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WHISTLE BLOWING: IS IT SO HARD IN INDIA?

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ABSTRACT

Whistle blowing plays an important role in any organization's corporate governance strategy as it empowers employees to act on incidences of misconduct and helps to maintain ethical environment in the workplace, while protecting profits and reputation of the organization. Whistle blowing is the disclosure of information about perceived wrongdoing in an organization, to individuals or entities. The main aim of Whistle blowing is to protect the public interest and it can be achieved by informing people or organizations that are in a position to prevent harm, to investigate or to take action against those who are responsible for wrongdoing. But is whistle blowing ethical? The act of whistle blowing can cause a conflict of interest between the personal, organizational and societal spheres. Much of this conflict arises from the context that how one views a whistleblower – as someone who is sharing knowledge of misconduct for the benefit of others or someone who is acting 'disloyal' to their organization. This paper explores how whistle blowing helps in exposing the illegal or unethical practices taking place in the organization and thus preventing the organizational ethics in addition to that it also throws light on current scenario, laws and challenges for whistle blowing in India.

KEYWORDS

Corporate Governance, Organizational Ethics, Whistle Blowing.

INTRODUCTION

In India the concept of a Whistleblower had come into existence during the Kautilya regime, who had the policy that - "Any informer (súchaka) who supplies information about fraud and if he/she succeeds in proving it, will get the reward of one-sixth of the amount in question; or if the informant is a government servant (bhritaka), he /she shall get one-twelfth of the amount for the same act."

The term whistle blowing was first coined by 'Ralph Nadar', an US civic activist, in early 1970's. According to the definitions given by various authors whistle blowing is-

Sekhar (2002) defines whistleblowing as an attempt by an employee or a former employee of an organization to disclose what he proclaims to be wrong doing in or by that organization.

Koehn (2003) whistle blowing occurs when an employee informs the public of inappropriate activities going on inside the organization.

Boatright (2003) whistleblowing is the release of information by a member or former member of an organization this is evidence of illegal and/or immoral conduct in the organization that is not in the public interest.

Whistle blowing is not the synonym of grievance (or making the complaint), usually whistle blowing issues involves risk to others (public, customers or employers) and whistle blower is a witness who discloses the sensitive information, and is not required to prove the case while grievance or complaint involves personal issues like breach of employment rights, being poorly treated etc. These issues should be handled under the grievance procedure and the complainant has to prove the case It is classified into two categories i.e.- internal or external where Internal whistle blowing means to report the higher authority about the misconduct or unethical activities, while external whistle blowing refers to informing media and society about such illegal activities.

A senior consultant Mr. Ketan Kothari who is associated with Thakker & Thakker in Mumbai believes that after discovering to unethical, immoral or illegal activities within their organization an employee's typical reactions fall into three categories. First category consists of those employees who blow the whistle; second are those who close their eyes and become neutral and the third category consists of those employees who participate and supports whistle blowers (first category). According to Kothari, most of the people in India fall into the second category, while only a few are risk pursuing and choose first or the third options.

Around the globe in most of the countries, it had been seen that the law do not protect these whistle blowers. Thus the main problem and focus of the paper is, whether one should or should not blow the whistle? Or one should save the society or save his/her own job?

IMPORTANCE OF WHISTLE BLOWERS

"Just as character matters in people, it matters in organization" says Justin Schultz, a corporate psychologist in Denver.

Today in our fast paced world every organization wants to be ahead of another and wants to earn quicker profits for which they adopt immoral or unethical practices that leads to deteriorating corporate governance and organizational values. Companies like Satyam computers services ltd., Bernie Madoff (scandal of 2008), Enron, Parmalat etc. have collapsed because they had adopted corrupt practices. In such situations these whistle blowers has been observed as the useful service providers as they bring in light the illegal and unethical practices happening in the organization like in WorldCom accounting scandal if Cynthia Cooper had not been spoken up, than the unethical practices would have continued and it may cause even more damage than the scandal did, till the time it is exposed to the public .It was also stated in one article of Fortune magazine that- " If Cynthia Cooper had been a good soldier, the whole incredible mess might have been concealed forever" Another prominent case on whistle blower role is of Dinesh Thakur who joined Ranbaxy as director and was responsible for blowing the lid on "false, fictitious, and fraudulent statements" made by Ranbaxy to drug controllers resulting in substandard and unapproved drugs. As a result the Food and Drug Administration (FDA) has increased the number of inspectors allocated to India from four in 2009 to nearly 15 at present. Whistle blowing activities should be practiced by management itself because the quality of 'honesty' brings complete dedication of employees in achieving the organization's mission and success. Therefore by encouraging the whistle blowing culture in the organization the management not only promotes transparent structure, effective communication in the organization but it also increases the employee's accountability and responsibility towards the organization. In addition to that it also creates the public confidence in the work that organization performs.

THE PRESENT SITUATION OF WHISTLE BLOWING IN INDIA

Regulations in India do not mandate companies to set up whistle blowing framework and provide protection to whistle blowers who raise their voice in good faith. Although SEBI in its circular introduced the concept of Whistle Blower Policy under Part IV of Clause 49 of Listing Agreement on 26 August, 2003 that every listed company should formulate a policy that allows employees to report about unethical practices to management without any fear of suspension or retrenchment. The revised Clause 49 which came into existence on 29th October, 2004, incorporates "Whistle Blower Policy" under non mandatory section. In fact, Satyam had a whistle blowing policy since 2005. But it is only after its unexpected scam that awakened The Ministry of Corporate affairs to set up new norms and policies and to undertake measures to cover up the loopholes to prevent future corporate frauds. The Limited Liability Partnership Act, 2008 has also incorporated provisions to protect the interests of whistle- blowers to ensure that no injustice should be done with them but according to a recent review of

whistle blowing incidents in India shows that among the whistleblowers, 62% lost their jobs, 18% felt that they were harassed or transferred, and 11% had their job responsibilities or salaries reduced and remaining 9% lost their lives.^[1]Therefore life is not the bed of roses for the whistle blowers. It requires tremendous courage and conviction. In reality there is no protection available for whistleblowers after they expose the wrongdoers so they will have to depend largely upon the goodwill of the community or some NGOs.

SOME DEMORALIZING CASES OF WHISTLE BLOWERS IN INDIA

SATYENDRA DUBEY

Talking about whistle blowing in the Indian context the first case that comes into the mind is that of NHA engineer Satyendra Dubey. He was one of those rare young men who were uncomplicatedly honest. A 31 year old civil engineer graduate, from IIT, Kanpur was working as Deputy General Manager for Centre's National Highway Authority of India. On August 2003 he was transferred to Gaya as project manager to supervise the Prime Minister's dream project in the Koderma division in Jharkhand as a part of the Golden Quadrilateral project. This project aimed to connect many of the country's major cities by four-lane highways with total length of 14,000 km. There he discovered high level corruption and mismanagement regarding subcontracting and quality control. He saw that the contracted firm, Larsen and Toubro, had been subcontracting the actual work to smaller low-technology groups, controlled by the local mafia. Dubey wrote a letter to the Prime Minister, Atal Bihari Vajpayee, detailing him about the financial and contractual misdeeds in the project. In spite of his request that his identity must be kept secret his letter was sent to the Ministry of Road Transport and Highways. On November 27, Dubey was shot dead by unidentified assailants in Gaya when he was returning from a wedding from Varanasi.

SHANMUGAM MANJUNATH

Another glaring example of the apathy faced by the whistle blowers in India is that of the Indian Oil engineer Shanmugam Manjunath. He was the marketing manager of Indian Oil Corporation (IOC) who was murdered for blowing the whistle on a scheme to sell impure gasoline. An MBA from Indian Institute of Management, Lucknow, Manjunath worked for IOC in Lucknow. While there, he had ordered two petrol pumps at Lakhimpur Kheri to be sealed for selling adulterated fuel for three months. On November 19, 2005, Manjunath was found dead in the backseat of his own car, his body riddled with at least six bullets.

M N VIJAY KUMAR

M N Vijaykumar is an IAS officer in the southern state of Karnataka. He has a penchant for disciplining colleagues who supplement their modest salaries with bribes, kickbacks and garden-variety pilferage. He exposed serious corrupt practices at high levels. His wife, J N Jayashree, set up a website detailing her husband's efforts to fight corruption, and to safeguard her husband's life.

LALIT KUMAR MEHTA

An activist in Jharkhand was murdered May 2008. He had exposed corruption in the local jobs-for-work scheme.

KAMESHWAR YADAV

He was gunned down by unknown persons in Jharkhand in June 2008. He had used the right to information law to expose a nexus between officers, politicians, contractors and middlemen in siphoning off government funds meant for irrigation work.

VENKATESH

A right to information activist from southern Karnataka state, whose questions had exposed encroachments on government land, was murdered on 12 April 2009. A local criminal leader was arrested in connection with the killing.

SATISH SHETTY

A right to information activist from the western city of Pune was killed by unidentified men while on a morning walk on 13 January 2010. His questions had exposed land scandals in the area.

SHASHIDHAR MISHRA

An activist from Begusarai in the eastern state of Bihar, was shot dead by unknown men while he was returning home on 14 February 2010. He had exposed alleged scams in welfare schemes in village councils.

VITTHAL GITE

An activist from the western state of Maharashtra was murdered on 18 April 2010, after exposing alleged irregularities in a village school.

AMIT JETHWA

An environmentalist working in Gujarat's Fir forest was shot dead on 20 July 2010. His applications had revealed illegal mining in the protected forest.

RAMDAS PATIL GHADGAONKAR

A milk seller from Maharashtra was murdered on 27 August 2010. He was using the right to information law to unearth information about illegal dredging of sand from the Godavari River.

LEGAL FRAMEWORK OF WHISTLE BLOWING IN INDIA

The Whistleblower Protection Bill was passed by Lok Sabha on December 27, 2011 and in Rajya Sabha on February 21, 2014 in order to provide protection to whistleblowers against retaliation and businesses from false or malicious complaints. The major highlights of the Bill are as follows:

1. Whistleblowers can make complaints about corruption, willful misuse of power by any person including a public servant and attempts to commit offences recognized under law by any public servant.
2. According to the act the Central Vigilance Commission (CVC) will receive complaints and assess public disclosure requests.
3. A complaint will not be inquired, if it does not contain the name of the public servant against whom the complaint is been made or if the identity of the public servant or the complainant is found to be incorrect or false.
4. The Competent Authority will not reveal the identity of whistle blower and violation of the same will be penalized with imprisonment up to 3 years and a fine up to Rs.50, 000.
5. The competent authority has the power to set up its own inquiring staff or can use the services of any other legal authority (Central Bureau of Investigation, police etc.) to investigate into complaints it receives.
6. The public official has to generate proof, that any action taken against a whistleblower was not retaliatory. The CVC also has the power to order that whistleblowers who suffered employment retaliation be restored to their prior position.
7. In case, if a company is found guilty of committing the offence then every person in charge of conducting the business of the company will be liable for prosecution and punishment till they prove their innocence.
8. If an offence is committed by anybody in a department then its Head will be considered as guilty and will be liable for prosecution and punishment till he/she proves that the offence was committed without his/her knowledge.
9. If the competent authority forwards any recommendation to the public authority then the public authority must comply with it within three months otherwise record the reasons for not doing so.
10. During the investigation process, if any public authority or official do not cooperate or refuse to provide reports when required, then competent authority will impose the penalty of Rs 50,000 on him/her.
11. While investigation process, the competent authority has the power of a civil court and all proceedings brought before it, will be deemed to be judicial proceedings.
12. Bill also seeks to protect the honest government officials and puts penalty on those who file false complaints with Imprisonment up to 2 years and fine up to Rs.30, 000.

MAJOR SHORTCOMINGS OF THE BILL

According to the views of various scholars and legal experts the current whistle blowing bill is "paper tiger" because of the following reasons:

1. The term Whistle blower, Frivolous disclosure 'Victimization' has not been defined in the bill.
2. The definition of 'Disclosure' is significantly constricted and does not include negligent acts and omissions of public servants.
3. The bill does not specify any penalty for victimization. In addition to that punishment for revealing the identity of whistleblower is insufficient.
4. Provisions made for protection of whistleblowers are inadequate. Besides, there is no separate provision for safety of women whistleblowers as they are more vulnerable to harassment.
5. The bill does not mention any penalty on anonymous complaints and disclosures.
6. There is a provision of penalty for frivolous disclosures which will discourage the persons from reporting against corruption.
7. Special Protection Group (SPG) and Private sector are not covered under the Bill. It is restricted only to the public servants or in works connected with the central government.
8. There is no provision of rewards for the whistleblowers.
9. The bill does not contain any mechanism for protecting the RTI users.
10. Period for filing a complaint increased from five to seven years though it is inadequate for cases involving gross negligence pertaining to public interest, safety and health.
11. Even it is not mention in the bill that what will happen to a case if the inquiry does not complete within the 3 months because such cases may lapse due to doctrine of laches.

THE FUTURE FOR WHISTLE BLOWING IN INDIA

There is a need of concrete, holistic approach which ensures that the whistleblower is not harmed by the wrongdoers he/she is targeting and would give more individuals the courage to report about the unethical practices they see. Following are some of the principles for whistle blowing legislation based on international best practice that should be considered while developing new legislation.

1. **BROAD COVERAGE**
The law should have a broad coverage. It should apply to public, private sector employees and also to national security cases.
2. **PROTECTION AGAINST RETRIBUTION**
The law should also have a broad definition of retribution that covers all types of job sanctions, harassment, loss of status or benefits and other detriments.
3. **PROTECTION OF FREE SPEECH**
The law should recognize that there is a significant importance of free speech whistle blowing. Public interest and harm tests should be applied to each release of any information that could have been released under FOI cannot be sanctioned.
4. **CONFIDENTIALITY**
The law should allow for whistleblowers to request that their identity should remain confidential as far as possible. However, the body should make the person aware of the problems with confidentiality and also make clear that the protection is not absolute.
5. **COMPENSATION**
Compensation should be broadly defined to cover all losses which should also include loss for pain and suffering incurred because of the release and retaliation.
6. **REWARDS**
Whistleblowers should be rewarded for making disclosures in cases that result in important recovery of funds or discoveries of wrongdoing.
7. **DISCLOSURE PROCEDURES**
The law should set up straightforward procedures that easily allow whistle blowers to disclose about the wrongdoings outside the organization to legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and reduce misunderstandings.
8. **NO ENDORSEMENTS FOR MISGUIDED OR FALSE REPORTING**
The law should not impose penalties against whistle blowers who make false disclosures, only in case of deliberate falsehood, normal sanctions such as a loss of job should be sufficient.
9. **EXTENSIVE TRAINING AND PUBLICATION**
The government and non-government organizations should adopt policies to encourage disclosures as non-confrontational processes and this effort should be supervised by a high level manager. Even they should provide training to their employees.
10. **REVIEWS AND DISCLOSURES**
The law should make such provisions that every government and non-government organizations should be required to publish annual reports regarding the disclosures and outcomes etc during that period.
11. **BUILDING A CULTURE OF TRUST AND OPENNESS**
For effective implementation of whistleblowing policy, an organization must develop the culture of trust and openness that comes from the very top.

CONCLUSION

Corporate whistleblowing, globally considered as one of the best tools to ensure good corporate governance, but it is still in its infancy in India. Many of the companies in India have a whistle-blowing policy in place but they use it as a "good to comply with" measure under Clause 49 recommendations. . Therefore with the growing number of scams related to corrupt practices in corporate there is a need for swift action from government in the form of stringent laws. Although Whistle Blower Protections Bill is one such initiative in this direction which is also not free from its inherent faults. But again its success depends upon its effective implementation, which only the coming time will tell.

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