

COMBATING WHITE COLLAR CRIME: A CRITICAL STUDY OF THE PROTECTION TO PERSONS MAKING DISCLOSURE UNDER THE COMMERCIAL LAW OF SRI LANKA

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ABSTRACT

White collar crimes are threats to nations which are striving hard for economic development. Such white collar crimes under the sphere of commercial law mainly take the forms of capital market malpractices, money laundering, financing to terrorism and falsifying company accounts. These crimes do not take place just in a single day. These are well planned and continuous dealings by few perpetrators. Some employees, associates or responsible citizens who come to know the happening of wrongdoing may be concerned to disclose but will be reluctant to reveal it due to reasons of fear or retaliation by their superiors or others connected. The category of people who are willing to make disclosure of information relating to crimes committed by high ranking people in the society are called whistleblowers. These whistleblowers need encouragement and protection to fight white collar crime. There are laws in place to protect whistleblowers in few jurisdictions such as Australia and United States, but not in many countries, including Sri Lanka. The law to deal with whistleblowers is a timely one since the repercussion of white collar crimes are so great that they affect innocent public, stock markets, regulators and the government economy. Though there are contra views for the regulation of whistleblower protection stating that overly complex regulatory environment will undermine people dealing with commercial entities, the pros of proper regulatory mechanism for whistleblowers outweigh the criticism. Maintaining or restoring public confidence and strengthening financial market is one of the main objectives of every modern State. Therefore, analyzing and demarcating the role and the limits of the regulator on the topic is significant for sustainable development.

This paper will highlight the research findings of the writer on the examination of the relevant statutory provisions relating to the protection of whistleblowers in Australia, the US and the UK with the objective of finding the effectiveness of the law, enforcement issues and to propose recommendations to Sri Lanka.

Keywords: White Collar Crime, Whistleblower Protection

1. Introduction

The world is not a paradise as God thought when it was created. There are wrong doers or violators of the law everywhere. Doing wrong or acting against the law may be a civil wrong or a crime. Civil wrong do not affect the society, but it affects certain individuals or group. Law provides for remedies including damages when civil wrong is done. On the contrary, crime is considered as a wrong against the entire society.

Classifications of crimes are done using various methods and it varies in different judicial systems. One such classification is traditional crimes falling under the penal code or criminal code of a country and the other.¹ Another classification is by way of status of people who commit crimes. Division of white-collar crime and blue-collar crime comes within the latter category.² These are generalized classifications coined by the media to make ordinary people understand the nature of the crime, and are not codified as crimes in the classic sense in our judicial system.

White collar crimes are crimes that are non-violent in nature committed by financially motivated high ranking people in the society. These white collar crimes take many forms such as bribery, fraudulent investment schemes, capital market manipulation, insider trading, cyber crime, money laundering, identity theft, terrorist financing and falsifying company accounts etc.³ In general. These are malpractices for financial gain.

Repercussions of white collar crimes are many. It creates fear in the minds of an ordinary citizen in his/ her day-to-day transactions and it affects the business and the financial system of the country as well. Sudden collapse of large companies is a good example for such malpractices because it is crystal clear that the reasons behind a corporate collapse is a series of wrong doing which is not done by one, but by many, surreptitiously. Leaking of secret information leading to wrong doing cannot be prevented. Those who come to know about the surreptitious dealings are the centre point of this article. Why are they not making known the information about such secret illegal dealings as they become aware, to the appropriate authorities is the crucial

¹ The word traditional is used because penal code crimes such as murder, robbery, rape or cheating are being committed historically. The offences that do not fall under the penal code are crimes such as money laundering, environment pollution etc are made crimes by separate statutes.

² The traditional attire of the person committing the crime defines the crime classification under this. White collar refers to the colour of the shirts worn by these types of people who are generally in air-conditioned office and whose dresses never become dirt. Blue collar would refer to the standard uniforms worn by many working class individuals. These are only general terms. There is no law or regulation that states that people belong to working class or labourer category cannot commit a white collar crime and vice versa. The classifications refer rather to the crime itself as a general definition than the actual offenders.

³ Writer will deal with only capital market malpractices, money laundering, financing to terrorism and falsifying company accounts since it is not possible to touch on all in a small article like this.

question. It is obvious that it is due to fear of reprimand or punishment directly or indirectly by the perpetrators. Will they be encouraged to give timely 'tips' of necessary information, if there are laws in place to protect them?

The writer seeks to examine that laws in place in the United States, Australia, the United Kingdom and Sri Lanka with regard to protection to whistleblowers.

2. History

The concern for whistleblower or whistleblower protection laws have historically been focused more on the public sector than on the private sector. Whistle is well known as an unharmed weapon of the police. The sound this instrument makes, gives a signal to the relevant persons. It has been the practice of the police officers to blow the whistle when they notice the commission of a crime. Such blow will alert the general public of peril, and alert similar enforcement officers as well to rush to the help of the blower. Over the period the meaning has changed. Now the meaning of whistleblower is transformed into an alert by a person who raises concern about occurrence of wrongdoing in an organization, public sector or in a particular dealing. In most cases, such person would be from the same organization or sector. The Oxford Dictionary explains the term whistle-blower as 'a person who informs on someone engaged in an illicit activity'. Whistle blowing is better said as 'making a disclosure in the public interest'.

In the public sector, misconducts such as corruption, bribery, fraud, misappropriation, violation of health/safety/environment laws or regulations and other activities that are direct or indirect threat to public interests may need a whistleblower to prevent or to stop the occurrence of such illegal activities. Conspiracies against a State, mass terrorist massacres or a coup to topple a democratically elected government are also areas that needed informants.⁴ A whistleblower is the most courageous person among the few who become aware of the illicit activity, a person with good intention and who is mindful of public interest. Nevertheless, in most cases, they face reprisal which is from the same organization or employer they have accused. Reprisal may take the form of transfer the whistleblower to a place where there are no basic facilities, appoint the whistleblower to solve the problem that was complained of and making the job impossible, destabilize the whistleblower's support base, harsh punishment such as termination of services or denying promotion and the like.⁵ A whistleblower being an ordinary person cannot afford to fight against wealthy or powerful organizations which dislike them for giving information. Therefore, governments started to intervene years ago and laws were enacted, to protect whistleblowers. First of its kind was in the public sector. Public value of whistle blowing and whistleblower protection has been increasingly recognized during the last four decades of the twentieth century and statutes and regulations were enacted to protect whistleblowers from various forms of retaliation. Even without a statute, numerous decisions encourage and protect whistle blowing on grounds of public policy.⁶

Corporate malpractices were not very common during the early part of the twentieth century since there was only little growth of corporations. When corporations started to develop rapidly and became the major contributor to the economy, misdeed also originated. Perpetrators, with the only objective of making quick money, went to every extreme to achieve it. As a result, there were many collapses.⁷ These were due to non adherence of accepted accounting standards or corporate governance rules and capital market manipulative activities. If there had been a tip off and a timely investigation, the position would be different⁸. One cannot come to a conclusion that no one was aware of any suspicious activity until the real collapse or the exact occurrence of capital market manipulation that affected innocent general public or investors in billions. The culture of silence has not only resulted in many corporate failures but wrongdoers go undetected gives more and more encouragement to the prospective wrong doers. There are many reasons for one to decide not to reveal the information he becomes aware of. It may be that he was not bothered; he did not understand the gravity of it or due to fear of retaliation. If it is the first two reasons, then the person should be encouraged to become a whistleblower while assuring that he will be protected by the law. If it is the third reason, *i.e.*, due to fear, there should be adequate laws to protect him.

3. Major malpractices

⁴ In early 2001, Coleen Rowley, an FBI staff attorney for more than 20 years, sent a letter to the FBI director Robert Mueller, indicating that the FBI's national headquarters had mishandled an investigation of Zacarias Moussaoui, who was later believed to be a co-conspirator in the September 11, 2001 terrorist attacks on US twin tower. Rowley later spoke before the intelligence committees of the House of Representatives and the Senate about her accusations.[Source: www.LawBrain.com]

⁵ See: Thomas M.Devine & Donald G.Aplin, 'Whistleblower Protection – the Gap between the Law and Reality', 1988, 31 Horward Law Review 223

⁶ For example, in the US federal False Claims Act (31 U.S.C.A. § 3729) provided for reward when a whistleblower brings a lawsuit against a company that makes a false claim or commits fraud against the government. Under this, any person with knowledge of false claims or fraud against the government may bring a lawsuit in his own name and in the name of the United States. As long as the information is not publicly disclosed and the government has not already sued the defendant for the fraud, the whistle-blower, who is called a relator in this action, may bring a False Claims Act case.

⁷ Few examples are: Enron in the US collapsed with a loss of \$638 million loss, Avonwood Homes of Australia with more than \$300 million loss, Worldcom and Tyco International also in the US, and Pramuka Bank and Golden Key in Sri Lanka

⁸ For example in 2001, Sherron Watkins, a vice president at Enron Corporation, informed the company's board that Enron's accounting practices were improper. Enron later suffered a major collapse and bankruptcy, largely as a result of its accounting practices and to the indictment of the company's auditor and chief financial officer. In 2002, Cynthia Cooper, an auditor with WorldCom, told the company's board that WorldCom had covered up major losses of \$3.8 billion through false bookkeeping. Like Enron, the accounting failures led to WorldCom's bankruptcy.

Not every wrong doing leads to a serious repercussion, but certain result in major collapse. The writer identifies the following as serious which, if a whistleblower detects and blows the whistle, needs follow up action and protection of the whistleblower.

3.1 Directors' duties

If the navigator of the ship sails the ship with proper care, chances are very remote for the ship to bang on an ice berg. Likewise, proper performance of directors duties of a company decides its life and death. Directors' duties include statutory duties, common law duties and adherence to codes such as corporate governance. Unless with a special knowledge, it is hard to detect non-compliance of duties of these nature. Every single act of non-adherence, joined together, make a company to close down.

3.2 Capital market malpractices

Market manipulative activities including insider dealing is a threat to the capital market because it affects the integrity of the market. It also results in unjust enrichment by the manipulators. Investors not only lose money but also the confidence in the market and may move out.

3.3 Accounting practices

It can be blindly said that the most important legal document of a company is its accounts (other than the Articles). Corporations law provides for certain requirements relating to this while there are other accepted practices that the companies are expected to follow. Irregularities in accounting related reports will take the company in a wrong direction.

It was only in 1990s it arouse the legislature to go for proper laws to deal with corporate fraud by way of protecting whistleblowers instead of allowing more collapses or covering up the frauds.

3.4 Money Laundering

Money laundering has become a serious threat to nations. Black money earned out of illegal transactions are laundered and converted into legal proceeds. Information leading to the arrest of money launderers will have an impact on the economy of the nation.

3.5 Financing terrorism

Needless to mention the repercussions of terrorist activities to every nation. Such terrorists need finances for all their activities. If financing to terrorism is cut, terrorists cannot plan anything. Informants are necessary for governments to take action on such financing.

4. The U S Law

In the US many States have enacted whistleblower statutes, but these statutes vary. Some statutes apply only to public employees, while some apply to both public and private sector and also to employees of public contractors. Some of these prohibit employers from terminating workers in reprisal for disclosing information about, or seeking a remedy for, a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or a specific danger to public safety and health. In whistleblower cases, states follow their general rules for determining whether a public policy cause of action exists in favour of the informant employee and therefore, actions must have a statutory basis. As a result, the case will be dismissed if the employer did not violate a statutorily enacted public policy. In many cases, the courts have refused to recognize a whistleblower's claim because no clear mandated statutory policy has been identified. In addition, employees who inform matters that affect only private interests, such as complaints about internal corporate policies, will generally be unsuccessful in maintaining a cause of action. Therefore, the position had been that, in the absence of a statutory provision, the whistleblowers were not protected.

Originally, the federal False Claims Act⁹ rewarded whistleblower who brings lawsuit against a company that makes a false claim or commits fraud against the government. This law allows a person who is not affiliated with the government to file actions against federal contractors they accuse of committing fraud against the government. The act of filing such actions is informally called "whistleblowing." Persons filing under the Act stand to receive a portion (usually about 15–25 %) of any recovered damages. The Act provides a legal tool to counteract fraudulent billings turned in to the federal government. Claims under the law have been filed by persons with insider knowledge of false claims that are generally involved with health care, military, or other government spending programs.¹⁰

The first U.S. law adopted specifically to protect whistleblowers was the Lloyd-La Follette Act of 1912. It guaranteed the right of federal employees who furnish information to the US Congress. Later, federal employees were benefited from the Whistleblower Protection Act 1986 which was subjected to various amendments up to 2007¹¹ and the No Fear Act (which made individual agencies directly responsible for the economic sanctions of unlawful retaliation).

⁹ (31 U.S.C.A. § 3729), also called the "Lincoln Law", originally enacted in 1863, but subject to significant change in 1986.

¹⁰ Source: http://en.wikipedia.org/wiki/Talk:False_Claims_Act

¹¹ See: whistle20.tripod.com/leghistlink2.htm

The Securities and Exchange Commission (SEC) of the US intervened by 1989 and paid monetary rewards to whistleblowers, when there is revelation relating to corporate or securities fraud, with the aim of encouraging them. The records reveal that during the period, from 1989 to 2009, the SEC's whistleblower program has paid out less than \$160,000 to just five whistleblowers.¹² These statistics may have resulted from would-be whistleblowers weighing harsh reprisals against the prospect of low rewards for raising concerns about wrongdoing in a corporation, opined Bebchick.¹³

The milestone in the history of whistleblower protection law was the enactment of Sarbanes-Oxleys Act 2002¹⁴ (US SOX 2002) which provides for two important issues in this regard. Those are the provision for protection of whistleblowers and at the same time adopting a mechanism to permit anonymous reporting. The US SOX 2002 contains provisions under 11 titles which describe specific mandates and requirements for financial reporting and out of those the title that deals with whistleblower protection is 'Corporate and Criminal Fraud Accountability'. The whistleblowers were protected under s. 806 of this Act which was created with an intention of building an environment in which employees feel comfortable reporting illegal activities without fear of retaliation by the employer. Every company required to register securities listed on a national stock exchange and every company which files reports with the SEC were covered by s. 806.¹⁵

In 2003, in *Boss v. Salomon Smith Barmey Inc.*¹⁶ the court held in favour of the employer requiring the employee to arbitrate his claim of retaliation relying on the agreements signed by the employee with the employer that any employment dispute that would arise in connection with the employment would be submitted to arbitration. This case was a critical victory for pro-arbitration supporters and employers in the securities and accounting industries.¹⁷ The case may have also given an indication the an employee's protection under the US SOX 2002 is subject to any employment agreement that has an arbitration clause.

The Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁸ (US DFA 2010) was brought into force in July 2010. This legislation contains numerous provisions designed to encourage and protect whistleblowers including increasing transparency and oversight in the financial industry. It also creates new monetary incentives and whistleblower protection under the Securities Exchange Act of 1934 (US SECA 1934) and Commodity Exchange Act also, expands the scope of coverage and protections already granted to whistleblowers under the US SOX 2002, and creates new whistleblower protection for employees performing tasks related to consumer financial products or services.

S. 922(a) of the US DFA 2010 amended the US SECA 1934 by adding a new s. 21F which provides powerful monetary rewards, as well as strong employment protection, for whistleblowers. Under this Act a person providing information relating to a securities law violation to the SEC is entitled to a significant monetary award when the information provided by a whistleblower is original¹⁹ and it leads to a successful SEC enforcement proceeding. Such whistleblowers may be awarded 10%- 30% of monetary sanctions imposed by the SEC that exceeds \$1 million. In determining the amount of the reward the SEC will consider the significance of the information, the degree of assistance provided by the whistleblower, the programmatic interest of the SEC in determining violations of the securities laws by making awards to whistleblowers and other factors the SEC may establish by rule or regulation.

The aforementioned s. 922(a) also prohibits retaliation against whistleblowers who provide information to the SEC, initiate, testify, or assist in any SEC investigation or legal action related to information provided by the whistleblower; or make disclosures that are required or protected under the US SOX 2002 or the US SECA 1934. Another notable factor under s. 922(a) is that it appears to protect whistleblowers who complain to the SEC without regard to the ultimate validity or reasonableness of the complaint. This can be distinguished from the earlier whistleblower provisions of US SOX 2002 which provided protection only when there is a "reasonable belief" that a violation has occurred.

Further, s. 922(a) allows a whistleblower employee alleging retaliation under the US DFA 2010 to bring an action directly in federal district court, which was not available under the US SOX 2002. This action may be filed either within six years after the date of the violation or within three years after the date when facts material to the right of action are known or reasonably should have been known to the employee, but not more than 10 years after the date of the violation. A successful whistleblower under the Act is eligible for relief including reinstatement, double back pay²⁰ and litigation costs including reasonable attorneys' fees.

¹² See: Doug Clark, Wilson Sonsini Goodrich & Rosati, 'Opening the Floodgates: The Dodd-Frank Whistleblower Provisions' Impact on Corporate America', <http://www.boardmember.com/Opening-the-Floodgates-The-Dodd-Frank-Whistleblower-Provisions-Impact-on-Corporate-America.aspx>

¹³ Lisa H. Bebchick, Howard Goldstein, William F. Johnson and Steven M. Witzel, 'United States: New Incentives for Foreign Corrupt Practices Act Whistleblowers: Dodd-Frank Wall Street Reform and Consumer Protection Act', 20 July 2010, www.friedfrank.com/index.cfm?pageID=22...1...2010.

¹⁴ Also known as Public Company Accounting Reform and Investor Protection Act, (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002)

¹⁵ Sections 12 and 15(d) of Securities and Exchange Commission Act 1934 respectively.

¹⁶ 263F. Supp.2d 682 (SDNY 2003)

¹⁷ See: Adam Fisher, 'Helping those who are Helping Us: Sarbanes-Oxley Whistleblower Protection and its interplay with Arbitration', *Cordozo J of conflict Resolution*, Vol.8:305

¹⁸ Dodd-Frank Act, 111th Cong. § 922(b)(1) (2010)

¹⁹ Information derived from independent knowledge or analysis, not public sources and not already known by the SEC

²⁰ Just back pay only available under US SOX 2002

Both the SOX 2002 and the DFA 2010 did not provide for non-pecuniary damages such as emotional distress the whistleblower underwent.

In addition, under the DFA 2010 whistleblowers are entitled for expanded protections such as the right to a jury trial and prohibition of mandatory pre-dispute arbitration agreements.

In the light of this legislative framework, the whistleblowers now have considerable financial motivation to report potential violations to the SEC, and as a result, companies face a significantly increased risk of investigations into their business and accounting practices. The SEC of the US reported that it is receiving numerous reports under the whistleblower program which means the companies are expected to review their corporate compliance programs and internal controls.

It is to be noted that the US DFA 2010 was criticized for encouraging whistleblower with knowledge to report to the SEC to earn handsome bounty rather than reporting internally to compliance personnel of the entity in question. As a result, on November 3, 2010, the SEC of the United States issued proposed rules for implementing the whistleblower program established by Section 922 of the US DFA 2010. Through the proposed rules, the SEC attempts to strike a balance between encouraging whistleblowers to report to the SEC and not undermining internal corporate compliance systems. In this effort, the proposed rules exclude the following persons from being eligible to receive bounties:

- those who receive information subject to the attorney-client privilege;
- attorneys and auditors who learn of potential violations as a result of professional engagements;
- those who come forward only after receiving a formal or informal request for information;
- those who obtain information in a manner that violates the law;
- persons who are involved with governmental or law enforcement;
- persons convicted of a criminal violation related to the SEC action ; and
- persons with legal, compliance, audit, supervisory, or governance responsibilities who learn of information under an expectation that they would cause the company to respond appropriately.²¹

Further, these proposed rules sought to incentivize internal reporting by providing that the date on which a whistleblower reports misconduct to internal compliance personnel, functions as the date of disclosure for reward purposes, so long as the individual reports the misconduct to the SEC within 90 days of the initial internal disclosure. However, it is envisaged that a whistleblower may prefer still to report directly to the SEC rather than provide the company with an opportunity to remediate the problematic conduct, for the reason that such step might result in a lesser penalty paid in connection with an enforcement action and, thus, a smaller whistleblower's reward.

A criticism that DFA 2010 faces under the new whistleblowing environment, as said above, is that the Act caused the creation of bounty hunters who may report minor or unimportant issues to the SEC. It is submitted that there is counter argument for this. That is, even if the complaint is minor, that may give the opportunity for the companies to nip it in the bud.²²

5. Australian Law

The Australian Securities and Investment Commission (ASIC) declares the importance of protecting whistleblowers for many reasons including avoidance of corporate failures.

The first step in Australia at federal level relating to whistleblowers protection under the corporate law regime was the discussion paper in 2002 titled 'Corporate Disclosure: Strengthening the Financial Reporting Framework' under the CLERP reforms programme. Proposal 35 in this paper contained whistleblower protection²³.

Thereafter the Australian Stock Exchange issued its recommendations in 2003 through its Corporate Governance Council.²⁴ The recommendations include fostering and encouraging whistleblowers. It also recommended a mechanism for self regulation by the companies relating to the conduct of directors and senior managers. The ASX carried out a public consultation process in this regard between November 2006 and February 2007.

Later in 2007, the CG Council released the revised Corporate Governance Principles and Recommendations with the idea of identifying measures companies should follow to encourage the reporting of unlawful or unethical behaviour and to actively promote ethical behavior and thereby protect whistleblowers, who report violations in good faith and its processes for dealing

²¹ Source: Wikipedia

²² See: Michael G. McGovern and Steven S. Goldschmid, 'United States: An Ounce of Prevention, a Pound of Cure: Mitigating the Impact of Dodd-Frank's Whistleblower Provisions', 20 January 2011, http://www.mondaq.com/search/topic_search_process.asp?itopic_id=243&iproduct_id=4&bsummary=on

²³ The ASIC submission on CLERP 9 for Proposal 35 recommended amendment to the law to provide qualified privilege and protection against retaliation in employment for any company employee reporting to ASIC, in good faith on reasonable grounds, a suspected breach of law. It also recommended that there should be an obligation on senior company officers to report suspected breach of law.

²⁴ This was 'Principles of Good Corporate Governance and Best Practices Recommendations 2003

with such reports. In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs tabled its report on the inquiry into whistleblower protection²⁵.

Now the company auditors and members of external audit teams have particular legal obligations under Part 9.4AAA s.1317 AA-AE of the Australian Corporations Act 2001 (ACA 2001) if they receive a revelation from a whistleblower. This part is titled as 'Protection for whistleblowers'.²⁶ The new provisions seem to have moved away from the sphere of company law to introduce a more direct overlap with general ethical principles.²⁷

As such, a person is protected as a whistleblower if he is an officer or an employee of a company or a contractor or their employee who has a contract to supply goods or services to the company.²⁸ The ACA 2001 restricts any retaliation against a whistleblower and gives them a civil right, including seeking reinstatement of employment.²⁹ It provides qualified privilege against defamation and precludes contractual or other remedies being enforced including civil and criminal liability for making the disclosure. This means that secrecy provisions in any employment contracts and the like will not preclude whistle blowing.

To qualify for protection, a whistleblower's revelation must be made to ASIC, the company's auditor or a member of the audit team, a director, secretary, senior manager of the company or another person authorised by the company to receive revelations of this kind. To be covered under the provisions of the ACA 2001, the whistleblower must give his name before making the disclosure, vouch that he has reasonable grounds to suspect that his revelation indicates the company or an officer or employee has, or may have, contravened or breached the ACA 2001 or the ASIC Act. Further, it is important that he acts in good faith.³⁰ Though the ACA 2001 prohibits victimization, it has not provided for any schemes for payment of bounty to whistleblowers like US DFA 2010.

While one group is pleased about the existing law, another group argue whether it is really possible to protect the whistleblowers since there is a general understanding that reporting or whistle blowing may lead to negative personal consequences. Vivienne opines that the Parliament can attempt to reduce disincentive to disclosure by providing protection for informants. He adds by questioning as to what extent is it practically possible to enforce those protections?³¹ He answers quoting Latimer³² that there is support for the proposition that legislation is not successful in encouraging and facilitating disclosures by whistleblowers. Reviewing four reported cases involving state-based whistleblower protection Acts (three from South Australia and one from Queensland), Latimer notes that the whistleblower was unsuccessful in each case in gaining the protection sought while accepting that effective whistleblower laws are needed to further the operation of a democratic society. The same writer comments later saying that any democracy is based on openness and whistleblowers are important in exposing corruption and misconduct. He adds that lawlessness, corruption and thuggery cannot properly be addressed without whistleblower protection in place and impropriety will only be revealed by whistleblowers if they have confidence that they will be protected and compensated if necessary.³³

6. The UK Law

In the United Kingdom, whistleblower protection has still not been introduced under the companies or securities legislations. Both Companies Act 2006 and the Financial Services and Markets Act 2000 are silent on this issue. Instead, Public Interest Disclosure Act 1998 of the UK (UK PIDA 1998) which is known as the whistle blowing legislation provides, in its sections 43C-H, that individuals who make qualifying disclosures of information, in good faith, in the public interest have the right not to suffer detriment by any act or omission of their employer because of the disclosure.

This is a general provision to cover malpractices in the public as well as private sector. The whistle blower can contact the FCA and he will be protected by the UK PIDA 1998. However, the Financial Control Authority (FCA),³⁴ the regulator of entire financial market including capital market shoulders the responsibility of whistleblower protection. The FCA states in its policy relating to whistle blowing that it aims to develop a culture of openness and interests to ensure that any malpractice does not occur. The FCA handles the complaints when the whistleblower discloses the information internally and concerned either by the response or lack of response, or feel unable to talk to anyone internally for whatever reason. However, the FCA should be satisfied that the informant satisfies the test for speaking to his employer as above, reasonably believes the information and any allegations in it are substantially true, and reasonably believes the FCA is responsible for the issue in question. Under these criteria, the crucial terms are malpractice, worker, qualifying disclosure and protected disclosure.

²⁵This Report titled "Whistleblower protection: a comprehensive scheme for the Commonwealth public sector" was considered by the Government with the aim of legislating to strengthen whistleblower protection.

²⁶ Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) (CLERP 9), Schedule 4. The whistleblowing provisions of CLERP 9, together with the majority of the Act's provisions, became effective on 1 July 2004

²⁷ See: Brand Vivienne, 'Sanctioned "dobbing": Whistleblowing under the Corporations Act.. www.accessmylibrary.com

²⁸ S.1317AA(1)(a) ACA 2001

²⁹ S.1317AB ACA 2001

³⁰ S.1317AA(1)(b) – (e) ACA 2001. See: www.whistleblowing.com.au

³¹ *Supra*. n .25

³² Latimer, P, 'Whistleblowing in the Financial Services Sector', (2002) 21 University of Tasmania Law Review, 39

³³ Submission by Paul Latimer, 'Improving Protection for Corporate Whistleblowers', www.treasury.gov.au/documents/1721/PDF/Paul_Latimer.p

³⁴ Formerly known as Financial Services Authority (FSA)

Malpractices covered under the statute could be improper, illegal or negligent behaviour by anyone in the workplace even if it has taken place in an overseas country. 'Worker' has a special wide meaning in the case of whistle blowing. In addition to employees it includes agency workers and people who aren't employed but are in training with employers as well. Some self-employed people may be considered to be workers for the purpose of whistle blowing if they are supervised or work off-site.³⁵

Right type of information will be considered as qualified disclosure and it is one which, in the reasonable belief of the worker, suggests that one or more of the following has been, is being, or is likely to be committed³⁶:

- a criminal offence;
- subjecting the health and safety of any individual in danger;
- a failure to comply with any legal obligation;
- damage to the environment; or
- a miscarriage of justice;
- deliberate concealment relating to any of the above.³⁷

Certain disclosures cannot be categorized as qualifying disclosures. It means, they will not be qualified if the whistleblower breaks the law when making a disclosure,³⁸ or if the information is protected under legal professional privilege.³⁹ Further, revealing it to the right person in the right way only will be protected. Making the disclosure in good faith (which means with honest intent and without malice) and in the reasonable belief that the information is substantially true only will be protected under the law.

In 2001 the FSA issued a consultation paper relating to whistleblower protection and under this too no plan has been revealed to initiate a separate whistleblower regime for companies and securities law.⁴⁰ In the said paper the FSA stated that it was in the public interest and that whistle blowing coming under unsanctioned disclosures which workers may want to make to the FCA and declared that it would not affect the normal day to day relationship between regulated firms and them. The paper further said that responding constructively to whistle blowing disclosures was a cost effective way both to contribute towards effective risk management systems in regulated firms and towards effective risk-based regulation as well. It focuses on the UK PIDA 1998 which provides protection for whistleblowers in certain circumstances and it reflects preliminary discussions with industry and worker representatives. In addition, the paper was with a view of encouraging firms to create one of their own without whistleblowing procedures adopted by the FSA

7. Position in Sri Lanka

There isn't a single hint even in the Sri Lankan companies and securities laws about whistle blowing. Sri Lanka too experienced corporate collapses. They were a private bank less than a decade ago⁴¹ and a private company just two year ago⁴² though there were few even earlier⁴³. The consequences of the second private company, namely the collapse of Golden Key, created much publicity. There were two suicides reported, by individual innocent creditors, on learning that they are not going to get their money back from the collapsed Golden Key. There were no whistleblowers during the life of the company to report to the appropriate authorities about the company's illegal business as well as its wrong accounting practices. These are not the only incidents of finance company frauds in Sri Lanka.⁴⁴

Directors never suffer consequent to a company collapse. It is the general public (either creditors or investors) who are on the streets demanding settlement after a collapse and it will be too late then. It is evident then that the collapse was unknown only to the general public, but not to directors and their close associates, and in most cases the directors and auditors themselves are the perpetrators. This was the scenario in most of the above incidents.

The above facts show that the people of Sri Lanka were not aware of malpractices. They were not educated how to make a correct selection for safe keeping of their hard earnings. The authorities were silent when all these malpractices were going on, may be because there were no informants. If there had been early detection, lives, money and mental agony that cannot be measured would have been saved. Prevention is always better than cure and therefore it is high time to have laws to encourage whistleblowers while ensuring their protection.

8. International Sphere

³⁵ S.43K PIDA 1998

³⁶ S.43B PIDA 1998

³⁷ See: www.direct.gov.uk/.../Whistleblowingintheworkplace/DG_10026552

³⁸ For example if he has signed the Official Secrets Act as part of your employment contract)

³⁹ For example, if the information was disclosed to the informant when someone wanted legal advice

⁴⁰ Consultation Paper 101 'Whistleblowing, the FSA and the Financial Services Industry' 2001. See: www.fsa.gov.uk

⁴¹ Pramuka Bank collapsed all of a sudden and with all the efforts of the government, the liabilities are still not settled. It is a known secret that the directors of the bank are leading a luxury life in an overseas country.

⁴² Golden Key Credit Card Pvt Ltd was known as a credit card company. It started accepting fixed deposit from public giving a very high rate of interest without the approval of the Central Bank, the monetary authority in Sri Lanka. The company collapsed and its liabilities only to fixed deposit holders is said to be around 130 billion Sri Lanka Rupees. The company is a member of Ceylinco Group in which other subsidiaries are doing well. The Chairman and few directors were arrested and released on bail. Cases are pending in every level of Court.

⁴³ Shabra Finance Co. Ltd., and House and Property Trades Ltd.

⁴⁴ Within the last five years two other major frauds, namely the illegal finances businesses of Daduwam Mudalali and Shakviti Ranasinghe came to light. In the year 2013, 2 more finance companies are facing serious financial crises

Whistleblower protection is a part of UN policy now. As part of his campaign to revamp the United Nations and root out misdeeds and mismanagement, Secretary-General Kofi Annan has signed a new whistleblower protection policy, to take effect on 1 January 2006, aimed at ensuring that the world body functions in an open, transparent and fair manner. "Retaliation against individuals who have reported misconduct or who have cooperated with audits or investigations violates the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view," the new policy states. The official name of the Secretary-General's Bulletin, as the policy document signed by the Secretary General in December 2005 is called, 'Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations.'⁴⁵

Further, the OECD too has revised its Corporate Governance principles to include protection for whistleblowers. The OECD approved a revised version of the OECD's Principles of Corporate Governance adding new recommendations for good practice in corporate behaviour with a view to rebuilding and maintaining public trust in companies and stock markets. The revised Principles respond to a number of issues that have undermined the confidence of investors in company management in recent years. They call on all 30 governments to ensure genuinely effective regulatory frameworks in place. In addition, companies are expected to be truly accountable. They also urge strengthened transparency and disclosure to counter conflicts of interest. One of the issues addressed by this CG policy includes Stakeholder rights and whistle-blower protection which provides that the Principles make reference to the rights of stakeholders, whether established by law or through mutual agreements and the new principle advocates protection for whistleblowers, including institutions through which their complaints or allegations can be addressed. The principles provides for confidential access to a board member.⁴⁶

9. Conclusion

Whether the law provides protection to the whistleblowers or not, they are identified as good citizens. This is evident from the publicity given to informants in many countries.⁴⁷ This shows that the public acceptance is there for a proper legal framework which is for their own safety as well as to prevent any more corporate failures. Thus, it is crystal clear that whistleblower protection and encouragement is inevitable for better governance of companies.

In the light of the above discussion the following steps may be taken by the legislature in a country where there is no whistleblower law at all within the commercial law regime.

Firstly, the regulating body should be identified, i.e., whether it is the Registrar of Companies or the Securities and Exchange Commission (SEC). SEC will suit better for this purpose in the opinion of the writer for the reason that the SEC handles similar functions.

Secondly, there should be awareness programmes in the local languages of the country. Such programmes should educate the general public and the investors about corporate governance practices, capital market activities, accepted accounting practices, money laundering and the steps that should be taken when a misdeed is found by any.⁴⁸

Thirdly, the companies should be given strict instructions by the regulating authority to follow best practices in accounting related reporting, corporate governance and other capital market related activities. This includes the board as well as the auditors. They should also be advised to have internal mechanism to deal with informants when any malpractice is reported. It should be a user-friendly mechanism. For example the Corporate Governance Code of Sri Lanka makes it mandatory for every quoted company to have independent directors in the board, at least one third of the number of directors in the board. These independent directors are the ideal persons to receive information and to take timely action. These steps will give a signal to the company management to correct their errors. An enterprise genuinely cares about doing things the right way will welcome these steps. It is submitted that companies that ignore information relating to misconduct or if they take adverse employment action against the whistle blowing employee may pay immense financial, regulatory price as well as public agitation. Instead, companies should be advised to take whistleblower information seriously, do a timely investigation and take appropriate action consultation with counsel. In the real world even the best-run companies must deal with compliance and governance challenges. How a company does so can make all the difference.

Fourthly, the law should have clear provisions to protect whistleblowers from victimization or retaliation. Taking action on anonymous reporting is dangerous in the opinion of the writer and the Australian law in the aspect of mandatory revelation of whistleblower identity is commendable. Therefore, there should be proper mechanism to maintain secrecy. If anonymous whistle blowing is allowed, it may lead to misuse the law for ulterior motives such as vengeance or jealousy.

Fifthly, there should be proper reward scheme for the whistleblowers. It shouldn't be a get rich quick dream, like the criticism under the US DFA 2010. It is the quality of the tips that matters and not the quantity. As the SEC of US has reported, awarding of reward of successful enforcement action will encourage more to become whistleblowers and at the same time companies will be compelled to adhere to best practices.

Over regulation is bad but under regulation is even worse. No regulation is the worst.

⁴⁵ www.un.org/apps/news/story.asp?NewsID=16993&Cr

⁴⁶ See: www.oecd.org/daf/corporate/principles for the text of the revised Corporate Governance Principles.

⁴⁷ 2002 Times Magazine 'Persons of the Year' award went to whistleblowers. See: www.time.com/time/personoftheyear/2002/

⁴⁸ Literacy rate is 91% in Sri Lanka in local language and awareness programmes will definitely be a success.