

Right to Information and Good Governance

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Lecture - 67

Whistle Blowers Protection Act and Right to Information - 1

Hello everyone, I am Madhubanti Sadhya from National Law School of India University Bangalore, and I shall be discussing on the Whistle Blowers Protection Act and the Right to Information. This discussion is a part of the course on Right to Information being offered by the National Law School.

Now, before moving in-depth into the topic, I would like to start by talking about two very interesting cases on whistleblowing that helped to uncover some of the biggest government scandals that involved people in the highest echelons of power. The first case is based out of U.S. and the second is based out of UK.

After discussing these cases and talking about what led to the whistleblowing, I would like to talk about who exactly is a whistleblower, what is whistleblowing, where the whistleblowing is even legal, and the series of events that led to the enactment of the first whistle-blower's protection legislation in the country, that is, the Whistle Blowers Protection Act, so on and so forth.

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Famous cases on whistle blowing



- The Infamous *Watergate Scandal* – named after Democratic National Committee headquarters in Washington
- Role of “Deep Throat” in uncovering the Watergate Scandal
- *Spycatcher case* – Peter Wright and his allegation against the head of MI5.
- Role of Press in whistle blowing



Now, moving on to the cases. The first case that I would like to talk about, as I already mentioned is the Watergate Scandal, which involved the United States' President and Republican Richard Nixon.

Now, the facts are something like this. Nearly five decades ago, United States' President, Republican Richard Nixon was running for election against democrat George McGovern. A security guard discovered clues that former FBI and CIA agents had broken into the offices of the Democratic Party and George McGovern in the Democratic National Committee Headquarters in Washington months before the election.

These people listened to phone lines and secret papers were stolen. When these men were found, it turned out that Nixon was involved and he had helped them cover it all up and he might have even hired these men. The White House distanced itself from the burglars and initially, the scandal did not involve Nixon, He was re-elected that November over his Democrat rival.

But months after his re-election, journalists and congressional investigations began to piece together details of the scandal pointing to the White House's involvement. Washington Post reporters, Carl Bernstein and Bob Woodward, with the help of a source who went by the pseudonym Deep Throat, later identified as FBI official Mark Felt, wrote a series of groundbreaking articles on the Watergate Scandal.

And months after the break-in, some of the buglers pleaded guilty and were convicted of conspiracy and other charges. But a handful of journalists, along with the judge who presided over the burglar's trials sensed that something was amiss and there was more to the story. In March 1973, the judge released a letter written by McGovern in which he said that the White House officials had pressured the defendants to plead guilty.

As this scandal blew up, Nixon and his aides were suspected of obstruction of justice by planning to use the CIA to stop the FBI's investigation. The Senate voted to create a special investigative committee to look into the Watergate Scandal.

In July 1973, a White House aide told the senate committee members that Nixon had taped all of his Oval Office conversations and the Watergate special prosecutor ordered the tapes to

be produce in court and Nixon refused to turn them over. Now, in what came to known as the Saturday Night Massacre, the Solicitor General fired the special prosecutor on Nixon's order and this was followed by other officials being fired.

After the firings, calls for Nixon to be impeached grew louder and the White House later agreed to release some of the tapes. And one of these tapes also included a mysterious 18-minute gap. In April 1974, the White House released more than 1200 pages of edited transcripts of the Oval Office tapes but it still refused to turn over the actual tapes citing executive privilege.

In July 1974, the U.S. Supreme Court ordered the White House to hand over tape recordings of the White House conversations. Nixon released the tapes which showed that he did actually try to use the CIA to block the FBI investigation of the burglary.

The tape clearly connected Nixon to the burglary, a fact that he had long denied. His support in the Congress vanished and the House Judiciary Committee approved three articles of impeachment against him. And Nixon had to resign but he did not admit to any guilt.

Now, how was Deep Throat, or the FBI official Mark Felt, involved in the Watergate Scandal? At the time of the break-in, Felt was second in command of the FBI and in charge of day-to-day operations. Felt knew pretty well that Nixon was involved in Watergate and knowing there was much more to the story, he took matters into his own hands and began leaking information to Woodward and Bernstein the Washington Post journalists.

But Felt never let Woodward or Bernstein quote him directly and at first, only confirmed the existing leads. As the investigations unfolded, he offered some new information. Now, these two journalists published a book titled All the President's Men, two months before Nixon resigned.

The books bore varying opinions about the identity of Deep Throat. The White House suspected that Felt was involved and as the investigation dragged on, Felt lived in dread of being discovered losing his job, or even worse.

Now, in February 1973, President Richard Nixon was recommended to appoint Mark Felt for the job of the FBI Director and Nixon and his Chief of Staff were concerned that Felt was leaking information to the press and choose William Ruckelshaus instead. Now, Felt and this new man, William Ruckelshaus had strain relationships and in June, when Ruckelshaus directly accused Felt of leaking information to the New York Times, Felt resigned and ended his 31-year career with FBI.

For nearly 30 years, Felt, Woodward, and Bernstein get Deep Throat's identity secret. Even when the story of the Watergate was made into a blockbuster movie, Felt and company continue to stay mum. Felt reportedly even denied the truth to his family, friends, and the closest colleagues. That is until May 2005, when Felt announced in Vanity Fair Article that he was guy who used to call Deep Throat.

Felt's family had figured that his pseudo-identity and encouraged him to tell the world. But he struggled with that decision and he was concerned about how it would affect his family and his legacy. It was not until that his family suggested that the truth could help them pay some bills that he agreed to share his story. Woodward and Bernstein also cautioned people to remember that Deep Throat was just one of the factors of a mammoth investigation which included other sources.

Felt or Deep Throat, largely confirmed information they had already gotten from other sources. Now, whether Felt was a courageous patriot willing to risk everything for justice or turncoat, hoping to take down a sitting President is up to individuals and history to decide. But what is certain is Deep Throat played a very critical role in ending the Nixon's administration, and Woodward and Bernstein's reporting brought new meaning to the term Investigative Journalism.

Now, this case of whistleblowing does throw light on the fact that the media has played a very important role in unearthing some of the biggest scandals which involved people in power.

Now, coming to the next case that is the Spycatcher's case, which involved Peter Wright, a Senior Officer in Britain's Counter Intelligence Agency, MI5. Now, in 1985, Peter Wright attempted to publish his memoirs in a book titled Spycatcher, which detailed his work from

1955 to 1976. The Central allegation of his book was that Sir Roger Hollis, the head of MI5 from 1956 to 1965, had been a Soviet Spy; that is where the name Spycatcher comes from.

Now, that was also, almost incidentally, a reference to a plot by 30 MI5 officers to destabilize Harold Wilson and Government in 1974. Wright wrote that he was tempted to join the plot but instead decided to name the conspirators to serve Michael Hanley, the then head of MI5.

Now, British government might Peter the right to you know, come out this book because he would be violating the Official Secrets Act which bounds civil servants not to divulge without any prior approval official information acquired in the course of duty. However, Peter was then a resident of Australia and he intended to publish his book there because the Official Secrets Act was not applicable in Australia.

The British Government knew that it could not enforce the Official Secrets Act in another country, so it initiated a civil lawsuit in the Supreme Court of New South Wales in Australia to stop the publication.

Britain claimed that Wright was guilty of breach of contract, the contract being that in effect, he had promised his superiors to maintain confidentiality of information acquired in the course of his work. Wright's defense attempted to demonstrate that no confidentiality was being broken and that Britain was tirelessly trying to indirectly enforce its Official Secrets Act in Australia.

The government stuck to its contention that Wright or the duty confidentiality and that Spycatcher would damage the security services and help the Soviets and terrorists. In the witness box, Wright presented himself as a patriot whose sense of mission had given him no choice but to break the silence. During the trial, it was also revealed that in 1980-81, Wright had secretly given his information to Chapman Pincher, a British journalist who in turn had published, *Their Trade is Treachery* which involves all the allegations which Wright already spoken of.

In March 1987, the Supreme Court of New South Wales ruled there was no breach of confidence in Peter Wright's case mainly on three grounds that the information or events

occurring decades earlier could cause no harm; that the information contained in the book was already in the public domain; and that the government had failed to stop publication of the same material in previous books.

Though appeals or through appeals, the case eventually reached the High Court of Australia and the High Court unanimously affirmed the decision of New South Wales Court of Appeals and dismissed the appeal of the United Kingdom government.

In April 1987, The Independent and two other London papers published major summaries of Wright's book, as did the Melbourne Age and the Canberra Times. Washington Post also published a summary of Wright's allegations, Viking Penguin announced its intention to publish Spycatcher in the United States.

The British Government did try to convince the parent company of Viking, a British corporation to use its powers to dissuade the New York subsidiary from publishing the book but the corporation declined to do so. While the British Attorney General was up with his efforts to do dissuade the different papers from publishing excerpts from this book, the South China Morning Post in Hong Kong, The Dominion New Zealand, and The Nation in East Africa, all published excerpts from the Spycatcher.

Through litigation, the British government did succeed imposing a gag order or a suppression order on English newspapers to prevent them from publishing Wright's allegations. The gag orders were upheld by the Law Lords but eventually, in 1988, the book was cleared for legitimate sale when the Lords acknowledged that overseas publication meant it contained no secret.

The British government was embroiled into an expensive and embarrassing whirlpool of litigation, and its efforts to suppress the Spycatcher were conducted in a blaze of publicity which ensured the widest possible circulation of the book.

The government's long battle ended in 1988 when the Law Lords unanimously rejected its demand for a blanket injunction to prevent the media's use of allegations by former security service officers. Spycatcher sold nearly two million copies and made Wright a millionaire and cost the taxpayer about 3 million pounds.

Now, these two cases reflect how whistleblowing has helped to uncover some of the deepest, darkest secrets and scandals in two (in two) of the world's greatest countries or greatest economies. And also, the role of media in unearthing these scandals.

The repercussions that the actions of whistle-blower can have is evident from the cases that we have just discussed. In the first case, that is, Watergate Scandal, the action of the whistle-blower brought down the regime of the United States President, Richard Nixon.

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Who is a whistle blower?



- Term "whistleblower" owes its origin to the **English bobbies' or policemen's practice of blowing their whistles**
- An individual who refuses to turn a blind eye to the wrongs that other men commit.
- Whistle blowers are considered to be "**snitches, tattletales, or industrial spies**"
- Study conducted between March - August 2009 across ten European countries, by *Transparency International* - term 'whistleblower' has the undertone of being an
 - **informant** (e.g. in the Czech Republic, Ireland, Romania and Slovakia),
 - **a traitor or spy** (Bulgaria, Italy) and/or
 - **a snitch** (Estonia, Hungary, Latvia and Lithuania) Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia
- Others see whistle blowers as **champions who put their lives and careers at stake** for the greater good of the society.



While in the second case we see, that is, the Spycatcher's case, the British government left no stone unturned to suppress the allegations made by Peter Wright to ensure that the government does not fall into the disfavour with the people.

Now, these are a few examples of what whistle-blowers can do. But who exactly is a whistle-blower and why do we call them whistle-blowers? The term whistle-blower owes its origin to the English Bobbies' or policemen's practice of blowing their whistle to indicate that a person is in the process of committing a crime.

If you were to look at the theoretical definition of the term, a whistle-blower may be defined as an individual who refuses to turn a blind eye to the wrongs that other men commit. To put it succinctly, a whistle-blower is one who divulges information about a wrongdoing.

Often whistle-blowers report a wrongful act even though it is considered to be norm or accepted behaviour in particular environment. And the decision to blow the whistle may seem difficult in such circumstances because by exposing the misdemeanour, one goes contrary to what is considered to be the accepted rule or a custom, which may not be appreciated by other members of that particular environment or organization, and the whistle-blower may have to face adverse consequence for the same.

A whistle-blower is usually an insider because the best knowledge of the internal whereabouts of an organization is best known to those who are in close proximity to its working but it is not atypical for an outsider to blow the whistle on fraudulent to conduct, provided he has concrete and bona fide information of the wrongdoings.

As we have just discussed, the first case, that is, the Watergate Scandal, Mark Felt was an outsider; but in the second case, that is, the Spycatcher's case, Peter Wright was very much insider of MI5.

Now, a bearer of ill-tidings is not welcomed graciously with open arms. Now, fortunately in this Spycatcher's case and in the Watergate Scandal, the whistleblowers did not have to pay dearly with their lives nor did they have to face retaliation, but that is not always the case.

For some, whistleblowers are nothing short of snitches, tattletales, or industrial spies who disregard their loyalty towards their employers to pursue their own personal schemes. Other derogatory terms like traitor, squealer, turncoat, or rat are not uncommon for someone who divulges wrongdoings of his colleagues or the organization that provides for his bread and butter.

A study conducted by Transparency International on whistleblower protection across 10 European countries between March and August 2009 revealed that the term whistleblower has the undertone of being an informant, a traitor, or a spy, or a snitch across the different countries which were involved.

Now, Transparency International is a global civil society organization that aims to combat corruption in the world. And the study conducted by them revealed how whistle-blowers are usually perceived in the different countries. But everybody does not see a whistle-blower as a

turncoat or a spy or a snitch, some even see whistle-blowers as champions who put their lives and careers at stake for the greater good of the society.

Though the work done by the whistle-blowers is indeed commendable, they have to face the wrath of their employers and the organization that they work for and more often than not, are retaliated against or persecuted, and are even shunned by their co-workers and have to face lives threatening ordeals.

Whistle blowers face nothing less than double-edged sword, they may either choose to embrace silence thereby bringing about potential internal harm or face unknown retaliations. This makes laws for protection of whistle-blower and necessity, especially when the need of the hour is combating any form of corruption.

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Are whistle blowers afforded legal protection?

- Who should be protected (and when and why) differs
- USA - Whistleblower's Protection Act, 1989
- UK - Public Interest Disclosure Act, 1998
- Ghana - Whistleblower Act, 2006
- Canada - Public Servants Disclosure Protection Act, 2005
- EU - Whistleblower Protection Directive approved in 2019 to be adopted by Member States by 2021.
- India - Whistle Blowers Protection Act, 2014



We have discussed who a whistle-blower is and the kind of role whistle-blowers plays in exposing corruption and other wrongdoing that threaten public interest, health, safety, human rights, and sometimes even the rule of law. By disclosing information about corruption, whistle-blowers have helped to save countless lives and huge sums of money and public funds.

According to Anna Mayas, Executive Director of Whistleblowing International Network, whistleblowing is increasingly being seen and perceived as an antidote to secrecy which is imposed by governments on the ground of the national security.

Now, whistle-blowers are among the main triggers for successful corruption investigations and this should come as no surprise because, without any kind of inside information, corruption is very, very hard to detect. But whistle-blowers often put themselves at high personal risk, we have discussed two cases and there will be more such cases that we will discuss, which show the kind of retaliation that whistle-blowers face.

Now, protecting whistle-blowers from such retaliation is very important because it can embolden and empower more and more people to report government wrongdoing and corruption and thus, increase the chances of corruption and wrongdoing being uncovered and also punished.

Now, we know the kind of work that whistle-blowers do and the kind of risk that they put themselves through, but are there even laws that protect legally the act that the whistle-blowers do?

Now, laws protecting whistle-blowers have advanced worldwide in the last decade as many countries have started recognizing the role the whistle-blowers play in reducing corruption and improving integrity. According to a research conducted in 2011, there are 30 countries with the dedicated whistle-blower laws and many more which at least gives some kind of legal protection to whistle-blowers even if they do not have standalone whistle-blower legislations.

Now, what kind of protection exists for whistle-blowers? Now, this is a question which has to be answered based on the organizations involved and the country's legal system. The boundaries of who should be protected, when, and how, depends and is impacted greatly by the political environment and the cultural perspectives on the value of a whistleblower.

In a particular government, in a particular political setting, the role of the whistleblowers may be shunned and in another country or another political setting, there will be more and more encouragement given to whistleblowers to come out and report any kind of government corruption.

Now, in general, much depends on the governments that govern whistleblower protection Laws and the jurisdiction to which a particular whistleblower belongs with. Now, there are

few laws on whistleblower protection that different countries have enacted; I would be listing out a few of them.

The Whistle Blowers Protection Act of 1989 of the United States of America, it affords protection to federal employees who make disclosures and aid in eliminating fraud, waste, abuse, and unnecessary government expenditure.

The Public Interest Disclosure Act of 1998 of the United Kingdom, provides protection to employees not only in the public sector but also in the private and the voluntary sectors. A comparatively recent legislation of Ghana, which was enacted in 2006, it does not restrict its applicability, that is, it does not restrict legal protection of whistle-blowers only to employees but it allows any individual to make a disclosure and public interest that relates to unlawful or other illegal conduct or corrupt practice of others.

Canada's Public Servants Disclosure Protection Act provides protection from reprisals for public servants who disclose wrongdoings in or relating to the public sector. Now, the EU has the come up recently with a Whistle-blower Protection Directive in 2019, which will introduce sanctions on any kind of retaliation against whistle-blowers. The new law protects whistle-blowers from liability related to reporting breaches of law in accordance with the Directive.

Under the EU Whistle-blower Protection Directive, whistle-blowers may make disclosures on anti-money laundering and corporate taxation, data protection, protection of the union's financial interest, food, products safety, environment protection, and even nuclear safety. Now, member states have been given their discretion to extend these rules to other areas as well.

The commission encourages them to establish comprehensive frameworks for whistle-blower protection based on these same principles of the Whistle-blower Protection Directive. And it has to be approved by and brought into operation by April 2021. And member states must be ready to comply with the EU Whistle-blower Protection Directive no later than two years after the adoption, that is, April 2021. And it applies to both the private and the public sector.

Similarly, closer home, the Whistle Blowers Protection Act seeks to afford protection to persons and not only employees per se, who testify acts of corruption or wilful misuse of power or discretion by any public servant.

So even in the country, in India, we have the Whistle Blowers Protection Act 2014, which affords people not only to public servant but also to any other person who reports corruption and wilful misuse of power.

Now, some laws as we have seen, whistle-blower protection are restricted to the public sector and do not include the private sector within their ambit. The Whistle Blower Protection Act, which is standalone legislation in India for the protection of whistleblower one such stature that pertains only to the public sector.

So, therefore, any kind of corruption or wrongdoing that is happening in the private sector is not within the ambit also Whistle Blower Protection Act.