand the rationale for exclusions based on threat to life.

Is the government indirectly admitting to its inability to provide robust whistleblower protection? Similarly why must the imperative to maintain friendly relations (with foreign states) be a hindrance to disclosures? What if the nature of the disclosure is such that exclusion could jeopardize national safety? Would the government still hold friendly relations sacrosanct? The bill also mandates, quite regrettably, the disclosure of the identity of the complainant. The proposed amendments have to be viewed in the context of the fact that several rules under the WBPA have yet to be framed that would fully operationalize the WBPA.

The extant framework does not adequately address private sector whistleblowing. Though the CA 2013 provision concerning vigil mechanism does cover private entities as well (provided they meet the requisite criteria), it is fair to say that the thrust of the current legal framework is on exposing misdeeds in the public sector.

That said, even prior to the CA 2013, leading private sector players in India had sound policies encouraging whistleblowing amongst their personnel including robust mechanisms to detect and prevent retaliation against whistleblowers. In fact, it is fair to say that whistleblowers in India's private sector have always enjoyed a fair degree of protection under the policies of their respective employers. A case in point is the US\$1 billion Satyam accounting scandal in 2009, which sort of shook the Indian IT industry to its very core.

Satyam Computer Services Ltd. was one of the big four India IT companies (alongside Infosys, Wipro, and Tata Consulting Services) that were spearheading an IT revolution in the country. Ironically, a few days after it was awarded the Golden Peacock Award for Corporate Governance in January 2009, Satyam's founder and then CEO, Mr. Ramalinga Raju, in a shocking confession, admitted to having fudged company's accounts dating back to 2001-2002.

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According to a report filed by the Serious Fraud Office of the Government of India, Raju's admission followed an anonymous email to a board member purportedly sent by a former senior executive of Satyam. The sender of email, who used the pseudonym Joseph Abraham, set in motion a chain of events that eventually blew the lid off the billion dollar scam which remains India's biggest corporate scandal. And the identity of the whistleblower Joseph Abraham remains confidential to this day. This is a remarkable example of how robust whistleblower protection can be in India's private sector.

Notwithstanding the Satyam saga, private sector whistleblowing has by and large been muted in India. Thanks primarily to sound policies and machinery governing whistleblowing, employees within

the private sector are increasingly speaking up and reporting wrongdoings (including anonymous hotline complaints). However, such disclosures are mostly confined to individual cases of fraud or other inappropriate conduct.

While a Satyam encore is difficult to envisage thanks to a more rigorous governance framework, there is nothing to suggest that India Inc. is completely bereft of sharp practices. Unlike in the public sector, potential whistleblowers in the private sector face no real threat to their life. However, they still appear reluctant to disclose publicly possibly due to apprehensions over the impact, real or perceived, to their careers.

Further, unlike in the United States or Europe, a whistleblower who chooses to come out is often perceived as a snitch by his colleagues resulting in workplace ostracization. Even in case of anonymous reports, there appears no genuine desire to see things through by this author's personal experience. Contrast this with what Sherron Watkins did at Enron Corp. Watkins, a former finance vice president at the private energy company, fearlessly blew the whistle on the company's fraudulent accounting practices that ultimately led to its downfall.

Sherron, who was known to be quite feisty, had in fact warned Enron's then-CEO Kenneth Levy in a blunt letter that the company might "implode in a wave of accounting scandals." Even with the best of protections, it is difficult to imagine an Indian employee doing what Sherron did at Enron. And that is somewhat worrying, to put it mildly, and should provide much-needed food for thought. The recent landmark ruling that found that individual privacy is a fundamental right under the Constitution of India should provide additional ammunition for the whistleblower community in their constant endeavor to safeguard their rights.

Would a comprehensive statute covering whistleblowing both in the public and private sectors mitigate the issue? To some extent, yes, but that is unlikely to be enduring. Often, it is not the lack of legislation but rather the weak enforcement (of existing laws) that is the stumbling block. While it is indeed desirable to have cogent and unambiguous laws, what is paramount is to have a whistleblower policy that has a clear tone at the top and incentivizes reporting of genuine wrongdoings without any fear of retaliation.

Whistleblower checklist

- Clear commitment from your senior management to whistleblowing?
- Seamless procedure for reporting wrongdoings: Do the employees know how to lodge complaints and to whom? Is there a process to facilitate external reporting as well i.e. to regulators et al?
- Reportable conduct: Does your company policy clearly identify and define conduct or activities to be reported?
- Anonymity and confidentiality: Does the policy facilitate anonymous reporting? How does the organization ensure the anonymity of the whistleblower and confidentiality of the information?
- Retaliation and retribution: Does the policy articulate the mechanism to protect whistleblowers against potential retaliation?
- Investigation and outcome: Timeline for investigating complaints and communicating outcomes.
- Consequences for frivolous reports: Does the policy spell out consequences for making false and bad faith disclosures?

References

Clause 49 was formulated in 2005 to improve corporate governance in listed companies in India.

To be operated through the audit committee in listed companies and in other companies through a director nominated by the board of directors who will play the role of the audit committee.

S. 177 (9) and Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014.

Manjeet Singh Khera vs. State of Maharashtra (2013) 9 SCC [Supreme Court Cases] 276.

Justice K.S. Radhakrishnan.

The Whistleblowers Protection (Amendment) Bill, 2015.

Justice K S Puttaswamy (Retd) vs Union of India & Others; Writ Petition (Civil) No 494 of 2012; delivered on 24 August 2017.

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