A Protective Legislation for Whistle-blowers to Thwart White-Collar Crimes: A Comparative Analysis of Sri Lanka and United Kingdom

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Abstract: *White collar crimes in the context of commercial law primarily carry the structures of money laundering, capital market malpractices, terrorist financing and falsification of financial statements. As these crimes pose a grave menace upon the economy of a country, Sri Lanka which is currently undergoing a massive economic crisis needs to pave its attention to prevent these crimes of privilege by safeguarding the employees who are willing to disclose but are hesitant to blow the whistle owing to the dread of retribution by their top management. In order to determine the efficacy of the law and to examine the concerns with its regulatory oversight, this article showcases the author's research findings from the assessment of the pertinent legal provisions made in relation to the security of whistle-blowers in the United Kingdom by additionally serving the purpose of comparing the British law with that of Sri Lanka to ultimately make recommendations based on the relevant provisions and to adopt them into the Sri Lankan legal system. The library research approach was applied to accomplish this objective, and the qualitative data that were retrieved from statutes, case laws, books, and journal articles proved how inadequate the statutory protections for whistleblowers in Sri Lanka are. For the fulfillment of analytical objectives, the methodology of International Comparative Research was adopted by citing UK case laws and statutes, ILO treaties, and UN conventions. Finally, the article is concluded with the principal recommendation of implementing an independent legislation on Whistle-blowers Protection modelled after the UK's Public Interest Disclosure Act 1998 by discussing certain additional recommendations to uplift the established standards laid under the provisions of Public Interest Disclosure Act.*

Keywords **:** *Whistle-blower Protection, White Collar Crimes, Disclosure*

1. Introduction

Contrary to orchestrated crime or other types of crime syndicates, white-collar crimes are being committed by individuals who seize advantages in organizations engaged in lawful commerce. It is hard to spot the wrongdoing when it's covered up by a reputable company. As a result, preventing and combating this form of crimes calls for a distinct strategy. For this purpose, disclosure from individual persons or corporate whistle-blowers is of paramount importance.

Ralph Nader originally used the phrase "whistle-blowing" in 1971 at a Conference on Professional Responsibility. The phrase "truth-telling insider" reeked of treachery, according to Nader, also stated that whistle-blowers ought to have the respect of the public despite how Americans typically referred to them as 'finks,' 'stool pigeons,' 'informers,' or ' rats within their own workplace.' (Harrell, 1983)

There are numerous definitions on whistleblowing and, subsequently, on who are referred to be whistle-blowers depending on the law of the particular state. The Council of Europe offers a broad definition in its Recommendation CM/Rec(2014)7 and accompanying memorandum, both of which

were approved by the Minister's Committee in 2014. Accordingly, it states that. “In the scope of their employment contract, whether in the public or private sector, anybody who reports or publishes information about a harm or damage to the public interest is referred as a whistle-blower.”

The Apex Court, in the case of Manoj H. Mishra v. Union of India [Civil Appeal No. 4103 of 2013] declared that the following criteria must be met in order for someone to be recognized as a whistle-blower.
(a) The primary goal of disclosing the matter should be to purge the organization and enhance the public welfare.

(b) The public interest needs to be best served by reporting such matters.

Despite the occurrence of corporate failures owing to white collar crimes in Sri Lanka, no reference on whistleblowing could be found under Companies or Securities legislations. The bankruptcies of Golden Key Credit Card Company and Pramuka Bank are two examples which could be cited. If a whistle-blower had disclosed the illicit business operations sooner, the livelihoods of huge number of bank depositors and their savings worth billions of rupees may have been saved, not to mention the employees' livelihoods as well.

The United Kingdome possesses strong roots of whistle-blower protection legislation implanted by the Public Interest Disclosure Act 1998 (PIDA), and it has been the prime source of securing whistle-blowers ever since its enactment, giving incentive to others who wish to blow the whistle as well. This research attempts to offer an equitable review by addressing both the benefits and drawbacks of the UK PIDA 1998, as well as by drawing a comparison between the established law of Sri Lanka and UK, by additionally forming the fact that Sri Lanka is nowhere close to offering protection to whistle-blowers, and thus requires to embrace the exemplary UK PIDA 1998 to seal the existing legal gap.

2. Methadology

A. Methodology

In order to gather secondary quantitative data as well as primary and secondary qualitative data, the article implemented the library research methodology. Secondary qualitative data and primary qualitative data were collected via comparative research methodology, and were mainly cited from the jurisdiction of United Kingdom. United Kingdom was chosen as the country for the purpose of comparison owing to the main reason that Sri Lanka being a country which has laid its English Law foundation based on the traditional British Law and thus makes it less challenging for Sri Lanka in the process of adopting the statutory provisions established under the British law.

B. Methods

UN Conventions, Conventions passed under ILO, UK’s Public Interest Disclosure Act 1998, Financial Services and Markets Act 2000, the Companies Act 2006 along with the Constitution of Sri Lanka were the main sources where Qualitative primary data were accumulated.

Websites, books and articles from journals were been used to gather qualitative secondary data, whilst pre-collected statistics generated via them were been used to gather quantitative secondary data.

LEGAL PROVISIONS UNDER SRI LANKAN LAW WHICH CURB WHISTLE BLOWING

S.16 of the Sri Lanka Press Council Law No.5 of 1973 renders it to be a crime indictable by a prison sentence to publicly release any news publication related to any portion of the Cabinet Ministers' proceedings, any

manuscript sent by a Minister to the Cabinet's Secretary or conversely, or of any affair purporting to be a decision of the Cabinet, ostensibly even though the publication was made in good faith with the intention of uncovering malfeasance or fraud.

Numerous statutes, notably those pertaining to financial institutions, necessitate declarations to be signed by employees promising to hold "every transaction" of that organization hidden unless transparency is mandated by the directors, by any lawful court, by the individual who is directly related to the transaction or if he/she is in the execution of his workplace duties or for the purpose of abiding by any law.(Section 61, Bank of Ceylon Ordinance No.53 of 1938)

The said law implies that employees are not permitted to expose fraud on their own discretion, but must stand in line until directed to do so by the directors or by a lawful court. But the problem is, it is very unlikely for the directors or a lawful court to be informed of white collar crimes unless exposed by an employee who is aware of such.

The exposure of fraud in the public interest is further restricted through S.45 of the Monetary Law Act No.58 of 1949 by stating that no employee shall be obligated to produce any document or book to disclose of any concern he comes across to a lawful court.

EXPLORING LEGAL RECOGNITION AFFECTING WHISTLE-BLOWERS UNDER EXISTING LAW

A. United Kingdom

Whistleblower protection is not yet recognized by the UK's Securities or Companies Acts. Both the Financial Services and Markets Act of 2000 and the Companies Act of 2006 remain mute on this matter. Alternatively, section 43CH of UK's Public Interest Disclosure Act 1998(an amendment of Employment Rights Act 1996) states that the individuals who disclose information which are qualified to be exposed in the interest of the public, the intention being a *bona fide* one (prior to 2013 Amendment), is entitled of the privilege of not being harmed by any action or default of their employer as a result of such exposure.

The 'public interest' requirement was strengthened by section 43B(1) whilst the bona fide requirement was eliminated on 25th of June 2013. As a result, a qualifying disclosure is now defined as one where the employee has a reasonable belief that such revelation is given in the public interest. Due to the fresh provision 123(6A) in the ERA 1996, which indicates that the arbitrator can decrease any grants made to the whistleblower by not more than 25% when the arbitrator identifies that the reporting was submitted bearing a mala fide intention, although 'good faith' is no longer a component of the PIDA and the ERA 1996, it does have some influence on remedies (Vinten, 2003).
In the case *Parkins v. Sodexho Ltd* [2002] IRLR 109, it was decided that a legitimate duty deriving from an employer-employer contract ought not to be differentiated from every other contractual duty. This decision elevated the argument that any grievance about a person's employment agreement can be regarded as a shielded disclosure, even if the problem does not directly affect other workers or the general public. Therefore, 'public interest' is also considered to be a subclass of the general public. However, it was determined in *Darnton v. University of Surrey* [2008] ICR 615 that an employee could be shielded even if he is erroneous but only reasonably misled.

Though the protection under PIDA would not be extended upto volunteering individuals or self-employees, the training employees, both private and public sector workers and temporary employees are offered coverage via the act regardless of years of stay or age. As

specified in S.43(B)(2), PIDA urges workers to disclose misconduct not merely within the jurisdiction of United Kingdom, but anywhere else, since it makes no difference whether the underlying collapse happened within the boarders of United Kingdom or overseas.

Under S.43(B)(3), a revelation of facts is not considered as a qualifying disclosure if the individual delivering the revelation commits a felony by executing it, demonstrating Act's attempt to draw a borderline among doing the correct thing and misleading the institution and related persons. Though the PIDA has indeed been enacted to shield whistleblowers from punitive acts, it is crucial to highlight that such protections does not apply to each and every exposure submitted and only qualifying disclosures produced in compliance with Sections 43C to 43H will provide whistleblowers with adequate coverage. Furthermore, Section 43D of the Act permits employees to raise concerns regarding the organization's misconduct and pursue legal advice on any issue thereto, including getting a counsel from Public Concern at employment, which has been approved as a recognized professional advicing institution by the British Bar Council.

In essence, the Act offers coverage in two distinct ways, one being the coverage from illegal impairment described under S.47B and the other being from unfair termination described in S.103A. The Court of Appeal in *Woodward V Abbey National PLC* [2006] IRLR 677 ruled that post-dismissal drawbacks are aswell enforceable within the Act.

The Act provides that any individual who is been exposed to such disadvantage may submit his or her grievance to a labour tribunal stating that such individual has been put through an impairment in breach of section 47B. By asserting that, whereby an arbitration panel uncovers an allegation under section 48(1)(A) the panel needs to render a pronouncement to that effect and grant a compensation to be reimbursed by the employer to the alleged victim in relation to the conduct or ommission to act to which the allegation pertains, S.49 of Employment Rights Act has added additional remedies.

Additionally, the Act's section 103A specifies that a termination of a worker will be considered unjust if the individual's only substantive cause for termination is that the person submitted a privileged disclosure. A teacher exposed the employer's malfeasance in *Bolton School v. Evans* [2007] ICR 641,CA by breaking into the employer's personal computer. Although the disclosure constitutes a protected disclosure, the jury decided not to offer whistleblower protection since the employer's primary motivation for disciplining the teacher was system hacking rather than disclosing.

Regarding compensation, S.124(1A) permits a grant of an unrestricted sum for termination in breach of S.103A or 105. (6A). In *Lingard v. HM Prison Service*, a jail official was granted an unprecedented compensation of £ 477,600 in 2003 for unjust constructive termination as a consequence of disclosing abuse and harassment in the jail. This demonstrates the manner in which the arbitral tribunals view placing a whistleblower at threat as a blatant violation for which a significant amount of damages should be awarded. The actuality that such massive grants are pricey for employers is another evidence of how gravely UK treats the protection of whistleblowers.

PIDA discourages revelations to exterior entities, despite the fact that such revelations are also shielded. Such whistleblowers must first meet specific requirements in order to be eligible for protection (AD claims whistleblower retaliation, 2015). The strictness of these conditions makes it very

evident that in the United Kingdom, media coverage is only to be used as a final option (Mazumdar, 2013), through clause 43G(3)(d). It is clear that the UK is insistent of offering internal whistleblowers the top significance. External revelations are discouraged except if the revelation is extremely significant and owing to such, the crime was not brought up at work out of trepidation of stigmatisation. Thus, it is evident that the statutes's goal is to encourage workers for internal exposures to the max (Park, 2018).

The three-tiered framework, which provides a rather more holistic strategy to the public release of relevant information regarding white collar crimes and the institutional concerns of maintaining such information confidentially, could be utilized to further explain why PIDA empowers internal whistleblowing over external whistleblowing. It establishes a tier system where each tier has more stringent requirements which must be met in order for the whistleblower to be shielded.

Since the disclosure is strictly implemented internally in the first layer, information remains within the company. If the first tier is ineffective, the second tier which is not the immediate exterior society but perhaps the proxy for it will be employed to blow the whistle. The organization is essentially discouraged by this. The second and third layers continue to be interconnected in the identical manner. Here, the third layer advances and serves as a monitor to ensure that the second tier is carrying its rectification role effectively. Thus, the 3rd tier approach primarily aims to hold organizations accountable for the manner in which they deal with complaints made against them and the people making those complaints rather than holding organizations directly responsible to public for their immoral behaviours (How does the EU Whistleblowing Directive protect whistleblowers?, 2022). It must be emphasized however that the PIDA requires no employer to establish a mandatory framework for handling complaints from whistleblowers or more precisely a protocol for doing so. Even though the employer has established a protocol, no one is particularly advised to follow it. This implies that there is no set procedure for placing a whistleblower policy into effect within the company either.

B. International Framework

- The International Covenant on Civil and Political Rights (ICCPR)

According to Article 9 of the ICCPR, freedom of speech includes the freedom to seek, receive, and transmit information of all sorts, independent of borders, verbally, in writing, or in printed form, through any means of preference. Since Sri Lanka has ratified this legal framework, Sri Lankan employees are shielded from punitive measures taken by their employers or institution for blowing the whistle, since it is the country's role to safeguard the rights granted by the ICCPR. This right comprises of the right to self-determination, the right to be free from prejudice, and the right to be free from being tortured, brutal, or humiliating punishments. However, it is to be acknowledged that the Human Rights Committee is responsible for issuing remarks on state parties' reports on the efficacious application of the covenant, but so far, it has not released remarks on the utilization of ICCPR's right to freedom of expression as a shield to safeguard whistle-blowers, but a minimum threshold of defence still exists.

- Universal Declaration of Human Rights (UDHR)

It is fair to accept that although UDHR contains no Articles explicitly connected to the safeguarding of whistleblowers, a few Articles can indeed be interpreted to offer such

connotation. As a member state of the United Nations, although compliance to the UDHR is voluntary and is non-binding, it has implemented a common criterion of accomplishments for all citizens in all countries. Thus, although not as powerful as a straight piece of legislation that offers protection and Sri Lanka could read such Articles in a way that implicitly protect whistleblowers.

Whilst Article 19 of UDHR guarantees the freedom of opinion and expression, Article 9 states, "No one shall be subjected to arbitrary arrest, detention or exile". Though arrests and exiles are too common and conventional, arbitrary arrest fits the criteria of a punitive impact a whistle-blower would face, and 'detention' here can be read as suspension from employment for disclosing.

- United Nations Convention against Corruption (UNCAC)

UNCAC was ratified by SL in 2004, and Article 33 of it provides that, every member state must take into account on incorporating suitable initiatives into their domestic laws to offer coverage against any unwarranted punishments for any individual who discloses to the proficient officials of any information relating to crimes determined in conformance with this Convention in good faith and on reasonable basis whilst the intention being a bona fide one. This plainly refers to the safety of whistleblowers. Thus Sri Lanka, being a state party, implicitly provides protection to those who blow the whistle.

- International Labour Organization (ILO)

The ILO Convention No. 158 on Termination of Employment enacted in 1982 is one of the principal instruments that expressly offers immunity for whistleblowers. This convention disallows the dismissal of an employee for raising concerns to administrative authorities over an allegation or involvement in proceedings against employers accused of violating laws. Regrettably, only 38 states have ratified the convention and Sri Lanka is not among them, which implies that this clause has no binding legitimacy over the employees and employers in Sri Lankan institutions. Nevertheless, several other ILO treaties ratified by Sri Lanka may be relevant to a certain degree, as well as on certain circumstances of whistleblowing.

1. Article 2(1) of the Forced Labor Convention No.29 of 1930 provides that the phrase 'forced labor' should imply all the services which would be levied from an individual subject to the threat of any sanction and for something that the aforesaid individual has not made himself voluntarily available. Additionally Article 25 provides that, the unlawful implementation of forced labor is a criminal offense and the ratifying states are obliged to ensure the sanctions being strictly adopted into the domestic legal system. According to the interpretation of the aforementioned two clauses when related to whistleblowing, no employee could be forced to perform forced labor given by the employer as a punishment for blowing the whistle.

2. According to Article 01 (b) of the 1958 Convention No.111 on Discrimination (Employment and Occupation), the word 'discrimination' encompasses the choice that has the impact of invalidating equal opportunity in occupation as may be ascertained by the person involved after meeting with constituent employers, trade unions and with other relevant parties. This may be taken to imply that workers from member nations would not face discrimination from opportunities which would be destructive to their employment

for the simple reason that those workers have raised the alarm about unlawful actions carried out by the institution within its doors.

C. Sri Lanka

- *Provisions Cited from the Constitution*

By inference from Article 12(1), the Sri Lankan Constitution establishes a fundamental right to be free of fraud and corruption. Articles 3 and 4 of the Constitution affirm this. This implicit anti-corruption liberation applies to the private sector organizations as well.

Article 14(1)(a) coupled with Article 12(1) recognizes the right of speech and expression, subjected to extremely limited constraints, to expose fraud. This liberty is not confined to the public sector.

Article 28 specifically imposes fundamental obligations on every citizen in Sri Lanka, including the duty to enhance the national interest, labour diligently in his chosen vocation, safeguard and preserve public property, and secure nature's resources. Fulfilling those tasks will frequently need the uncovering of malfeasance. .

The Constitution explicitly offers administrative(Article 156(1) , parliamentary (Article 42 and 43) and judicial remedies (FR jurisdiction under SC – Article 126, writ jurisdiction of COA- A.140) for malpractice and corruption, compatible with the objective of addressing white collar crimes and to safeguard the individuals involved in disclosing such conduct.

- *Provisions Cited from Other Statutes*

In the utter lack of an explicit clause to the contrary, confidentiality provisions added by Legislative acts should be interpreted as 'offering a protective cover of secrecy' solitarily for 'legal transactions' rather than for corrupt practices, especially in the context of the rights and obligations enriched in the constitution which were highlighted above.

The same principles should apply to confidentiality provisions added by regulations like Established Codes, with the exception that those should be null and void if they are in conflict with the fundamental rights established under the Constitution.

- *Clauses in Contracts*

Confidentiality clauses in contracts, whether public or private, that directly exclude disclosing white collar crimes or that are intended to be regarded in that way are unlawful under the Contract Law as it is contrary to public policy and are thus ineffective (Weeramantry, 1967).

ATTEMPTS UPTO DATE TO ADOPT EXPLICIT PROVISIONS INTO THE SRI LANKAN LEGAL SYSTEM

Sri Lanka being a nation which has experienced numerous corporate failures, it is regrettable to admit that some creditors have even committed suicide since they were unable to pay debtors because the company lacked internal whistle-blower strategies and whistle-blower shielding laws, which would have provided assurance for whistle-blowers to disclose and prevent irreparable harm from corrupt practices within the firms. When the Golden Key crashed down, the liability burden for the fixed deposits was solely totalled up to Rs.130 billion (Golden Key: System and investors to blame, 2022). It could have been avoided if a single employee raised the alarm but nobody came forward to do so owing to the anxiety of aftereffects of such disclosure.

Though Sri Lanka initiated the first ever draft policy to safeguard whistle-blowers in the year 2016, it appears to be challenging since there is a confusion between the words

'witness' and 'whistle-blower' which makes it problematic to design an effective statute because not all whistle-blowers are witnesses (Yamey, 2000).

A Right to Information Act, according to some is an important instrument in the process of combating white collar crimes and would promote good governance in private as well as public sectors (McDougall, 2002). The Right to Information Act should indeed be supplemented with a legislation to safeguard whistle-blowers, because the data gleaned through the RTI Act could essentially be utilized to rectify an unfairness or misconduct, which would necessitate that individual's protection. For the purpose of sustaining an action of a whistle-blower in the interest of public, legislation on Whistle-blower Protection is required to safeguard the courageous individuals who initiate such action. The significance of a separate legislation is not just to safeguard whistle-blowers, but equally to put the Right to Information Act into action. Nevertheless, it is necessary to highlight that, separate whistle-blower protection legislation has a significant impact when seen as a standalone statute, as a weapon to combat corporate malpractices.

As previously stated, the RTI Act protects persons who reveal information pertaining to the provisions of the Act. Nevertheless such protection is not offered to those who reveal malfeasance. Accordingly the requirement of an independent piece of legislation on whistle-blower protection applicable to employees in both public and private sectors, identical to PIDA is spotlighted by the Right to Information Commission's obligation to exercise caution when disseminating information that could impact the degree of protection granted upon the whistle-blowers.

3. Conclusion

There seems to be a comprehensive restriction on the disclosure of malfeasance and white collar crimes in Sri Lanka due to the imposition of legal provisions relevant to numerous numbers of organizations, via subsidiary statutes such as the Establishment Code which applies to all public office holders and by contractual confidentiality terms and conditions applicable to both public and private sectors. Such restrictions not only discourage whistle-blowers, but also subject individuals to disciplinary punishment, perhaps termination for being a whistle-blower. Thus, as a consequence of the existing legal context in Sri Lanka, the domestic legal system is craving for legal protection upon whistle-blowers.

The research was largely centered on the juxtaposition of Sri Lankan and British laws, with the purpose of determining the necessity for Sri Lanka to implement legal changes to safeguard its private sector and public sector employees. In the comparison process of the two jurisdictions, it was made clear that the United Kingdom Public Interest Disclosure Act 1998 is the most comprehensive legislative act related to whistle-blower protection. When the crucial provisions of the Act were compared with the prevailing implicit legal provisions in Sri Lanka, the researcher was able to determine that Sri Lanka requires to grasp a massive breakthrough and render significant adjustments for the purpose of accomodating whistle-blower protection.

Considering the arguments built in recent years, one could rely on the opinion that the PIDA is no longer up to scratch, which is partially precise, but it should be noted that certain improvements and modifications to the Act could restore its effective operation. Therefore, this research concludes its work by making legal recommendations on adopding

the British law by suggesting additional improvements to PIDA.

4. Recommendations

Initially, the regulator to be placed in charge of dealing with concerns relating to whistle-blowers when introducing a separate legislation needs to be determined, i.e., whether the Securities and Exchange Commission or the Registrar of Companies. According to the researcher, SEC will work much better for this function since it performs equivalent tasks.

- Enactment of a Separate Legislation for Whistle-blower Protection

A specific law not only aids in putting issues in context but also assists the augmentation of statutory assurance and precision. Despite receiving its fair proportion of critics, the UK PIDA of 1998 has been in effect for 20 years and serves as the model law for other developing nations including South Africa. As a consequence, it will also be an appropriate piece of statute for Sri Lanka. Furthermore, it should be emphasized that not all provisions of the PIDA could be adopted by Sri Lanka due to practical considerations. Consequently, what could be implemented precisely in practice need to be chosen and the followings were chosen by the researcher to include mandatorily.

To achieve uniformity, identical laws must be applicable towards the employees in both government and private sectors. Unlike PIDA, the extent for protected individuals should not be restricted to permanent employees but should cover contractors, consultants, former employees, interns, trainees, volunteers and part-time employees as well.

According to the PIDA, the suggested law should also recognize qualifying disclosures as outlined in its PART IVA. Moreover, it is recommended to adopt UK's three-tiered strategy into the Sri Lankan legal system, by primarily encouraging internal whistleblowing, allowing recourse to external authorized authorities and if that fails, by allowing recourse to the public, media or police. The goal of encouraging internal whistleblowing ought to be to preserve an institution's integrity.

In order to stay one step ahead of PIDA, the researcher recommends enacting a provision which encourages anonymous reporting. The statute should make it illegal to reveal the whistle-blower's identification unless the whistle-blower consents.

A protection has not been offered to the whistle-blowers prior to or throughout the process of disclosure by PIDA. Contrary to such, the researcher recommends to offer a shield for the individual who blows the whistle throughout the process of disclosure under the Sri Lankan law since a considerable amount of harm could occur even during the said period of time.

The suggested Sri Lankan statute, analogous to PIDA should offer remedial action via the employer such as monetary compensation and interim relief for wrongful termination and related matters thereto. Additionally, while granting compensation, courts must consider not merely the losses on wages but equally the injuries for mental distress and wellness.

Furthermore, by exceeding the standards established under PIDA the researcher recommends Sri Lanka to declare it a legislative obligation for employers to implant an internal whistleblowing mechanism for employees to execute within each firm during the occurrence of a white collar crime.

In the event of an unfair dismissal claim, the burden of proof must be moved from the whistleblower to the employer and such

employer must be burdened to demonstrate that the whistleblower was fired for a cause independent from blowing the whistle.

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