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WHISTLEBLOWING IN INDIAN PERSPECTIVE: A STEP TOWARDS BETTER CORPORATE GOVERNANCE

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ABSTRACT

Whistleblowing has emerged on the forefront of corporate governance. It refers to blowing the lid off the rampant malpractices prevailing in today's times. This paper examines why a need was felt for whistleblowing in India, relevant legal provisions and certain Indian cases (like Indian Oil Corporation, National Highway Authority of India, Ranbaxy, National Rural Employee Guarantee Act, Infosys et cetera) that dramatically led to a paradigm shift in the arena of whistleblowing. Recommendations in Indian context to encourage future whistle blowers are also provided. In the face of the dynamicity of business conditions, whistleblowing policies backed by the top echelons of management and government will usher in an era of true corporate governance.

KEYWORDS

ethical environment, protection, retaliation, whistleblowing.

1. INTRODUCTION

According to Thomas M. Devine, "Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private" (1999, p. 533)

Ralph Nader coined the term 'whistleblower' in 1970s. Essentially, blowing a whistle by a referee indicates foul play. Based on the same line of thought, a whistleblower can be defined as a person who exposes misconduct, alleged dishonest or illegal activity occurring within an organization. (Wikipedia)

2. REVIEW OF LITERATURE

According to Ahern and McDonald, whistleblowing refers to an attempt made by a current or former member of an institution to forewarn the higher authorities or the public about a wrongdoing kept in veils by the organization. (2002) Whistleblowers may pose as a threat to an organization's hierarchy, authoritative structure, harmony and public image. (Weinstein, 1979) Those who report breach of law to the administrators or the government are likely to encounter major threats and hence, the individuals who wish to report alleged misconduct should take a halt and ponder deeply about the possible outcomes before informing the authorities. (Brewer, 2005)

The employees should be encouraged to make timely disclosures that safeguard the interests of the organization and such reporting will act as a deterrent for people who intend to defraud the organization. (Vinten, 2000) Camerer explains that whether the whistleblower will be considered as a wrongdoer or as a do-gooder is dependent on the organization's own culture, regardless of whether the whistle has been blown through internal channels or through external channels. (1996)

Whistleblowers often face retaliation in the form of:

- putting the spotlight on the whistle-blower
- being threatened into silence, isolation or humiliation
- setting them up for failure
- prosecution
- elimination from their jobs
- debilitating their careers (Kaplan & Kleiner, 2000)

An organization will discover through the cost benefit analysis that the positives associated with whistleblowing like employee morale and motivation, avoidance of costly fines and lawsuits outweigh the costs of putting in place and effectively implementing a whistleblowing mechanism. (Paul & Townsend, 1996)

3. IMPORTANCE/RELEVANCE OF THE STUDY

This paper will help to understand the framework of whistleblowing in India, with special lessons from leading cases of whistleblowing in the Indian context. This study also attempts to fill the gap in research by suggesting further recommendations to encourage whistleblowers.

4. OBJECTIVES OF THE STUDY

The basic objectives of this study are listed as follows:

- To understand the underlying concept of whistleblowing.
- To examine the need of whistleblowing for effective corporate governance
- To analyze the major whistleblowing episodes that ultimately led to a change in the structural framework of the whistleblowing policy in India
- To highlight the legal provisions of The Whistleblowers Protection Act, 2011 and The Whistleblowers Protection (Amendment) Bill, 2015

5. RESEARCH METHODOLOGY

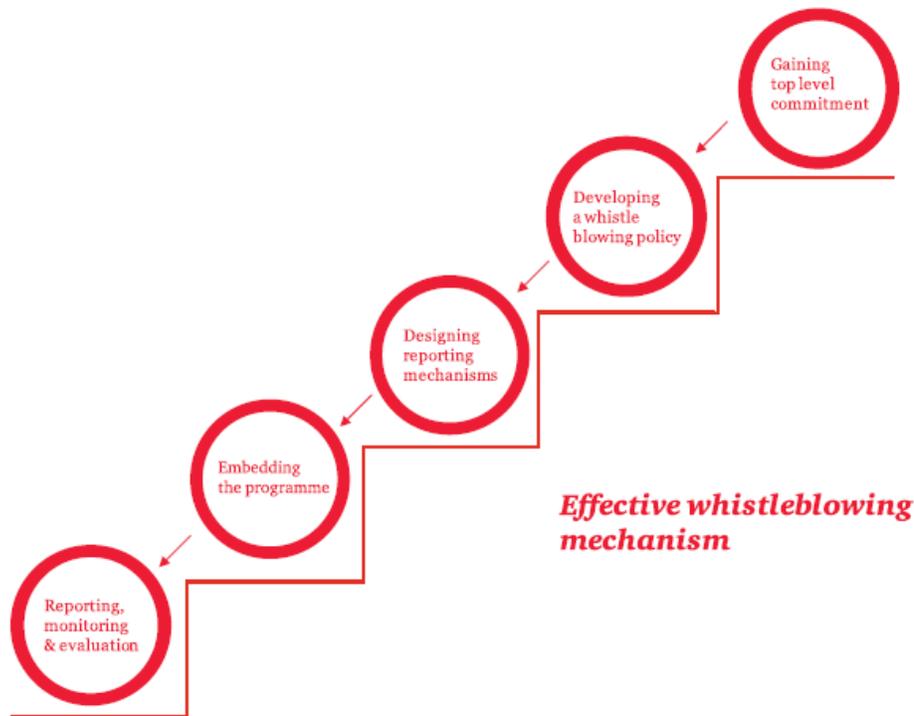
To delve deeper into the topic of whistleblowing with reference to Indian context, secondary data has been extensively studied and review of literature is done for the purpose of research analysis. Various articles, magazines, newspapers, journals, websites and books have been consulted to collect information for the study.

6. NEED FOR WHISTLE BLOWING IN INDIA

Companies have to operate in a highly competitive and a dynamic environment. The past decade has been full of countless cases of malpractices, both in the corporate sector and in the government sector, which has finally led to ushering in of a new era of corporate governance with whistleblowing playing a key role in bringing about the requisite change.

It forms a key pillar of a sound corporate governance framework. The word 'whistleblowing' often carries a negative connotation in the minds of the people at large, who perceive the whistleblower as an informer, betrayer or a snitch. It's high time that we encourage the act of blowing a whistle because it will prevent corruption, wrongdoings and frauds in the time to come.

FIG. 1



Source: PWC Report- Whistle blowing: Effective means to combat economic crime, 2011

7. RELEVANT LEGAL PROVISIONS REGULATING THE WHISTLEBLOWING POLICY IN INDIA

TABLE 1: THE WHISTLE BLOWERS PROTECTION ACT, 2011

DETAILS	DATE
Introduction of the Bill	August 26,2010
Lok Sabha	December 27,2011
Rajya Sabha	February 21,2014
President’s Assent	May 9,2014

- The Act establishes a mechanism whereby complaints are received regarding disclosures of corrupt practices, abuse of power and it provides safeguards against victimisation of the whistleblower.
- Every complaint must include the identity of the complainant.
- The Central Vigilance Commission (CVC) shall conceal the identity of the complainant. In cases where it becomes necessary to reveal the identity, it can be done with the prior written consent of the complainant.
- The disclosure can be made upto seven years from the date of happening of the alleged event.
- This Act extends to all the companies as well.
- It penalizes any person who malafidely reveals the identity of the complainant. The Act also prescribes penalties for knowingly making false complaints. (Verma, 2014)

THE WHISTLE BLOWERS PROTECTION (AMENDMENT) BILL, 2015
 This bill has been passed by Lok Sabha but is pending in Rajya Sabha currently. As per this amendment, The Official Secrets Act, 1923 will apply to the whistleblowers.
 The government has also included 10 exemptions in Section 4 (1A), thereby ensuring that any matter certified by it as not being in "public interest" or affecting the "sovereignty and integrity of India" or related to "commercial confidence" or "information received in confidence from a foreign government" will remain outside ambit of inquiry under the law. (Sharma, 2015)
 This amendment is regressive in nature and may act as a deterrent for whistleblowers because of the fear of prosecution under the Official Secrets Act.
Clause 49 of the Listing Agreement also mandates listed companies to establish a vigil mechanism for whistleblower protection, with direct access to the chairman of the Audit Committee.

8. LEADING INDIAN CASES OF WHISTLEBLOWING

NATIONAL HIGHWAY AUTHORITY OF INDIA

Satyendra Dubey (1973-2003) was a project director in the National Highways Authority of India (NHAI) at Koderma. The 30-year old civil engineering graduate from IIT Kanpur was working on the 60-km Aurangabad-Barachatti segment of the Golden Quadrilateral project in Bihar wherein he spotted huge financial irregularities in the way the construction work was carried on. Dubey discovered that the contracted firm, Larsen and Toubro, had been subcontracting the actual work to smaller low-technology groups, controlled by the local mafia. When he wrote to his boss, NHAI Project Director SK Soni and to Brij Satish Kapoor, an engineer overlooking the supervision, no action was taken. At one point, he forced the contractor to rebuild six kilometres of under-quality road which allegedly came as a huge loss for the road contract mafia. Dubey sent an anonymous letter to the Prime Minister’s Office on November 11, 2003 with his CV that was attached separately, telling the then PM Shri Atal Bihari Vajpayee

how a lot of contractors had "submitted forged documents to justify their technical and financial capabilities" to win bids for the contract and he requested the PMO not to reveal his identity. But his request for anonymity was apparently not heeded to and the letter was forwarded along with his CV to the Ministry of Road, Transport and Highways. He was ultimately shot dead in Gaya on November 27, 2003. Satyendra Dubey was honoured with the Whistleblower of the Year 2004 Award from the London-based group 'Index on Censorship'. He was also nominated for the Padma Shri Awards in 2011. (Wikipedia)

His letter highlighted the following key points:

- The "big contractors have been able to get all sorts of help from the officials in NHAI and even the note sheets carrying approval of Chairman have been leaked outside."
- NHAI officials have shown great hurry in giving "mobilisation advance to selected contractors. The entire mobilisation advance of 10% of contract value (which goes up to Rs 40 crore in certain cases) has been paid to the contractors "within a few weeks of award of work" without follow-up to ensure they are "actually mobilised at site with the same pace."
- NHAI is going for international competitive bidding to procure the most competent civil contractor for execution of its projects. When it comes to the actual execution, it is found that most of the works (sometimes even upto 100 per cent) are being sublet or sub-contracted to small petty contractors who are not at all capable to execute such projects and ensure the quality of construction" (Outlook India, 2003).

INDIAN OIL CORPORATION

Shanmugam Manjunath (1978–2005) was a manager working for the Indian Oil Corporation (IOC). He was murdered for sealing a corrupt petrol pump station in Lakhimpur Kheri, Uttar Pradesh. The 27-year-old who completed his MBA from IIM Lucknow had to pay with his life for trying to ensure that people did not get adulterated fuel.

Manjunath had ordered sealing of two petrol pumps for selling adulterated fuel for about three months. When the pump started its operations again after a month in November 2005, he decided to conduct a surprise inspection and unearthed gross anomalies in the supply of petrol at the filling station. He recommended strict penal action against the owner and was later shot dead by the owners' son, Pawan Mittal.

In place of laurels pinned to his chest, all he got were six bullets riddled through his body that silenced him forever. (Siddiqui, 2005) In December 2005, the Centre asked the state governments to provide adequate police protection to oil company officials for carrying out inspections at petrol pumps to avoid cases like that of Manjunath. (Times of India)

Indian Oil Corporation paid ₹2.6 million compensation to the Manjunath family. This incident inspired IIM students to set up the "The Manjunath Shanmugam Trust", with the immediate agenda of fighting his murder case and a broader objective of improving governance in India. The Trust currently runs India's first National Right to Information Act Helpline.

In March 2007, nearly sixteen months after the murder, all eight accused were found guilty by the Lakhimpur Kheri Sessions Court. The convicts challenged the verdict in High Court and thereafter in the Supreme Court. On March 11, 2015, the latter dismissed all the convicts' appeals and they are presently serving their life sentences. A biopic on Manjunath's life, titled 'Manjunath', directed by Sandeep Varma, was released in May, 2014. (Wikipedia)

RANBAXY

In 2004–2005, Dinesh Thakur and Rajinder Kumar, two Indian employees of Ranbaxy, blew the whistle on the company, accusing it of fabricating drug test reports. When Dinesh Thakur reported his findings to his superiors, his evidence was blindsided and he was accused of watching pornography on his company computer. He was forced to resign in 2005. Thakur escaped from India to the United States of America and contacted the Food and Drug Administration (FDA) which started investigating his claims. (Wikipedia)

He gave evidence to the US authorities about the company falsifying drug data and violating good management practices, triggering a massive investigation that resulted in the drugmaker pleading guilty to felony charges related to the manufacture and distribution of certain adulterated drugs made at two of its plants in India. The company has agreed to pay \$500 million to resolve false claim allegations. This is the largest financial penalty paid by any generic drugmaker in the US for violating the provisions of the federal Food, Drug and Cosmetic Act (FDCA). (Das & Rajagopal, 2013)

Thakur's fate has been quite different in comparison to most whistleblowers. Not only is he alive and hale and hearty, he also received a massive sum of Rs 244 crores (\$48.6 million) under the False Claims Act (As per the Act, the whistleblower may be entitled to a percentage of the fine imposed on the perpetrator.) He has stated that he now funds a new venture to help companies comply with regulators. (Srinivasan, 2014) The Taxpayers Against Fraud Educational Fund (TAF) presented Dinesh Thakur with the "Whistleblower of the Year" award in Washington. (Lakshman, 2013)

In an interview with The Economic Times, Thakur said: "If we want corporate frauds in the country to be reported, the government must ensure a strong framework for whistleblower protection, both in terms of the information and individual sharing it," He explained that the natural response of the target company, when an insider turns into a whistle-blower is retaliation. "In India, we have seen many cases, where people who have attempted to blow the whistle have faced threats and worse. In that context it is important that the whistle-blower and his family have a basic sense of security to continue to cooperate with the government to establish a fraud." (Das, 2013)

NREGA

Lalit Mehta (1972–2008) was a prominent member of The Right to Food Campaign and worked in the Vikas Sahyog Kendra (VSK) in Palamau District in Jharkhand. He was an RTI activist and had been working hard to make sure that the National Rural Employment Guarantee Act (NREGA) reaches the maximum people in the area.

Lalit was brutally killed near Palamau on May 14, 2008 when he was on his way home. A major audit was scheduled to take place just after the day he was murdered. His body was found by the Chhatrapur Police in a mutilated condition with a belt around his neck, suggesting possibilities of strangulation. His face was smashed in order to deform it beyond recognition. The contractor lobby and the corrupt government officials perceived him as a threat.

Lalit first thwarted corrupt contractors and government officials in 1990 by developing a software to prevent overestimation of civil works under the Sukha Mukti Abhiyaan funded by the state government. The software made it near-impossible for contractors and a section of government officials to make money fraudulently. With the help of the community he built 125 check dams as part of a long-term strategy to overcome droughts in the district ... He came up with damaging facts about the Rs 5 lakh nregs[sic] project to build a pond in the block. These facts presented during the audit have been compiled in a cd. It reveals that the project was bogus. During the audit it was found that the roster contained names of 108 people but only eight of them were employed. Villagers' signatures on the payment register were forged. Job cards were made in the name of 10 villagers who had migrated long ago. In one case the card was issued in the name of a dead person. (Gupta, 2008)

In July 2008, a CBI probe was ordered into the Lalit Mehta murder case by the Jharkhand government, in the face of strong protests and public rallies.

It [NREGA] places a ban on contractors and their machines. It mandates payment of statutory minimum wages and provides various legal entitlements to workers. It visualises the involvement of local people in every decision — whether it be the selection of works and work-sites, the implementation of projects or their social audit. All of this is obviously incompatible with programmes where the main goal was, in effect, the maximisation of profits of the contractor. But even after the enactment of NREGA, things have been slow to change at the grass-roots... It is in this context that activists like Lalit become a major threat for local vested interests, all part of the long chain of recipients of sleaze-money siphoned out of NREGA. (Shah, 2008)

"National RTI Forum has honored his martyrdom by naming an award after him as Lalit Mehta RTI Gallantry award." (Wikipedia)

Years later, Niyamat Ansari, a worker with Gram Swaraj Abhiyan and the resident of Kope Gram Panchayat in Manika Block, Latehar District, was also beaten to death. He worked for the implementation of NREGS (National Rural Employment Guarantee Scheme). On February 20, 2011, he lodged an FIR against Kailash Sahu, the former Block Development Officer (BDO) of Manika, in connection with embezzling Rs.2.5 lakhs from the NREGS funds. On March 2, a group of unidentified

men picked up Ansari from his house and beat him up mercilessly. Before he could be rushed to the nearest hospital, he succumbed to the injuries. He had also been subjected to a lot of attacks in the past and even received some death threats. (NDTV, 2011)

INFOSYS

Jack B. Palmer was working as a project manager with Infosys when he filed a lawsuit against the company in February 2011 in USA, alleging that it misused US B1 visas. He accused Infosys of using "temporary visas to bring Indian staff to the US to work on long-term contracts." (Information Age, 2012) The company made use of B1 business visitor visas which were comparatively cheaper and easier to acquire vis-a-vis the more expensive and tedious H1B skilled workers' visas.

Mr. Palmer's lawsuit, claiming he had been punished and sidelined by Infosys executives after he alleged witnessing widespread visa fraud, was dismissed in August 2012 by a federal judge. Infosys had asked the US court to not consider emails submitted by Mr Palmer as evidence in the visa fraud case, alleging that the documents were forged.... "They wanted to buy my silence, and I wouldn't do it," he said. "I never did it for the money. I did it because they were violating the law." (NDTV, 2013)

On 30th October 2013, Infosys agreed to pay \$34 million- largest immigration penalty ever levied against a company, to settle allegations that it had engaged in visa fraud. Infosys denied committing any fraud but acknowledged it had made mistakes on its I-9 worker-verification forms. (Jordan & Schectman, 2013)

In 2014, Palmer filed a fresh lawsuit against Infosys in New Jersey "seeking reappointment and compensation for alleged wrongful termination." (Thoppil) Previously, in 2012, he had lost his case in the Alabama state court wherein he accused the Indian outsourcing giant of harassing him and subjecting him to retaliatory measures, after he blew the whistle on the company's rampant visa fraud.

An Infosys spokeswoman said in a written statement: "Mr. Palmer resigned in 2013 November and released the company from the charges he has alleged in the complaint. We believe this is without any legal merit and will vigorously defend this complaint."

TABLE 1: LEADING INDIAN CASES OF WHISTLEBLOWING

Year	Organisation's name	Name of the whistleblower	Summarized particulars
2003	National Highway Authority of India	Satyendra Dubey	Exposed rampant and deep-rooted corruption in the construction of Golden Quadrilateral project.
2005	Indian Oil Corporation	Shanmugam Manjunath	Sealed a corrupt petrol pump station in UP during a surprise inspection.
2005	Ranbaxy	Dinesh Thakur	Found evidence against Ranbaxy of fabricating drug test reports and reported it to FDA
2008	NREGA	Lalit Mehta	Found expenditure records revealing high-level corruption in NREGA by contractors
2011	NREGA	Niyamat Ansari	Lodged an FIR against the former BDO, pertaining to embezzlement of funds
2011	Infosys	Jack B. Palmer	Filed a case against the outsourcing giant for rampant misuse of B1 visas

The recent Vyapam scam in India (2015) is a poignant account of the vulnerabilities of the whistleblowers. Many of them have been found dead under mysterious circumstances. It's high time for the government to walk the talk.

9. CONCLUSION AND FURTHER RECOMMENDATIONS IN INDIAN CONTEXT

The whistleblower faces an ethical dilemma (to tell or not to tell) as he has to weigh the retaliatory forces (isolation, harassment, difficulty in finding jobs etc.) that arise as a result of his disclosure with his moral sense of right and wrong.

Whistleblowing should not be looked down upon as a sign of negative deviant workplace behaviour. Reporting malpractices within the organisation does not clash with the principle of organisational loyalty in any way.

Organizations should realize that a whistleblowing policy should not be implemented merely on paper, but in its true spirit. The company must foster a positive environment that encourages whistleblowers as it will help to minimise frauds in the long run and also enhance its goodwill.

1. Companies should build trust amongst the employees assuring them that their tips will remain confidential and anonymous.

2. The helplines should function 24 X 7 X 365, with proper language and technical support of trained call handlers.

As per Deloitte Forensic's survey report, "Lead by example: Making whistleblowing programs successful in corporate India", our country has achieved considerably little success in this area. One of the key reasons attributable for such a scenario is the casual 'tick in the box' approach that companies adopt while planning and implementing a whistleblower program. (Business Standard, 2014)

In order to counter wrongdoings and acts of malfeasance, holistic laws need to be put in place but it is only through effective implementation that we can usher in a new era of change. One key shortcoming in The Whistleblowers Protection Act is that the power of the CVC is limited to only making recommendations to the relevant public authority. Also, the Act has a limited definition of disclosure and does not define victimisation.

Currently, there is no witness protection program for whistleblowers in India despite strong recommendations by The Law Commission. The government needs to strengthen The Whistleblowers Protection Act by ensuring absolute protection of the witnesses.

Moreover, the upper echelons of management need to oversee that vigil mechanisms put in place by the company are not just 'paper tigers'.

A commendable step in the right direction has been taken by the Indian government to bring back black money and protect the Swiss whistleblower Herve Falciani: A "cash reward" is offered by Indian government to a former HSBC bank employee-turned-whistleblower Herve Falciani in exchange for any fresh information about its citizens holding illegal accounts in various tax haven countries, including in Swiss banks, after he hinted that he possessed additional information on the lines of the list of 628 Indian entities holding accounts with the bank in Switzerland's Geneva. As per rules, up to 30 per cent of the tax amount realised could be offered to whistleblowers who provide specific information on illegal funds. The Finance Ministry said in February 2015 that the Income Tax department was already in touch with Falciani, "who apparently brought out the names of persons holding undisclosed bank accounts in HSBC, Switzerland." (The Economic Times, 2015)

On 30th July 2015, the Delhi government launched the country's first witness protection scheme called as the 'Delhi Witness Protection Scheme, 2015' to encourage witnesses to come forward by relocating the person, changing their identity, installing security devices and providing escort vehicles.

Amidst pandemic cases of deaths of whistleblowers like Satyendra Dubey, Manjunath, Lalit Mehta, such exemplary steps are the need of the hour. A strong whistleblowing framework needs to be complemented with an efficacious witness protection scheme, only then can we dream of a shining India.

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