

INCENTIVES FOR BETTER PROTECTION OF WHISTLE-BLOWERS - AN ECONOMIC ANALYSIS

*Anushka Mittal**

Abstract

Whistle-blower protection is necessary across all sectors; public and private. In India, whistle-blowing in public sector is governed statutorily by the Whistle-blower Protection Act, 2011. It provides the procedure to file a complaint, conduct enquiry and provide protection to whistle-blowers. There have been many instances of whistle-blower deaths. The deaths caused by an activity such as whistle-blowing indicate the deep rooted malaise in the entire system of governance of a nation. The process to seek protection against threats is long drawn and time-consuming enough to cause detriment in the intervening period. Against this status quo, this article recommends a better mechanism to provide protection to the whistle-blowers. The recommendation aims to provide mandatory interim protection to an applicant. The recommendation tries to resolve the classic dilemma between a rule and a standard. The provision for whistle-blower

*Anushka Mittal is a fourth-year student at Gujarat National Law University, Gandhinagar. The author may be reached at anushkamittal1295@gmail.com.

protection, as it stands, is an ex-post standard whereby the enforcement and information cost is high. The recommendation proposes an ex-post rule regime whereby the promulgation cost, though high, would be justified due to the clarity and vital protection that it provides to the stakeholders.¹ The recommendation is based on the use of economic analysis which signifies a new approach to deal with an old issue.

I. INTRODUCTION

A whistleblower law is essential for an effective regime against corruption.² The murder of Mr. Satyendra Dubey due to disclosure of information related to corruption in the National Highway Authority of India awakened the government to enact a much needed legislation. Even then, the government drafted the Public Interest Disclosure and Protection of Informant (**PIDPI**) Resolution which provided the procedure for whistleblowing.³ Later, the Public Interest Disclosure and Protection to Person Making the Disclosures (**PIDPPMD**) Bill, 2010 was framed. It was subsequently renamed as the Whistleblower Protection Act, 2011 (hereinafter, the **WPA** or **Act**) and passed as such.⁴ It was notified in 2014 after it received

¹Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE LAW JOURNAL 557-629 (1992), <http://scholarship.law.duke.edu/dlj/vol42/iss3/2>.

²Whistleblower Protection and the UN Convention Against Corruption, TRANSPARENCY INTERNATIONAL, (July 26, 2016), http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption.

³Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001.

⁴Central Vigilance Commission Report, 2014, 7, 1-120, 2014, ¶1.11, <http://cvc.nic.in/ar2014.pdf>.

Presidential assent. In 2015, certain amendments were suggested. The Whistleblower Protection (Amendment) Bill, 2015 is currently pending in the Rajya Sabha.⁵ There has been widespread criticism of the Act and the proposed amendments. The Supreme Court has said that the veracity of the amendments can be checked once the amendments are effected as law.⁶ Amidst all the criticisms of the Act and the Amendment Bill, there is another limitation of the entire scheme which renders it weak.⁷ It is the actual level of protection assured to the whistle-blower which makes the legislation ineffective. This article aims to highlight the persistent lacuna in the legislation, in terms of the way the protection is provided to a whistle-blower.

The final grant of protection takes time and the whistle-blower may have been put in a dire situation due to the disclosure. Thus mandatory interim relief must be provided once a Complainant applies to the Competent Authority (hereinafter, the CA) for protection against victimisation, under the Act. This will not only change and improve the incentives for the whistle-blower but also make the CA more efficient due to diversion of resources for which a final decision must be taken as soon as possible.

The focus of the Article is on Chapter V of the Act. This Article will use tools of game theory and Hicksian analysis to provide a theoretical understanding of the benefits of the recommendation. The aforementioned methods will show the change in incentives for the

⁵The Whistleblowers Protection (Amendment) Bill, 2015, PRSINDIA.ORG, <http://www.prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015-3784/>.

⁶Amit Anand Choudhary, Set up systems to protect whistle-blowers: SC to government, TOI (Jan. 7, 2016), <http://timesofindia.indiatimes.com/india/Set-up-system-to-protect-whistleblowers-SC-to-government/articleshow/50475061.cms>.

⁷Transparency International Secretariat, South Asia's Corruption Watchdog Need Sharper Teeth, (May 21, 2014), http://www.transparency.org/news/pressrelease/south_asias_corruption_watchdogs_need_sharper_teeth.

whistle-blower to make a disclosure. Part I provides the outline of the legislation, Part II provides the outline of the recommendation and Part III provides the economic analysis using game theory and partial equilibrium analysis.

II. METHODOLOGY

The impetus to choose the topic comes from the fact that the Law Commission of India in its 179th Report, introducing the PIDPI Bill, extensively talked about the economic effects of corruption, such as a bribe being a payment for better resource allocation etc.⁸ The modulation of a topic such as corruption strengthened the author's intuition to apply economic analysis to whistle-blower protection. In order to substantiate the issue and the recommendation objectively, an attempt was made to obtain statistics related to requests for protection filed by the whistle-blowers, from NCPRI and the Annual Reports of the Central Vigilance Commission. However, the attempts were rendered futile due to no response from both channels. Thus attempts have been made to reconstruct the issue using newspaper reports. It is pertinent to note here that what was said of the Public Interest Disclosure Protection Act, 1998 (UK) is equally true for India i.e. research is meagre and largely anecdotal. Rarely does the public learn of cases of whistleblowing that have not attracted media attention. The academic literature is comprised mostly of empirical case-studies of individual whistle-blowers, with the occasional survey, and is predominantly North American in origin.⁹ Though the paper is analytical, prescriptive and theoretical, the use of economics converts it into a model which can be depended upon to churn out conclusive

⁸Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001.

⁹James Gobert & Maurice Punch, Article, Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998, 63(1) THE MODERN LAW REVIEW, 25-54 (Jan. 2000), <http://www.jstor.org/stable/1097463>.

results once variables such as cost of the recommendations are supplied.

A. *Outline of The Legislation*

The WPA was previously named Public Interest Disclosure and Protection to Person Making the Disclosures Bill, 2010. The change to WPA clearly highlights that the thrust of the legislation is towards the protection of whistle-blowers. The Preamble highlights three main functions viz. establishment of a mechanism to receive disclosures, engagement in enquiry, basis the disclosure and provision of adequate standards against victimisation of the whistle-blowers. The current regime must be judged on the benchmark of the objectives of an ideal whistle-blower legislation.

A whistle-blower legislation must address the following:¹⁰ (1) what types of perceived wrongdoing should be disclosed, (2) to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation), (3) how and by whom the alleged wrongdoing should be investigated, (4) the mechanisms and procedures to encourage persons to disclose wrongdoing while protecting the whistle-blower from any disciplinary action or adverse consequence for reporting the wrongdoing, and (5) the steps to be taken if adverse consequences are or appear to be, imposed on the whistle-blower.

Against this benchmark of best practices, the WPA has provided a definition of a ‘Competent Authority’ in every public organisation under Section 3(b). The Competent Authority is the functionary that receives, takes an overview of and deals with the complaint. Before the legislation, this function was performed by the Central Vigilance

¹⁰Victoria Luxford, Whistleblower Protections, (July 26, 2016), <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Chapter%2012%20.pdf>.

Commission. This change is important for clarity of the procedure and reducing the burden on the Central Vigilance Commission as was previously loaded in the PIDPI Resolution. However, the definition clause falls short of defining key terms like ‘victimisation’, ‘discreet enquiry’ etc.¹¹ which are used throughout the legislation.

Chapter II is crucial for understanding the scope of the legislation and the major incentive for both the parties, namely, the whistle-blower and the Competent Authority. All disclosures received by the Competent Authority or its representative are public interest disclosures. Such disclosures can be made by anyone, a public servant, citizen or an NGO.

Chapter III outlines the mechanism for carrying out an enquiry. It outlines the statutory responsibility of keeping the identity of the whistle-blower confidential under Section 5. The first stage that a disclosure must pass is one of a discreet enquiry which is carried out by the Competent Authority itself. According to the statistics of the CVC Annual report, 2013, 94.6% of the complaints received under the PIDPI Resolution (which was in force before the WPA) pass through the barrier.¹² In 2014 also, 93.3% complaints passed the barrier.¹³ Once the disclosure passes this stage, the Competent Authority seeks information from the Head of the Department and carries out the more substantial investigation. If at any stage, the disclosure of identity of the whistle-blower becomes imperative, the CA shall do so only after the consent is provided by the whistle-blower. Section 6 provides the restriction on the scope of exercise of the power and provides the objective parameter within which the

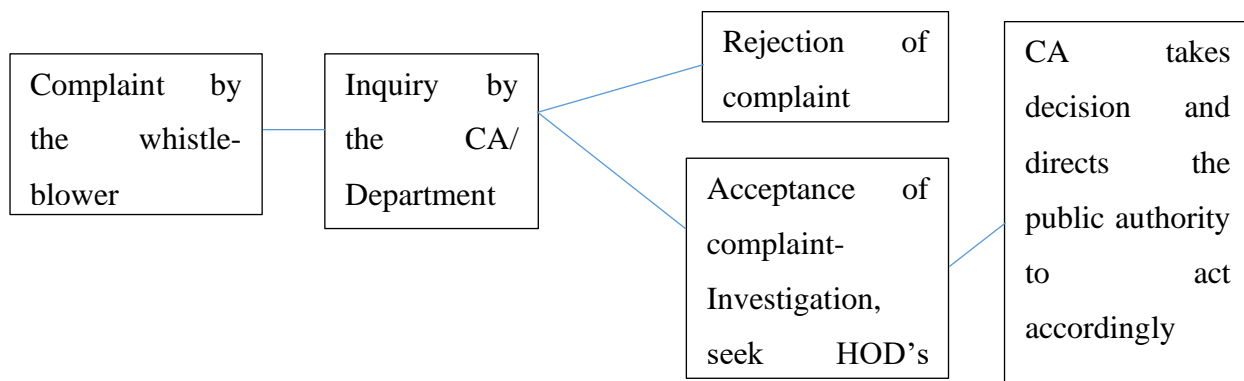
¹¹Kaushiki, Standing Committee Recommendations on the Whistleblower’s Bill, PRSINDIA.ORG (July 26, 2016), <http://www.prsindia.org/theprsblog/?p=1014>.

¹²Central Vigilance Commission Report, 2013, 7, 1-148, 2013, Table 6, <http://www.cvc.nic.in/ar2013.pdf>.

¹³Central Vigilance Commission Report, 2014, 7, 1-120, 2014, Table 6, <http://cvc.nic.in/ar2014.pdf>.

discretion to carry out the enquiry must be exercised. For example, it cannot be exercised for a disclosure which has been adjudicated by a court or a tribunal or is an exercise of bona fide discretion of the department etc. This ensures that the mechanism does not become one of appealing against adverse judgments.

Fig. 1



Chapter IV deals with the powers of the Competent Authority, in terms of, conducting the inquiry. Section 7 lists down the activities for which the Competent Authority shall function like a civil court. These include summoning and enforcing the attendance of any person, examination of the said person on oath, receiving evidence etc. Section 8 provides for certain kinds of information which are exempt from disclosure such as information prejudicial to the security and sovereignty of the nation. This list of exemptions has been increased by the 2015 Amendment and has been widely criticised,¹⁴ more so, because now it disallows disclosures which are prohibited under the Official Secrets Act, 1923. The list of exemptions now

¹⁴Legislative Brief, Whistleblowers Protection (Amendment) Bill, 2015, PRSINDIA.ORG, [http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20\(Amendment\)%20Bill%202015.pdf](http://www.prsindia.org/uploads/media/Public%20Disclosure/Brief%20Whistleblowers%20Protection%20(Amendment)%20Bill%202015.pdf).

includes information which may harm the attempts of the department to apprehend an offender, information which is personal in nature etc. Section 9 and 10 provide for the machinery of enquiry. The Competent Authority has the power to frame regulations for the procedure to receive complaints. It can also take assistance from the CBI (set up under the Delhi Special Police Establishments Act, 1964).

Chapter V is an important chapter which deals with the way protection can be provided to whistle-blowers. Section 11(1) casts responsibility on the Central government to ensure that no whistle-blower or any person, who aids the enquiry, is victimised. Under Section 11(2), any person who apprehends victimisation may apply to the Competent Authority which may direct the government department to provide adequate protection. The proviso provides that a fair hearing must be provided to the government authority where the burden of proof rests on it to show that there has been no victimisation. Once the allegation is proved, the department or authority must act upon it. Section 12 states that the CA can exercise discretion on an application of the complainant to provide police protection. The obligation to conceal the identity takes a beating on reading Section 13. It states that the identity may be revealed if the CA so decides itself or the court directs it to. While the latter is within the scope of the statute, the former effectively compromises on the obligation of the CA as enshrined under Section 5. It is a glaring inconsistency which must be resolved as soon as possible. The CA has power under Section 14 to provide interim relief. (The final recommendation is based on the entire scheme of this Chapter whereby compulsory interim relief must be provided once an application for protection is made under section 11)

Chapter VI deals with the offences and penalties under the Act whereby non-cooperation to provide evidence is punishable with a penalty after a due hearing is provided to the authority (Section 15). Under Section 16, the disclosure of identity of the complainant by

negligence or mala fide intent is punishable with imprisonment. Section 17 punishes false, incorrect, misleading and false disclosures. Section 18 attributes the responsibility of the department over the HoD unless the offence was committed without the knowledge of the said HoD. Similar to this, Section 19 attributes responsibility to the director of a company for public companies covered by the statute. Section 21 and 22 deal with matters of jurisdiction by the Civil Courts whereby the jurisdiction is barred for all matters which the CA can deal with.

Chapter VII comprises of the standard clauses for amendments to the Act, its relation with other legislations and the requirement of an annual report to be furnished by the CA to the central government.

This is the brief outline of the legislation which is not largely contested in the Article.

B. Outline Of The Recommendation

The aim of the recommendation is twofold- firstly, to reduce discretion that can be exercised by the CA to provide protection to the Complainant and secondly, to provide protection to the whistleblower. There is an intuitively direct correlation between corruption and the amount of discretion that exists (more so, if there are no checks and balances). Corruption can motivate the extortion of bribes when inefficient rules provide bureaucrats with a high level of discretion.¹⁵

¹⁵Johann Graf Lambsdorffs, Corruption and Rent-Seeking, Public Choice, 113 (1/2), 97-125 (Oct., 2002), <http://www.jstor.org/stable/30025775>.

Corruption can be understood by the following formula: Corruption = (Monopoly) + (Discretion) – Accountability.¹⁶ Thus opportunities for corrupt behaviour develop¹⁷ –

- (i) whenever public functionaries have large discretion in exercising the powers and little accountability for their actions taken therefor;
- (ii) whenever government policies leave some gap, then these gaps create opportunities for middlemen or the actors of corruption.

As will be indicated in Part III, there is a possibility that the CA may exercise mala fide intention to reject a bona fide complaint under Section 5. However, the recommendation will provide the optimum check against such exercise of discretion.

The traditional model of whistle-blowing contains five stages:¹⁸

Stage 1- a trigger event

Stage 2- the observer considers the action to be problematic and takes action

Stage 3- action is taken

Stage 4- the process shifts to the organisation

Stage 5- the process returns to the observer to decide what to do

This paper attempts to suggest that Stage 2 is invariably dependant on Stage 4, 5 and everything that transpires in between. It is quite obvious that the actions are interdependent on each other but the Article makes an important recommendation as it shows that the

¹⁶ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 75 (University of California Press 1988).

¹⁷Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001 (Part I).

¹⁸Erika Henik, Mad as Hell or Scared Stiff? The Effects of Value Conflict and Emotions on Potential Whistle-Blowers, 80 (1) *JOURNAL OF BUSINESS ETHICS* 111-19 (2008), <http://www.jstor.org/stable/41219196>.

decision and final outcome depends not only on the immediately preceding or succeeding stage but a combination of various stages.

Anti-retaliation Provisions by themselves do not motivate whistle-blowers to take action. The law should be reformed to strengthen such provisions to make them substantively and procedurally fairer to both the parties.¹⁹

There is a close connection between whistle blower's protection and the right of employees to disclose corruption or mal-administration.²⁰ It is important to assess the most important impediment or the largest disincentive to whistle-blowing. It is generally believed to be the fear of reprisal and victimisation for which a legal regime is in place.²¹ Now, there are various forms of victimisation possible such as transfer, harassment, fear of death, etc. The CVC has informed the Supreme Court that it had received 244 cases of alleged harassment and threat to life to whistle-blowers from 2007-13. The number of such cases was 22 from 2004-06, it said.²² That amounts to roughly 20-30 cases per year.

The sole reason for this suggestion is that the number of protection seekers must face grave danger. This assumption is backed by the

¹⁹Jarod S. Gonzalez, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010).

²⁰Report on the Public Interest Disclosure Bill, 179th Law Commission Report, 2001, <http://lawcommissionofindia.nic.in/reports/179rpt1.pdf>

²¹It is so in the US, see Eric Yoder, Surveys show fear of retaliation keeps would-be whistleblowers from speaking up, THE WASHINGTON POST (June 17, 2014), https://www.washingtonpost.com/politics/surveys-show-fear-of-retaliation-keeps-would-be-whistleblowers-from-speaking-up/2014/06/17/9a574e12-f66d-11e3-a606-946fd632f9f1_story.html.

²²Amit Anand Choudhary, Whistleblowers harassed for exposing corruption: CVC to SC, TOI (Mar. 2, 2016), <http://timesofindia.indiatimes.com/india/Whistleblowers-harassed-for-exposing-corruption-CVC-to-SC/articleshow/51228549.cms>.

number of complaints received in a year, roughly 1000²³ under the PIDPI Resolution. So it is important to take care of these situations. It may be that the group of protection seekers suffer from paranoia or are genuinely threatened. In either case, temporary assistance of compulsory nature will be beneficial for all.

A criticism of the suggestion may be that the protection will be too expensive for the CA to undertake. It must be iterated that the compulsory interim protection is not only of the order of police protection. The CA may take any step as needed, it could be the one sought or what the CA feels to be appropriate and apply it accordingly. Moreover, different nations witness different troubles with respect to the whistle-blower context and thus the law must adapt accordingly.²⁴

The methodology clearly highlighted the lack of evidence with respect to a conclusive determination of such fears. However, there is common consensus that 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 is an increased likelihood that the government would be able to get substantial information about corruption.²⁵ The lack of adequate protection for whistle-blowers is a systemic problem across almost all jurisdictions.²⁶ Nevertheless, it has been pointed out that the way in which the retaliations and

²³Central Vigilance Commission Report, 2014, 7, 1-120, 2014, ¶2.32, <http://cvc.nic.in/ar2014.pdf>.

²⁴INTERNATIONAL PRINCIPLES FOR WHISTLE-BLOWER LEGISLATION, INTRODUCTION, https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en.

²⁵Ethics in Governance, Second Administrative Reforms Commission, 4th Report (Jan. 2007), <http://righttoinformation.info/wp-content/uploads/2013/10/ARC-report-on-ethics-in-gov.pdf>.

²⁶WHISTLEBLOWING: INTERNATIONAL STANDARDS AND DEVELOPMENTS, (To be published in Sandoval, Irma E. (Editor) 2011. "Corruption And Transparency: Debating The Frontiers Between State, Market And Society", World Bank-Institute For Social Research, Unam, Washington, D.C.).

victimisation channel actually work, steps taken by a whistle-blower against them may ultimately be futile.²⁷ Where there is a threat to a whistle-blower, all possible and required action would be taken within an appropriate time frame to ensure that the threat does not actualize and where harm has already occurred, no further harm occurs.²⁸

The recommendation i.e. compulsory interim protection till the CA decides on the direction to be given to the authority after receipt of a complaint, must be based on international best practices. Against this backdrop, the principles laid down by Transparency International, titled 'International Principles for Whistle-blower Legislation - Best practices for laws to protect whistle-blowers and support whistleblowing in the public interest'²⁹ must be studied.

The relevant principle is Principle 14; Personal protection – whistle-blowers whose lives or safety are in jeopardy, and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection.

The broad precedent for the recommendation lies under Section 22 of the Public Interest Disclosure Act, 2002, Australia whereby the complainant can apply to the Supreme Court for interim action. In India, interim action is within the discretion of the CA. The specific recommendation of mandatory interim relief may be unprecedented³⁰ but is necessary for the Indian context.

²⁷Judith A. Truelson, Protecting David from Goliath: On Blowing the Whistle on Systemic Corruption, 8(3) DIALOGUE 1-23 (1986), <http://www.jstor.org/stable/25610471>.

²⁸Note for Discussion on the Loksuraksha Whistleblower Protection Bill, http://www.thehindu.com/multimedia/archive/00761/Whistleblower_prote_761743a.pdf.

²⁹INTERNATIONAL PRINCIPLES FOR WHISTLE-BLOWER LEGISLATION, INTRODUCTION, https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en.

³⁰Jarod S. Gonzalez, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010); *supra* note 20.

C. Economic Analysis

Law and economics is ‘the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions’. The integration of economic analysis with traditional legal analysis is crucial to the effectiveness in the regulatory, enforcement and adjudicatory missions.³¹

There are markets wherever we look. The whistleblowing regime, from a decision to disclose to the outcome of the disclosure, also reflects a market. The good or the commodity that the parties are willing to trade is the disclosure, the incentive to carry out a trade in disclosures is public interest and the currency of trade is the legal framework or the law. The law has the potential to make the whistleblower wealthy enough that h/she can afford to make a disclosure for the public interest. Similarly, the law has to incentivise the CA to buy the disclosure or at least ensure that the value of the disclosure does not amount to the life of the whistle-blower.

a) Game Theory

The structural approach to policy evaluation emphasizes the use of explicit economic models in which the primitives—preferences, technologies and endowments—are specified and equilibrium allocations are derived from these primitives. The analysis of specific policies or regulations then requires the analyst to specify the details of the policy or regulation, and solve for the new equilibrium that would emerge in the presence of the policy or regulation.³² In the

³¹Sharon Brown-Hruska & Robert S. Zwiirb, Legal clarity and regulatory discretion—exploring the law and economics of insider trading in derivatives markets, 2(3) CAPITAL MARKETS LAW JOURNAL, 247 (2007), <http://cmlj.oxfordjournals.org/content/2/3/245.full.pdf>.

³²Richard Rogerson, Assessing the Economic Effects of Environmental regulations: A General Equilibrium Approach, (Feb. 2013),

discussions of complex policy issues, a model often serves primarily to provide a structure within which the various factors under study can be accounted for.³³

Chapter V specifically deals with protection against victimisation whereby the duty is cast upon the Central government to ensure that the public servant is not victimised. The Competent Authority is a quasi-judicial body with all the powers of a civil court for investigation under Section 7. Section 11(2) envisages a trial for providing protection to the complainant, once h/she applies to the competent authority for the same. Here, the public authority which is responsible for providing protection will be heard and a decision as to the appropriate level of security will be taken where the said authority will discharge the burden of proof.

The current regime is amenable to a game theoretic analysis due to the complex choice of disclosure which a complainant must make. There are incentives such as public interest, self-satisfaction³⁴ and disincentives like fear of retaliation and reprisal.³⁵

The first part will focus on the existing legal framework, how the law is while the second part would focus on the change after the recommendation is put in. It must be clarified that this

[https://yosemite.epa.gov/ee/epa/erm.nsf/vwan/ee-0572-05.pdf/\\$file/ee-0572-05.pdf](https://yosemite.epa.gov/ee/epa/erm.nsf/vwan/ee-0572-05.pdf/$file/ee-0572-05.pdf).

³³Antonio M. Borges, *Applied General Equilibrium Models: An Assessment of their Usefulness for Policy Analysis*, <https://www.oecd.org/eco/outlook/applied%20GE%20models.pdf>.

³⁴Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistle-blower Policy*, 25(1) JLEO 157-182 (2009) different behaviours or morality also supports whistleblowing, <http://jleo.oxfordjournals.org/content/25/1/157.full.pdf+html>.

³⁵Erika Henik, *Mad as Hell or Scared Stiff? The Effects of Value Conflict and Emotions on Potential Whistle-Blowers*, 80 (1) JOURNAL OF BUSINESS ETHICS 111-119 (June 2008), <http://www.jstor.org/stable/41219196>, this article concludes that fear has pessimistic expectations for whistle-blowing.

recommendation is not the only one possible. This exercise is an attempt to provide a model for better allocation of incentives.

Situation: The decision making for a whistle-blower is rendered difficult because the absence of effective protection can pose a dilemma for whistle-blowers: they are often expected to report corruption and other crimes, but doing so can expose them to retaliation.³⁶

i. As the law is

The author will present a payoff matrix between the two participants, the whistle-blower and the Competent Authority.

Players

The whistleblower-P1

The Competent Authority-P2

Strategies

P1 has to decide whether to make the disclosure or not, given the circumstances of the legislation.³⁷

P2 is the decisive authority to act on the disclosure made by the whistle-blower. Thus it can decide to act or not act.

Assumption:

³⁶Observation by Transparency International, https://issuu.com/transparencyinternational/docs/2013_whistleblower_principles_en.

³⁷Jenny Mendelsohn, Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing, 8 WASH. U. GLOBALSTUD. L. REV. 723 (2009), http://openscholarship.wustl.edu/law_globalstudies/vol8/iss4/6; Anthony Heyes & Sandeep Kapur, An Economic Model of Whistle-blower Policy, 25(1) JLEO 157-82 (2009) different behaviours or morality also supports whistleblowing, <http://jleo.oxfordjournals.org/content/25/1/157.full.pdf+html>.

All complaints are bona fide and not false or vexatious. This assumption is important as resources for protection will be expended only for bona fide whistle-blowers. There may be an objection to this assumption as it implies that non-action by the CA is mala fide. This assumption is important because if the CA takes such a stance and does not act then it closes all possible avenues for the whistle-blower under the WPA. It cannot even approach the court contending the provisions of the WPA. This also gives an idea to the reader about the responsibility that must be shouldered by the CA when rejecting a complaint. This assumption also supports the payoff whereby the potential loss of life increases when a complaint is rejected for mala fide reasons.

There may also be instances where the CA rejects even a bona fide complaint. There is simply no guarantee that all bona fide complaints would be acted upon.³⁸ Since, this is a reasonable possibility, it can be translated into an assumption for present purposes. Since any action by the CA involves discretion, this is a realistic possibility.³⁹ The exercise of discretion at this stage is to take the first step once the CA receives a complaint i.e. undertake a discreet enquiry. It is ex-ante complaint for protection. Largely, discretion is difficult to incorporate into models.⁴⁰ Thus a decision of non-action by the CA is chosen as one possibility.

Payoffs:

³⁸See, Jarod S. Gonzalez, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010) for improper dismissal of complaints under the OSH Act, USA.

³⁹As seen in Avinash Kumar v. ArunaAsaf Ali Government Hospital, GNCTD, MANU/CI/0198/2015.

⁴⁰Max Schanzenbach, Comments on Discretion, Rule of Law, and Rationality by Brian Forst and Shawn Bushway, presented at Symposium on the Past and Future of Empirical Sentencing research, http://www.albany.edu/scj/documents/Discretion_Schanzenbach.pdf.

A simple benefit cost analysis has to be initiated using variable numbers that give an approximate idea of the decision making variables.

Benefits:

A disclosure is intended to effectively reduce, prevent or help in punishing corruption or any instance of bad faith in an organization setup such as a government department. The actionable disclosure is headed as Public Interest Disclosure under Section 4 of the WPA. The whistle-blower discloses with an intention of public interest. This is the sole and near sighted motivation for a complainant. There may be a possibility of a promotion or media idolation but these are far-fetched possibilities not necessarily on the mind of the whistle-blower when h/she makes an immediate decision. The benefit is assumed to be 10 units.

Costs:

There are various forms of risks that a whistle-blower must undertake such as revelation of identity, transfer, isolation by co-workers, harassment etc. Each of these is attributed a cost of 2 units. If the whistle-blower loses his/her life then the cost is infinite (∞) as there is no provision for compensation provided in the WPA. Thus it is difficult to attribute such a cost.⁴¹

⁴¹Although, costs of life have been estimated using different formulae for different contexts, it is still difficult to attribute a specific cost in this context as such an incident substantially reduces the chances of that disclosure happening ever again unless media attention is diverted to it.

Table 1

P1	P2		
		Act	Don't act
	Disclose	$2^{\#}, 8^*$	$10-\infty^{\alpha}, -10^{\beta}$
	Don't disclose	$-10^{\gamma}, 8^{\delta}$	$-10, 0^{\phi}$

Analysis:

According to the payoffs, P2 must always act.

When P2 acts then P1 must disclose while when P2 does not act then P1 must not disclose.

It is important to note here that since the assumption is that the non-action by the CA reflects a mala fide intention on the part of CA, the

[#]This is a benefit cost calculation viz. $10 - (2+2+2+2)$, for all forms of victimisation with a cost of 2 each = 2.

^{*}Simple deduction of 2 as administrative expense of investigation, enquiry etc.

^{α} This amounts to a situation where either the discreet enquiry concluded that no further action is required or the CA had ulterior motives not to act.

^{β} The entire potential benefit turns to a cost for the public at large.

^{γ} Opportunity cost whereby the CA was conducive to take action on the complaint. There may be a possibility of someone else making the disclosure whereby P1 loses out on the benefit.

^{δ} Another whistle-blower, apart from P1, makes a disclosure and the CA acts.

^{ϕ} Status quo is maintained whereby no disclosure, no possibility of any action.

disposal of application for protection under Section 11 may also yield obvious results of no protection, since it is discretionary and decided after providing an opportunity of hearing to the other party or government department.

ii. As The Law Could Be⁴²

Suggestion 1- once an application for protection is filed under Section 11(2), till the time the CA decides the step according to the proviso (after the trial), mandatory interim protection must be provided. This includes police protection as understood under Section 12.

Here all the variables, players, strategies, costs, benefits, assumption remain the same but the net payoffs change.

⁴²Note the author does not state how the law should be as this solution requires understanding the vagaries of realities statistically. Thus there may be other viable solutions on the same lines. Thus the suggestion is also numbered as 1.

Table 2

P1	P2		
		Act	Don't act
	Disclose	6 [#] , 6 [*]	10 ^α , -12 ^β
	Don't disclose	-10 ^γ , 6 ^δ	-10, 0 ^φ

Analysis:

As before, P2 must ideally act.

The payoffs for P1 have changed. P1 must always disclose due to net benefit.

[#]This is a benefit cost calculation viz. 10- (2+2+), for all forms of victimisation with a cost of 2 each = 6, since interim protection would mandatorily be provided on an application under Section 11(2), it will have some positive effect to reduce the cost to the whistle-blower.

^{*}Deduction of 4 due to administrative expense of investigation, enquiry and interim protection

^αThe probability of loss of life substantially reduces as P1 will now be more susceptible to seeking protection against victimisation.

^βThe whistle-blower is aware of the change in law; even if the CA decides not to act; P1 may apply for the protection. In that case, there is more loss to the CA due to loss of the entire public interest and an additional cost of -2.

^γOpportunity cost whereby the CA was conducive to take action on the complaint. There may be a possibility of someone else making the disclosure.

^δAnother whistle-blower, apart from P1, makes a disclosure and the CA acts.

^φStatus quo is maintained whereby no disclosure, no possibility of any action.

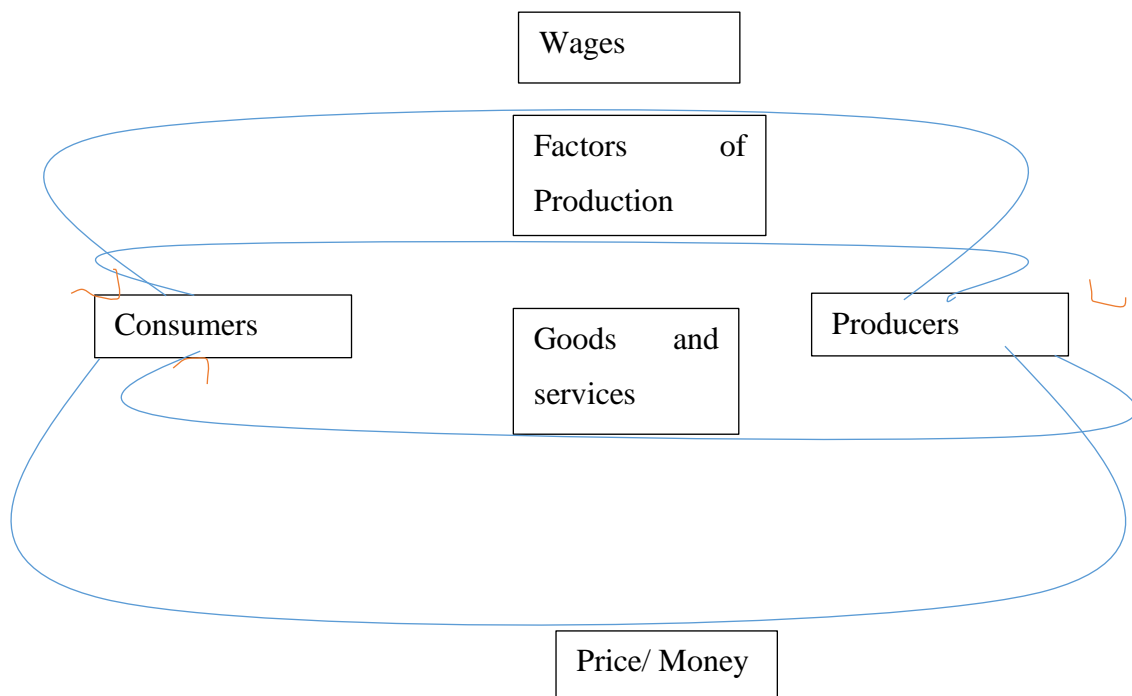
A pertinent point about the suggestion is that a whistle-blower can seek protection at any stage of the enquiry; even before his/her complaint is rejected under Section 5(6). A whistle-blower may rightly apprehend retaliation due to a complaint, even though it may not be acted upon and can use this provision. The assumption is mala fide action by the CA when it decides not to take action. Even so, such mala fide discretion would be exercised within the four corners of law. Thus, once a complainant files an application for disclosure and reasonably apprehends victimisation, it can apply for interim protection and reap the benefits, howsoever temporary it might be (because it will be compulsory).

Partial Equilibrium Analysis

The most comprehensive tool for an economic analysis is the general equilibrium analysis. However, existing literature only focuses on either (i) the case of an exchange economy, or (ii) partial equilibrium techniques.⁴³ The general equilibrium analysis, in macroeconomics, shows a circular flow of income where the producer derives the factor of production from the consumer and, in turn, pays the consumer wages from which the consumer then buys the goods that he/she has been instrumental in producing. This is the simplest explanation of an exchange economy.

⁴³Daniel M. Schydrowsky & Ammar Siamwalla, Monopoly Under General Equilibrium: A Geometric Exercise, 80(1) THE QUARTERLY JOURNAL OF ECONOMICS 147-153 (Feb. 1966), <http://www.jstor.org/stable/1880585>.

Fig. 2

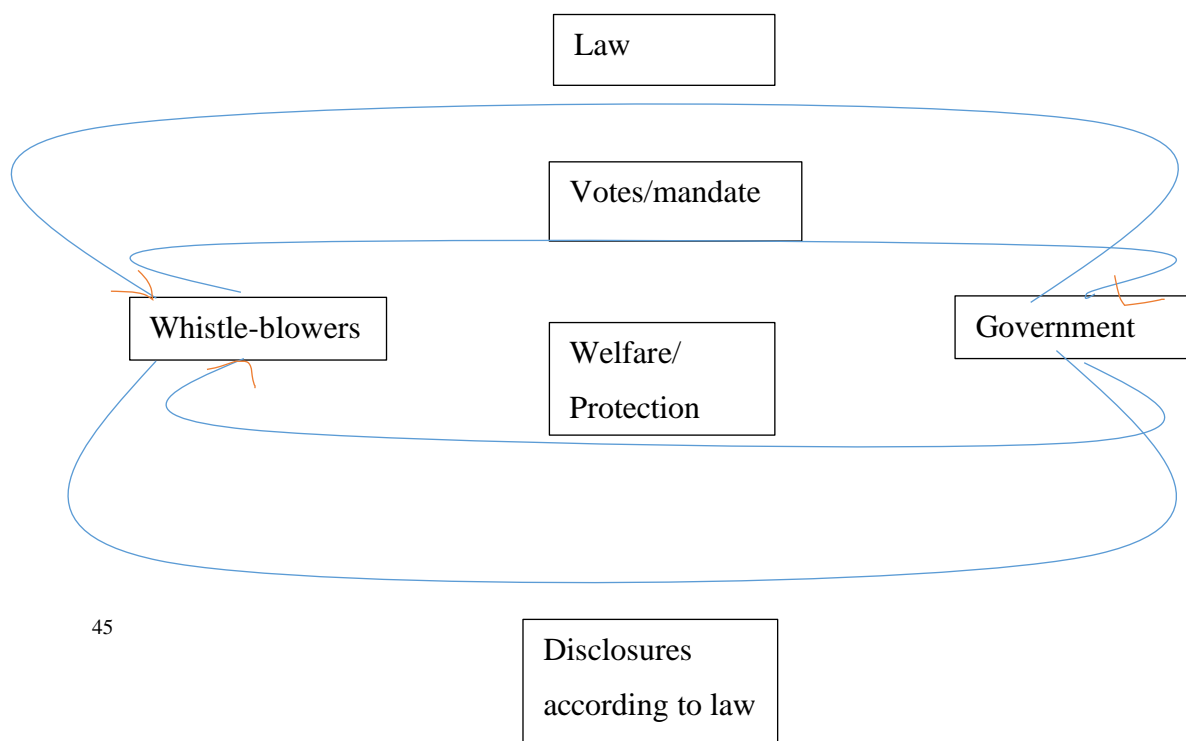


A general equilibrium analysis is most commonly used for competitive markets. However, the present situation is one where the producer, the government, is a monopoly⁴⁴ producing the legal framework (the currency), in exchange of the mandate and support given to it by the people (factors of production) so that the consumers (a small portion of the population) can use the law to provide disclosures and thus public interest. The consumers, firstly, represent

⁴⁴State as having monopoly on allocation of property rights, Johann Graf Lambsdorffs, Corruption and Rent-Seeking, 113(1/2) PUBLIC CHOICE, 101 (Oct. 2002), <http://www.jstor.org/stable/30025775>.

a very miniscule part of the population as whistle-blowers and do not compete with each other. In Pareto terms of a General Equilibrium analysis, the consumers trade and compete with each other for mutual gains; this is not possible for a disclosure based market due to the persistent fear amongst all whistle-blowers.

Fig. 3



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Thus a Hicksian analysis indicating partial equilibrium and the first law of demand has been chosen. Due to the extent of its assumptions for simplicity, it clearly shows how the law increases the incentives

⁴⁵Just like wages translate into prices for the good and services in Fig 2, similarly the law (currency) converts itself into the disclosure i.e. a disclosure can be made only by the 'use' of law.

for the whistle-blower to make a disclosure. Also, the majority of benefit-cost analyses are partial equilibrium analyses that include impact in one or a few markets, as compared to, general equilibrium analysis which takes into account a number of interrelated markets.⁴⁶ But partial analysis also has certain shortcomings; it is characteristic of complex systems that a sub-part may not share properties with the whole.⁴⁷

b) Hicksian Analysis

The Hicksian analysis of consumer demand (based on Partial Equilibrium analysis) is an important way to understand consumer behaviour in demand theory. It basically enunciates the law of demand i.e. an increase in demand with the decrease in price. This is called the price effect on demand. The price effect comprises of income effect and substitution effect. The Hicksian method diagrammatically shows the price effect as a combination of the two effects.

The prerequisite for an analysis of this kind is the characterisation of the entire scenario as a market. In this case, the whistle-blower is a consumer. The utility is derived from making a disclosure that leads to public interest. This can be understood as the unit of the utility. Now public interest can be derived from either making a disclosure herself or a disclosure by anyone else. There are many choices available to a potential whistle-blower, in terms of, blowing the whistle herself, helping another one, employing a strategy of group disclosure so that there is strength in numbers and the probability and

⁴⁶THE OXFORD HANDBOOK OF THE ECONOMICS OF GAMBLING (Leighton Vaughan Williams, Donald S. Siegel ed., 2013).

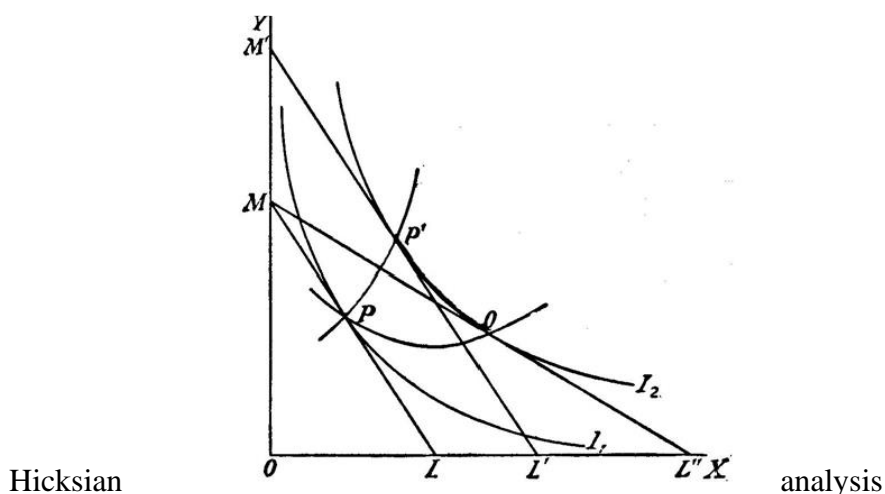
⁴⁷Henry E. Smith, Law and Economics: Realism or Democracy?, 32 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 127 (2009), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4046&context=fss_papers.

effect of any retaliation reduces etc. These are the various choices of goods available before a whistle-blower to satisfy her demand of public interest. The author distributes them into two categories: disclosure by the self and disclosure by other(s) or in conjunction with another. These are the two broad categories of goods available to the whistle-blower. The whistle-blower is indifferent between the two categories of disclosures as the final aim of public interest is being achieved. The constraint to the consumer demand is a budget line. The budget line is the value of the whistle-blower's life. This is the measure of the income available, to buy the good of disclosure. This is because, intuitively, the whistle-blower stops acting in any manner once there is a probable threat to the life of the whistle-blower.

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Good 2- disclosure by
another/ group
strategy/ helping the
other whistle-blower

Good 1- disclosure
by self



⁴⁸Hicks on Demand, Value and Capital by John R. Hicks, 5 fig.8, <http://la.utexas.edu/users/hcleaver/368/368hicks VCdemand.pdf>.

basically focuses on combining the effects of price change on income and demand.

The original budget line is LM with indifference curve I1. The point of tangency is P where the requisite combination of goods provides the whistle-blower with satisfaction. Now, if the recommendation is put in place, it amounts to

Price change of Good 1- mandatory protection after the application for protection is made.

From the perspective of the whistle-blower, this reduces the price for Good 1 and the whistle-blower will be incentivised to make disclosures herself.

The whistle-blower would like more of Good 1. There is a pivotal and rightward shift in the budget line to L'M. This indicates the law of demand. This does not mean a change in the value of life of the whistle-blower (which was the original budget line), but rather equivalence of the value of life of the whistle-blower as perceived by the whistle-blower herself and the law i.e. the law values the life as much as the person does because optimum allocation of resources for protection has taken place. The indifference curve tangent to this budget line is I2 at point Q.

This can be seen as a part of income and substitution effect.

Income effect- Assume that there is a proportional increase in income i.e. the new budget line is L'M'. This may be due to a decrease in value of life of the whistle-blower over some time which makes the whistle-blower less risk averse so that h/she can buy more goods or indulge in more such activities. This new budget line is tangent to I2 at point P'. The co-ordinates that P' represents on the X and Y axes is a new combination of goods that the whistle-blower can consume due to an increase in income. The X co-ordinate for P' represents the income effect. It represents a combination on I2, achieved by an

increase in income. Thus, the income effect of fall in price of Good 1 is represented by P'.

Substitution effect- The remaining portion on the X- axis i.e. price effect- income effect= substitution effect. The X co-ordinate for point Q represents the substitution effect. It is a substitution between the combination represented by P' and Q. Since both lie on I₂, they provide the same amount of utility. Here, the hypothetical assumption of an increase in income is removed and all units of Good 1 at P' are substituted with Q, because Q is tangent to I₂. Since the price of Good 1 has fallen for the whistle-blower, all combinations must be looked at from the position of Q.

III. LIMITATION

The cost matrix in the game theoretic analysis may come out to be different due to actual calculation of this compulsory protection. Herein, lie the figures which suggest that presently, very few whistle-blowers actually seek protection. This step may increase that number and lead to depletion of a huge amount of resources. The reaction to such use of resources would be a positive push on the authorities to act in a speedy, fast and effective manner. This may also reduce the perception of mala fide of intent of the CA which runs deep among laypersons, both within the organisation and outside it.

IV. CONCLUSION

The recommendation is vital in the Indian context due to the number of deaths that arise from instances of whistleblowing.⁴⁹ Thus, once a

⁴⁹Combining number of deaths of RTI activists and public servants turned whistle-blowers, Mehul Srivastava & Andrew MacAskill, Whistleblower Murdered Show

whistle-blower applies for police protection, the application should not be delayed or taken lightly. Human resource is capital with a corresponding value. In the context of whistleblowing in the public sector, the value of the human capital readily surpasses the value of other humans. Civil servants and bureaucrats pass through rigorous levels of testing to reach and obtain their positions of responsibility. In this context, the loss of even one bureaucrat for something of the order of whistleblowing reflects a colossal waste of resources.

Hazard of Exposing India Corruption, BLOOMBERG NEWS (Oct. 20, 2010), <http://www.bloomberg.com/news/articles/2011-10-19/whistleblowers-face-deadly-hazards-in-india>.