

WHISTLEBLOWING: A CONSTRUCTIVE WAY TO EFFECTIVE CORPORATE GOVERNANCE

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Abstract- This article attempts to analyse the pivotal role played by Whistleblowers as part of the Corporate Governance mechanism. Since the advent of the 21st century, Liberalisation and Privatisation have opened the doors of the Indian Economy to the world. With this, there has been an increase in the magnitude of business and sometimes companies employ means which are of unethical and illegal nature. Whistleblowers are defined as those persons who report such wrongdoings to higher authorities due to their moral obligations to their companies. However, they often find themselves in a situation which is characterised by victimisation, humiliation and harassment at the workplace. Hence, even if such people make such disclosures in public interest, what is the status of the whistleblowers in India in light of a number of instances where such persons have met with dire consequences? This article attempts to analyse the same while also understanding the current legal framework governing it and it also gains an insight into the laws which govern other countries.

Keywords: Whistleblower, Public Interest, Disclosure, Current Legislation, Committees.

“Corporate Governance without the avenue of whistleblowing is like a ship without a rudder, prone to veer off course and into treacherous waters.”

–Lord Justice Brian Leveson, Jurist and Legal Scholar

INTRODUCTION

Today, we face an age that is marked by a significant rise in information dissemination at unprecedented rates. As businesses and corporations grapple with the intricacies of modern governance, it is pertinent to analyse the intertwined threads of corporate governance and whistleblowing. It goes far beyond the financial metrics as whistleblowing emerges as a fulcrum for aligning operational strategies with ethical imperatives, fostering a holistic approach to organisational success. Even beyond its legal and regulatory implications, whistleblowing serves as a clarion call for corporations to uphold their commitment to ethical conduct and societal well-being. To yield a more resilient and principled business landscape, whistleblowing as a tool and corporate governance as a guide, form a crucial standpoint where ethical values are tested, reshaped, and woven into the fabric of various organisations.

The word whistleblower finds its origin from the word ‘whistle’, which when used in general parlance refers to someone who blows a whistle. Over time, the word has now evolved into a term signifying an employee who brings to attention any wrongdoings by an employer or other employees to the relevant authority or agency. The need to further amplify the importance of whistleblowing was in order to foster more enhanced corporate governance practices. Its importance in a time of shifting corporate environments and rising ethical quandaries cannot be discounted or understated.

Whistleblowing, when speaking of corporate governance, is the act of reporting any event or activity characterised by fraud, corruption, or any other wrongdoing which occurs within a company. A whistleblower may be an employee, employer, or even a Director who raises alarm about such wrongdoings or unethical activities. Corporate governance mainly stands on the pillars of fairness, transparency, and accountability and hence, whistleblowing as a tool enables a strong framework of corporate governance to operate in an organization. In today’s time, it proves to be an imperative system of ensuring that a company operates properly, in an ethical manner while also enforcing the key principles of corporate governance.

HISTORY OF WHISTLE BLOWER POLICY

For a long time, India did not have any law that dealt with the definition of whistleblower or the mechanism of whistleblower policy. In the case of Indirect Tax Practitioners’ Association v R.K. Jain¹, the Apex Court took a significant step by determining who is a whistleblower. Such a person has been defined as any ordinary employee of a public authority who raises concern over corruption or wrongdoing of an authority. Consequently, it was noted that there was an increasing recognition of the phenomenon of whistleblowers, and the revealed misconduct could be classified as a contravention of laws, rules, regulations, and/or a direct threat to public interest, as evidenced by corruption or breach of health or safety standards. The Hon’ble Court further noted that such allegations may be informed internally, that is by a person who is a part of the same organization or either externally, that is through law enforcement agencies, regulators, etc. Out of these, internal whistleblowers are more common.

India began its journey of protecting whistleblowers when in 2001, the Law Commission proposed a law protecting whistleblowers in order to combat corruption and hence a draft bill was also prepared. It was formulated as the ‘Public Interest Disclosure and Protection of Informers), Bill 2002 by taking inspiration from the provisions of the United Kingdom’s Public

¹Indirect Tax Practitioners’ Association v R.K. Jain (2010) 8 SCC 281

Interest Disclosure Act (1998), the Australian Public Interest Disclosure Act (1994), the New Zealand Protected Disclosures Act (2000) and the US (Federal) Whistleblowers Protection Act (1989).

In 2004, the Hon'ble Supreme Court further urged the Union government to establish an administrative mechanism to handle whistleblower allegations until the enactment of the law. What escalated the need to bring the protection of whistleblowers to light was the murder of the whistleblower in the case related to the Golden Quadrilateral Project by the National Highways Authority of India.

On the evening of November 29, 2003, Satyendra K. Dubey, an IIT, Kanpur civil engineer, was tragically murdered for raising concerns about the Golden Quadrilateral Project's ongoing unethical behaviour. He had produced a report alleging corruption during the construction of the motorway for the then-prime minister, Atal Bihari Vajpayee, and requested expressly that his identity not be made public out of fear for his life. This tragic incident sparked numerous conversations about the necessity to put up a system to protect whistleblowers. Therefore, as a stopgap measure, the then-NDA government passed the Public Interest Disclosure and Protection of Informers Resolution (PIDPI Resolution).

The aforementioned resolution granted the Central Vigilance Commission (the "CVC") the power to address claims made by whistleblowers. The CVC's jurisdiction extended to anyone employed by the Central Government, any business established under any Central Act or conducting business thereunder, as well as any Government enterprises, societies, or local governments that the Central Government owns or controls. However, the CVC did not apply to the activities of state government workers or corporations or other comparable organisations.

Due to the death of Manjunath Shanmugham from IIM, Lucknow, who died while working as a sales manager for the Indian Oil Corporation (IOC) and attempted to uncover an adulteration ring at an IOC gas station, this resolution was instantly criticised for being ineffectual and inefficient.

Both of these cases conveyed the pressing need to create certain protection mechanisms for whistleblowers. In 2005, India took a significant step by signing and ratifying the United Nations Convention against Corruption in December, 2005 and May, 2011 respectively. This convention covered various grounds ranging from preventive measures to different forms of corruption in the private sector.

Following this path, in 2007, a specific law was recommended to protect the whistleblowers in India by the 4th Report of the Second Administrative Reforms Commission titled 'Ethics in Governance'.² As per this report, there existed a hesitation among employees which restricted them from disclosing corruption which might exist in their organization since there was no provision which would protect their identity.³

Finally, in 2014 the Whistleblowers Protection Act, 2014⁴ was enacted, allowing anyone to file a complaint against a public servant if the complaint meets the requirements as given under Section 3(d) and such complaint is treated as a disclosure under the Act's definition of a "public interest disclosure."

As rightly said by Mahatma Gandhi, "There is a Court, higher than the Court of Justice, it is the Court of Conscience, and it supersedes all". The ability to express concerns in the form of public disclosure about potentially unethical activity that exists within an organisation is the most empowering aspect of the act of whistleblowing. This also benefits the firm because it reduces losses and escalation, prevents instances of fraud and corruption, and fosters a secure work environment for employees. A stronger push is felt when an organization's employees' conscience is protected by a robust policy structure.

For instance, in the case of Dinesh Thakur, an honest and diligent employee who was working for the pharmaceutical giant, Ranbaxy. In 2015, he disclosed illegal manufacturing practices going around the company so he gathered various evidence and documents and sent it to the U.S. Regulators due to which Ranbaxy was proven guilty. In conclusion, they settled the legal charges for 500 million dollars and additionally, Thakur was rewarded with 48 million dollars on account of his honesty about such discovery.⁵

Therefore, to encourage such disclosures and to bring an end to the opaque and irregular reporting to the authorities, the Whistleblowers Protection Act, 2014 was enacted. This was also done in the view that during that time, the arms of corruption were far and wide which had to be tackled and hence, this law proved to be efficacious to serve the needs of the country.

POLICY FRAMEWORK RELATED TO WHISTLEBLOWING

The concept of Whistleblower policy was adopted at a time when corruption reached an all-time high in the country. This practice of corruption while still being a social evil; at that time, existed freely with no one to hold a person or department fully accountable and this in turn created barriers for economic and social growth of the country. One of the main causes of such loss to public offices was felt when there were not enough safeguards for those who might want to speak up about possible unethical activities in a business. This also implied that individuals who would have significant positions in the aforementioned offices regularly abused the authority entrusted to them.

Therefore, there was a growing need to create a proper and rigorous legal framework so that corruption or the abuse of power could be prevented and detected. This was done by offering legal protection to those who revealed such crimes perpetrated by individuals or sought to avert losses to an organisation. The whistleblower mechanism was also developed to encourage

²Second Administrative Reforms Commission, *Ethics in Governance*, (2007) 4th Report, <https://darpg.gov.in/sites/default/files/ethics4.pdf>

³ *Id.* At 2.

⁴Whistleblowers Protection Act, 2014, No. 17, Acts of Parliament, 2014 (India).

⁵Kalpita Krushnakant Pandit, *Legal Protection of Corporate Whistleblowers in India*, 3.1, JCLJ 2099, 2103 (2022).

employees to realise and recognise their duty to the organization as well as the general public and hence, any disclosure made under this framework is considered as a “disclosure in public interest”.

In 1996, India took initial steps towards formulating a Corporate Governance code with an aim to promote and encourage awareness about its principles which were to be embraced and adhered to by a wide range of entities, including private and public sector entities, banks and financial institutes, which at the end of the day, operated as corporate entities. This code was specifically enforceable upon the listed companies as they were predominantly accountable to the public and additionally, the Code placed significant emphasis on safeguarding the interest of the shareholders and creditors. It is also significant to highlight that at this time, there were no clear or comprehensive definitions of whistleblowing or safeguards for those who engaged in it.

A major shock was felt at the instance of the Satyam scam which served as a wake-up call for all the authorities as it highlighted the lack of corporate governance, auditing and regulation standards and overall ethical behaviour. Hence, it prompted the introduction of the Company Bill in 2009 which marked a significant milestone with respect to Corporate Governance in India. This Bill was divided into 28 chapters with 426 sections which aimed to strengthen and streamline the principles of shareholder democracy, facilitated the integration of e-Governance into corporate processes, acknowledged the responsibilities of the company board, its directors and the senior management staff by introducing a new framework regarding the penalties and sanctions in case of breach of law. Additionally, it brought corporate regulation into line with the initiatives of the sector-specific authorities and incorporated a thorough Insolvency Code built on the latest principles recommended by the United Nations Commission on International Trade Law or UNCITRAL. This development marked a substantial improvement in India's corporate governance norms and the safeguarding of shareholders.

NAVIGATING INDIA'S WHISTLEBLOWING REGULATIONS TODAY

The murder of Satyendra Dubey and thereafter that of Manjunath Shanmugham garnered public and media attention which in turn set in motion the wheels of formulating a robust Whistleblower Policy and hence, came the Whistleblower Protection Act of 2011. Under the Hon'ble Supreme Court's directions, this Act established a Central Vigilance Commission (“CVC”), one point contact where complaints related to unethical and illegal actions may be reported. Prior to the enactment of the Act of 2011, India lacked a proper protective legislation and as a result, the informants were more than often, handed the shorter end of the stick. This also resulted in a lot of well-known people losing their lives in order to enforce transparency and accountability. For instance, Ms. Sneha Masood became a victim while seeking the truth behind the Bhopal Case and Mr. Premnath Jha whose life was under threat on a daily basis and he was ultimately killed due to the disclosures he made. However, even though the Act came into force, almost a decade later, it still proved to be inadequate.⁶

A framework for reporting corrupt and fraudulent public servant practises is provided under the Whistleblowers Protection Act of 2011, which came into effect in 2014. However, the Act only covers corporate whistleblowing and has a very narrow scope. For instance, Section 4(6) is a shortcoming in terms of complainant anonymity as it provides that one must identify themselves while filing a complaint; hence, anonymous complaints cannot be filed, which creates a hostile environment for an honest employee to make reports against unethical doings of influential post-holders in an organization. This Act also excludes the workers of the private sector under its framework which therefore makes it a rigid legislation. Hence, it must also cover the corporate whistleblowers under its umbrellas to shield such persons from dire consequences of making a disclosure.

- Regulations That Apply to the Listed Companies

The provisions relating to setting up an appropriate "Vigil Mechanism" by the firms for whistleblowing in India are covered by several provisions under the Companies Act, 2013. The provisions for inquiry, inspection, and investigation are outlined in Sections 206 to 229 of the same, while Section 177(9) read in conjunction with Regulation 22 of the SEBI (Listing Obligations and Disclosure Requirements) Regulation, 2015 mandates the establishment of a vigil mechanism for the employees and directors by every listed company and it must be supplemented with adequate protections against their exploitation. This regulation, under Clause 30 also provides that listed companies must also make disclosure of the material events which occur to the stock markets where their securities are traded under Schedule III of the Listing Regulations.

The specifics of the vigil mechanism must also be made public in the Report of the Board of Directors and on the company website, according to a reading of Section 177(9) and Rule 7 of the Companies and (Meetings of the Board and its Power) Rules 2014. According to the aforementioned regulation, in case of several fictitious complaints, the audit committee or the director designated to serve as the audit committee may take necessary action against any director or employee who files such complaints. The Securities Exchange Board of India made amendments to the Corporate Governance Principles in 2003 as a result of the Satyendra Dubey case. As per Regulation 9A (6) of SEBI PIT (Prohibition of Insider Trading) Regulations, 2015 every Listed Company is required to have a Whistleblower Policy in place and further, the employees must be made aware about the same as they would be empowered to make disclosures regarding the leaks of unpublished price sensitive information. Additionally, a "Reward Mechanism" was put into place under the terms of Chapter III A of the SEBI PIT Regulations, 2015, which became effective in 2019, to reward anyone who reported insider trading breaches to SEBI.

The Companies (Auditor's Report) Order, 2020 (CARO 2020), which intends to improve the Corporate Governance framework under the 2013 Companies Act, was recently published by the Ministry of Corporate Affairs. It must be noted that even a foreign company as specified under this Act is subject to the said order. The CARO 2020 is designed to promote transparency in the financial status of qualifying organisations by requiring increased due diligence and disclosures from the auditors of those companies.

- Laying the law for Public Servants

⁶*Id.* at 5.

The Whistleblower Act, 2014 empowers and enables a whistleblower to disclose unethical and illegal behaviours or actions which amount to misuse of power and/or authority, corruption, criminal offences committed by public officials etc. This act is only applicable on the public servants ranging from the Ministers to the lower Judiciary. As per Section 3 (d)⁷ of the Act, any person can file a complaint against a public servant is it related to any of the following grounds

- “(i) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988 (49 of 1988);
 (ii) wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party;
 (iii) attempt to commit or commission of a criminal offence by a public servant”⁸

Such complaints are termed as disclosures and they are deemed to be called ‘public interest disclosures’ under the said Act. However, investigations cannot be done in cases of anonymous complaints because the Competent Authority needs to know who the complainant is. Once such identification is made, the discretion of revealing his/her identity to the organisation rests completely with the complainant. However, the Special Protection Group (SPG) officials and employees, who are constituted under the Special Protection Group Act of 1988, are exempt from the law's requirements.

In 2015, the Whistleblowers Protection (Amendment) Bill, 2015 was introduced as a means to secure sufficient safeguards and protection against disclosures which may adversely affect the integrity and sovereignty of the nation. This bill sought to amend the Act of 2011 and it proposed several suggestions. For example, any public interest disclosure involving material of the kind listed under 10 categories shall not be the subject of an investigation by the Competent Authority. Additionally, it wanted to exempt any person from giving details or answering any questions or producing any document or assisting any inquiry if it would result in the disclosure of any information under any of the said categories. It is also pertinent to note that such safeguards were largely based on the existing safeguards provided under the Right to Information Act, 2005.

EMBEDDING WHISTLEBLOWING IN CORPORATE GOVERNANCE: COMMITTEE INSIGHTS

With the emergence of transnational and multinational corporations, the 1990s were characterised by the phenomena of liberalisation, privatisation, and globalisation, which prompted the need for Foreign Direct Investment (FDI). As a result, the need for accountability and investor protection in the nation increased. In 1996, the Confederation of Indian Industries (CII) was created and it was tasked with formulating laws for Indian Companies to move towards corporate governance. Eventually, two Committees under SEBI started building the foundation for formalising the best practices on corporate governance.⁹ However, ‘Whistleblowing’ as an important component of corporate governance was first discussed by the Narayana Murthy Committee Report in 2003.

1. Narayana Murthy Committee Report on Corporate Governance, 2003

Under the chairmanship of Sh. N. R. Narayana Murthy, the principal mentor of Infosys, the Murthy Committee was reinstated in response to the Enron scandal in the USA, and therefore, a need was felt to review Clause 49 in light of the Corporate Governance standards. Insofar as corporate governance is concerned, this Committee recommended that SEBI follow all of the Naresh Chandra Committee's obligatory recommendations. These mandatory recommendations, as per the Chandra Committee were to be followed not only in letter but also in spirit. Some of these recommendations are:-

- *“The employment and other personnel policies of the company shall contain provisions protecting “whistle-blowers” from unfair termination and other unfair prejudicial employment practices.*
- *Companies shall annually affirm that they have not denied any personnel access to the audit committee (in respect of matters involving alleged misconduct) and that they have provided protection to “whistle-blowers” from unfair termination and other unfair prejudicial employment practices. Further such affirmation shall form a part of the Board report on Corporate Governance that is required to be prepared and submitted together with the annual report.”¹⁰*

2. Dr. Jamshed J. Irani Expert Committee Report on Company Law, 2005

Under the administration of Dr. J. J. Irani, an Expert Committee on Company Law was established in December 2004. It produced a seven-part report and under Heading 35 of Chapter XII of the thirteen chapters titled ‘Offences and Penalties’, the committee suggested that a law should enable the protection to individuals who make disclosures about the offences committed by companies, thereby recognising the concept of ‘Whistleblowers’. Such provisions must also extend to the standard employment terms as well as against harassment at the workplace. Additionally, if these employees are found to be complicit, the sanctions that they may otherwise be subject to should be lessened due to their assistance.

3. SEBI Committee on Corporate Governance, 2017¹¹

In June 2017, SEBI established a Committee on Corporate Governance under the direction of Mr. Uday Kotak with the aim of improving the corporate governance practices of listed companies in India. This Committee recommended there must be a leniency mechanism in place which would provide incentives for persons who are actually a part of the offence committed but decide to disclose the same to the authorities as it would protect them from victimisation and harassment. This was suggested in

⁷Whistleblowers Protection Act, 2014, S. 3(d), No. 17, Acts of Parliament, 2014 (India).

⁸*Id.* at 7.

⁹Ajay Sharma, *Whistleblowing as a Tool to Corporate Good governance-An Indian Perspective*, 9 RJHSS, (2018).

¹⁰Securities Exchange Board of India, *The Report of Shri N R Narayana Murthy Committee on Corporate Governance* 1, 21 (2003), <https://www.sebi.gov.in/reports/reports/mar-2003/the-report-of-shri-n-r-narayana-murthy-committee-on-corporate-governance-for-public-comments-12986.html>

¹¹Securities Exchange Board of India, *Report of the Committee on Corporate Governance*, 1, (2017), https://www.sebi.gov.in/sebi_data/attachdocs/oct-2017/1509102194616.pdf

order to boost efficiency with respect to the potential violations which might be happening in a company and further, smoothen out the process of investigation. Further, it would also function as an inhibitor while promoting overall compliance with the law. Such protection, as per the Committee, would be granted and decided by SEBI on a case to case basis. In all, it was believed that this machinery would be beneficial to both SEBI and the whistleblower.

AN ANALYSIS OF WHISTLEBLOWER POLICIES OF DIFFERENT COUNTRIES

One must embark on a comprehensive analysis of the different Whistleblower policies to have an insight into the way the other Countries have attempted to approach the concept of whistleblowing. This concept is a very sensitive component of Corporate Governance and hence has divided opinions upon it. An analysis allows us to understand the diverse range of perspectives adopted in the different socio-legal settings of the various corners of the World. For this purpose, this paper will attempt a very brief analysis of the policies of mainly two countries, namely the USA (United States of America) and the UK (United Kingdom).

- **United States of America (USA)**

Over a 150-year span, the US's whistleblowing laws have changed, with several state and federal laws in place today. However, the False Claims Act (1863), the Whistleblower Protection Act (1989), and the Criminal Accountability Act, also known as the Sarbanes-Oxley Act of 2002, are the three main acts that largely deal with the aforementioned notion.

The 1863 Act empowers the private individuals to initiate a legal action against fraudulent claims which may be made against the Governmental authorities as well as instances of corporate fraud.¹²

The Whistleblower Protection Act, 1989 provided for the protection of federal employees to be from workplace victimisation after making disclosures about fraud. This federal law protects persons who are government employees who create agency misconduct reports. The hallmark provision of this Act is that it emphasises the importance of burden of proof and allows an option to the whistleblower to opt for a transfer.

With the advent of a new century, there was an increase in the number of frauds with big names such as Enron, WorldCom and Global Crossing coming up in the news. These scams have caused significant financial losses to the shareholders which amounted to billions of dollars. Additionally, a dark shadow had been cast upon the credibility of the securities market and the efficacy of corporate governance. In response to such questions, the Sarbanes-Oxley Act of 2002 was passed.

- **United Kingdom (UK)**

The Public Disclosure Act, 1988, a component of the Employment Rights Act, 1996, was passed in response to the UK's ongoing financial frauds and health and safety disasters. In nations including the Netherlands, New Zealand, and a few Australian states, this piece of law has been hailed as a cornerstone of the Corporate Governance framework. It was mainly introduced as a means to shield the employees from unjust and harmful treatment at the hands of the employers. It came into being after a series of discussions and debates in the Nolan Committee Report. It also includes contractors and LLP Partnerships and is applicable to both the public and private sectors.

A major distinctive point of this legislation is that it places specific importance on the information received through the disclosure rather than focusing on the whistleblower. However, this was the first time that protection was provided to whistleblowers.

CONCLUDING REMARKS

There was an increasing need to focus on the protection of whistleblowers in India and hence came the Whistleblower Protection (Amendment) Act, 2014. However, it must be noted that even though there are a number of protections available to informants, people still fear the consequences awaiting them as a result of the disclosures they make. The case studies are enough of an example for people to think twice before disclosing any information in public interest. Quite often, they are also termed as traitors and face victimisation and harassment at their workplace; they even face the prospect of legal proceedings which may be initiated against them, or even criminal charges which at times, they won't be able to rise above due to various constraints. These constraints may be a result of companies using their right to hold the salaries of such informants, demote them from their existing position in the company, and even the possibility of being fired from the same. Hence, these are complex consequences which definitely plague the mind of an informant before they go ahead with a disclosure.

Nevertheless, the authorities must always strive to promote this concept under the aegis of Corporate Governance. This could be done by holding regular seminars in private and public offices to educate all levels of employees as well as employers about the provisions of the 2014 Act. In addition to this, there must be stricter norms related to disclosures and the anonymity factor of the same. Further, the ambit of "competent authority" must be widened to include several more agencies which would aid the process of investigation and enforcement of the law in both, essence and practice. Another agency must also be instituted which would be responsible for protecting the whistleblowers and enable them to carry out their normal routine after making such disclosures. The State, on the other hand, must also formulate several other strategies to deal with fictitious complaints which may be a deterrent to the entire mechanism of whistleblowing. The entire process of whistleblowing is an involuted process but it will only gain importance if protection is ensured and guaranteed to those who chose the road of honesty.

¹²Kanika Chaudhary, *Whistleblowing: Comparative Analysis of India and U.S.*, 5 CASIRJ 28, 33 (2014), http://www.casirj.com/Artical_details?id=2329