

ISSN :2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 6

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 5 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ANALYSIS



Dr. Namita Jain

Head & Associate Professor



School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



INTERNATIONAL JOURNAL

Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench.

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN

2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

A large, semi-transparent watermark of the IJLRA logo is centered on the page. The logo features a stylized emblem at the top, followed by the acronym 'IJLRA' in a bold, sans-serif font, and the full journal title 'INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS' in a smaller, all-caps font below it.

IJLRA
INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

Whistleblowing as a Method of Corporate Governance: A Critical and Comparative Analysis

Authored By - Padma Singh

Abstract

Robust whistleblowing policies are good tool for corporate governance of a company but it can also lead to deficiency of trust and relations between various members of the company and the board and other interested parties. The information with the companies is very sensitive and needs to be duly protected. Although it seems to be a good measure, it comes with its own foes. This paper aims to explore the policies relating to corporate whistleblowing and implementation by the company to optimize corporate governance. The possibility that whistleblowing policy can also be looked at critically and exploring its criticisms. This also discusses that whether Corporate Governance failures responsible for increasing corporate fraud in India. While providing an overview of whistleblowing ideology in corporate management, the article also considered a proposal that may be created to adopt a whistleblowing procedure in the country. The purpose of whistleblowing in this context is to create a systematic framework for stronger corporate governance regulations, hence whistleblowing in general laws is only briefly discussed while focusing on whistleblowing in corporate entities. It has been further suggested that strong internal channels should be made and whistleblowing should be kept as a last resort. There is also a question of ethics and morality, which of course is very subjective in nature. It has been continuously asked that whether whistleblowing will stand on moral grounds. The answer is both affirmative and negative in some aspects. The paper also deals with how it has failed to achieve the smooth flow of information between the board and the management. The present study will be focusing on doing a comparative study of the current legislative framework regarding corporate whistleblowing protection in India and in the U.S.A..

Key words- Whistleblowing, Corporate Governance, Companies (Auditor's Report) Order, 2020 ("CARO 2020"), The Companies Act, 2013, the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR")

Introduction

Transparency and accountability have been held of considerable interest in the corporate culture and has grown interest in public life as seems like a requisite in these modern times. Whistleblowing is considered to be a technique which helps in 'blowing the whistle' as the name suggests of the frauds or any illegal functioning of the corporation. It has been favored a lot as a tool of eradicating the illegal and fraudulent activities which are going on in the company. Whistleblowing is limited in nature and is not at all uniform. The policies differ from company to company as there are no set laws in India for corporate whistleblowing.

Corporate whistleblowing forms an important part of the corporate governance. It aims to create transparent and effective redressal environment at any corporation. It is defined as the warning that employees provide to the corporation about the misconduct that exists within an organisation or an illegal act. It can be understood as an effort that is made by the existing or former employee of an association or a corporation or the public regarding certain wrongdoings on the part of the company that is hidden by the company. It can also be defined as the disclosure by a current or a former employee of the illegal or the illegitimate practices in an organisation to the person in authority in an organisation or outside of it also who is having the power to take further action on it.

Whistleblowing is an effective method for ensuring corporate governance in today's business environment. Corporate governance can be effectively implemented in any organisation by ensuring the independence of board, appointment of auditors, shareholder activism, and redressal of independent complaints, and ensuring protection is provided to whistleblowers. The International Labour Organisation defines whistleblowing as the reporting of illegal, dangerous or unethical practices of the employers by the employees or former employees.

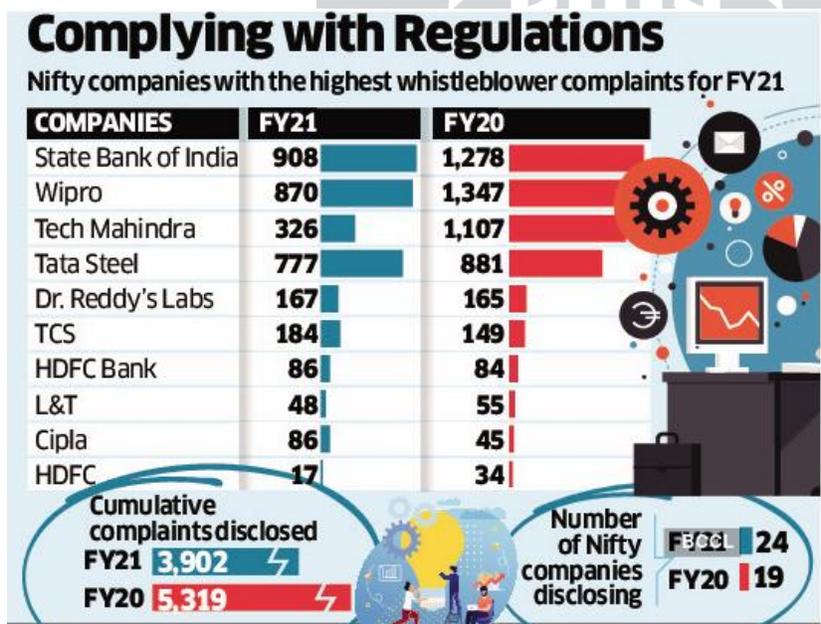
The need for corporate governance is also more in today's times because it helps in ensuring that there are less instances of corruption and there is effective regulation and it also clearly defines the duties of every officer of the company and encourages them to keep in mind these duties while performing their functions. The main principle behind the corporate governance is ensuring the protection of the interests of the shareholders as they are the true owners of the corporation. It includes in itself the ethical business conduct that must be followed by a company and the division between the private and corporate funds in the affairs of the management of the company so as to ensure the benefit of shareholders.

The need for an effective corporate whistleblowing policy also becomes important because it can

act as a means to avoid larger catastrophes and it also helps in ensuring trust amongst the important counterparts in a company and creating a transparent environment and also instilling a sense of protection in the minds of the person who come forward to point to illegal or improper activities in an organisation.

Over 50 countries now protect whistle-blowers. Others have adopted protections through labour legislation or public employment guidelines. Few countries have comprehensive whistleblowing legislation. On the one hand, they try to change the culture of organisations by making it acceptable and facilitating the disclosure of information about negative activities such as corruption and mismanagement; on the other, they try to protect people from being sanctioned for disclosing information. It's hard to tell if these laws function. Few cover the entire public sector or certain sorts of misbehaviour. In most nations, there is ample evidence of retaliation against whistle-blowers, which causes many workers to remain silent.

But there is good news. Whistle blowers are also being viewed more positively as a crucial aspect of fighting corruption and averting mismanagement, abuses, and accidents. The below table displays the number of complaints that were received in the Financial Year 2021:¹



Source- The Economic Times

¹The Economic Times

Whistleblower complaints down 27% among half of Nifty-50 companies in FY21 - The Economic Times

https://www.google.com/url?sa=i&url=https%3A%2F%2Fm.economictimes.com%2Fmarkets%2Fstocks%2Fnews%2Fwhistleblower-complaints-down-27-among-half-of-nifty-50-companies-in-fy21%2Farticleshow%2F86632494.cms&psig=AOvVaw2c7YYTxZ-uVBKVDdk4MZ8u&ust=1651945287224000&source=images&cd=vfe&ved=OCAOQjhxqFwoTCPCbvfi1y_cCFQAAAAAdA AAAABAD

CONCEPT OF WHISTLEBLOWING

As in soccer, the word whistle-blowing derives from the official signalling a foul by blowing a whistle. The whistle would notify both law enforcement and the public to danger. A member or former member of an organisation who blows the whistle on misconduct inside or by the organisation. Consider some key definitions of whistleblowing:

- 1) Boatright-“Whistle-blowing is the release of information by a member or former member of an organization that is evidence of illegal and/or immoral conduct in the organization that is not in the public interest.”²
- 2) Sekhar- “an attempt by an employee or a former employee of an organization to disclose what he proclaims to be a wrongdoing in or by that organization.”³
- 3) Koehn- “Whistle-blowing occurs when an employee informs the public of inappropriate activities going on inside the organization.”⁴
- 4) R. M. Green - “A whistle-blower is an employee who, perceiving an organizational practice that he believes to be illegal or unethical, seeks to stop this practice by alerting top management, or, failing that, by notifying authorities outside the organization.”⁵

Using the definitions above, whistle-blowing is now defined as the voluntary disclosure of non-public information by a current or former member of an organisation to outsiders who can address the misconduct in the public interest. A whistle-blower is an employee or group of employees, Directors, associates, or any stakeholder of the firm who makes a Protected Disclosure under the company policy, according to Indian commercial practise.⁶

Types Of Whistleblowing

Depending on by who and to whom the wrongdoing is disclosed, researchers have classified whistle-blowing into several types.⁷ These are:

² John R. Boatright, BUSINESS ETHICS (STRAYER UNIVERSITY), PEARSON CUSTOM PUBLISHING (1868) AT 104.

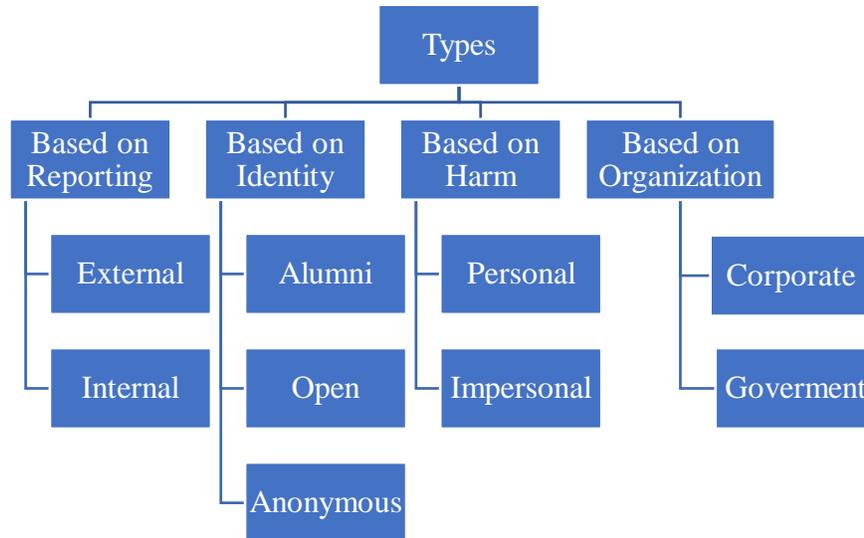
³ R.C. Sekhar, ETHICAL CHOICES IN BUSINESS (SECOND EDITION), (RESPONSE BOOKS (A DIVISION OF SAGE PUBLICATIONS, 2002) AT 179.

⁴ Koehn Daryl, *Whistle-Blowing and Trust* in Laura P Hartman (Ed.): PERSPECTIVES IN BUSINESS ETHICS, Tata McGraw-Hill Publishing Company Limited, New Delhi at 4567.

⁵ Green R. M, *The Ethical Manager: A New Method for Business Ethics*, (Macmillan, New York, 1994) at 145-146.

⁶ Apollo Hospitals, Whistleblower Policy, https://www.apollohospitals.com/apollo_pdf/whistle-blower-policy.pdf, Tata Power, Whistleblower Policy and Vigil Mechanism, <https://www.tatapower.com/pdf/aboutus/whistle-blower-policy-and-vigil-mechanism.pdf>, Bharat Electronics Limited, Whistleblower Policy, http://www.bel-india.in/Documentviews.aspx?fileName=Whistle%20Blower%20Policy_Revised.pdf.

⁷ Castagnera, James (Spring 2003). "The Rise of the Whistleblower and the Death of Privacy Impact of 9/11 and Enron". Labor Law Journal; De George, R. T. 2010. Business Ethics. 7th ed. New York: Mac Milan.



A. INTERNAL

Internal whistle-blowing occurs when an employee reports a misconduct to higher-ups within the firm. In this scenario, the goal of the whistle is to have the wrongdoings examined as per the organization's processes. Whistle-blowers usually target internal issues such as disloyalty, bad behaviour and indiscipline.

B. EXTERNAL

When wrongdoings are revealed to the media, public interest groups, or law enforcement agencies, this is known as external whistle-blowing. While some support outside whistleblowing, others reject it due to employee morale and loyalty to their employer.

C. ALUMNI

A former employee of the organisation acts as a whistle-blower.

D. OPEN

Open whistle-blowing is when the whistle-identify blower's is revealed.

E. ANONYMOUS

Anonymous whistle-blowing refers to non-disclosure of the whistle-identity. blower's

F. PERSONAL

Personal whistle-blowing occurs when an organization's wrongdoings hurt an individual directly. While not ethically justified, it is desirable when one's freedom, dignity, or esteem are under jeopardy.

G. IMPERSONAL

Harming others is called ‘impersonal whistle-blowing.’

H. GOVERNMENT

The act of revealing wrongdoings or unethical conduct by government personnel is known as government whistle-blowing.

I. CORPORATE

The act of revealing wrongdoings in a firm, company or corporation is known as corporate whistle-blowing.. Corporate whistle-blowers can assist prevent, stop, or remedy various actions. Even at the highest echelons of corporate management, waste, fraud, abuse, and corruption are commonplace. Become a corporate whistle-blower to save hardworking taxpayers from corporate greed.

Examples of common corporate fraud include: falsifying quarterly earnings or liabilities, using high-risk accounting processes, misleading the board of directors or shareholders. Cost/expense/corruption reporting fraud Corporate waste, Tax evasion, Wage and hour abuse by corporations.

ESSENTIALS OF WHISTLEBLOWING

The following are some key qualities to notice in the above whistle-blower definitions.:



A. REAL INFORMATION MUST BE RELEASED IN ORDER TO BE CALLED 'WHISTLE-BLOWING.'⁸

Simply expressing public dissatisfaction with an employer without having all of the facts is not enough to constitute a whistle-blower. Whistleblowing entails the public disclosure of criminal activity. As a result, blowing the whistle is distinct from raising the alarm in that the former involves disclosing information that the general public is not aware of because it has been concealed, whereas the latter involves making an effort to bring the general public's attention to facts that are already well-known.

B. The Information Is Evidence Of Organizational Wrongdoing.

Whistle-blowing is frequently used to report things that are harmful to the public interest. As a consequence of this, elements that just affect a course of action but do not work against the interests of the general public are almost never considered to be "whistle-blowing".⁹

C. To Correct Some Wrongdoing, The Whistle Must Be Blown With A Moral Motive.

There are many different motivations that could lead members of an organisation to opt to go public. As a result, information revealed to the public with the intent of exacting revenge does not qualify as whistleblowing.¹⁰

D. Only An Organization's Member Or Former Member Can Blow The Whistle Against Wrongdoing.

Whistle-blowing refers to information regarding wrongdoings that is informed or snitched by an internal member of an organisation. It follows that outsiders such as journalists, social activists, political leaders, and others who blow the whistle on an organization's wrongdoings are not regarded whistle-blowers. The reason for this is that such informers have damaging information regarding organisational wrongdoings and are under no responsibility to keep it private. Employees, on the other hand, are in a distinct predicament because they are aware of wrongdoings in their organisations while simultaneously having commitments to them. Employees are required to follow pre-determined and agreed-upon orders, follow defined procedures, and act in ways that

⁸ Harman G.: 2000, Explaining Value, (Oxford University Press, Oxford).

⁹ Kaplan, C.: (Winter 2002–2003), "The Sarbanes-Oxley Act of 2002—Employment Law Aspects – Whistleblower and Securities Analyst Protections," http://www.thelenreid.com/articles/article/art_165_idx.htm

¹⁰ Larmer R. A.: 1992, "Whistleblowing and Employee Loyalty Journal of Business Ethics", 11(2), 125–128

benefit the company. As a consequence of this, blowing the whistle is an action that can take place within an organisation.

E. The Person At Whom The Wrongdoing Whistle Should Be Blown Must Be Clearly Identified.

The appropriate adjustment or correction can then be made, but only after that. Whistle blowing is not always synonymous with providing information about misconduct to a third party, it can also refer to ordinary snitching.¹¹

F. INFORMATION ABOUT THE ORGANIZATION'S WRONGDOING MUST BE RELEASED OUTSIDE THROUGH THE ORGANIZATION'S REGULAR COMMUNICATION CHANNELS.

Employees must follow a set protocol in many firms to report incidents of wrongdoing to their immediate supervisors or designated officials, such as the ombudsman of the LIC (Life Insurance Corporation of India). Following a standard method for reporting wrongdoings is not referred to as "whistle-blowing."¹² Although blowing the whistle does not always include "going public" and exposing misconduct outside of the organisation, it has been demonstrated that doing so is often advantageous since it allows the information to reach the appropriate authorities, who are then able to handle the wrongdoing.¹³

G. INFORMATION ABOUT WRONGDOING MUST BE RELEASED VOLUNTARILY.

However, there has not been clear distinction between information released voluntarily and forced. Legally or when subpoenaed constitute whistle-blowing or not.¹⁴

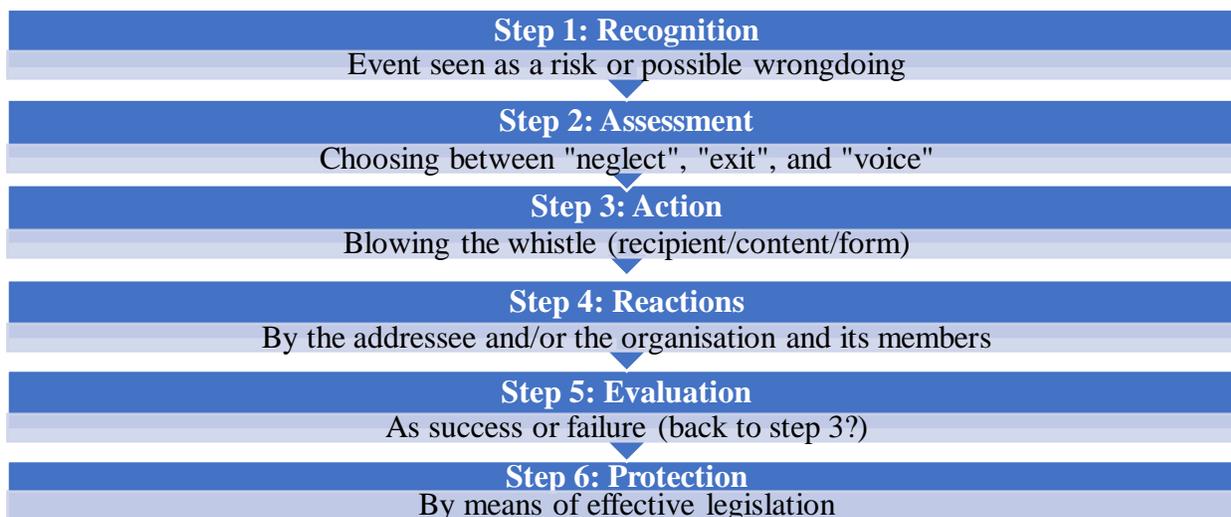
¹¹ Id.

¹² Near J. P., M. P. Miceli: 1996, Whistle-Blowing: Myth and Reality, Journal of Management, 22(3), 507–526

¹³ id.

¹⁴ Bowie, Norman (ed.) (1981). Ethical Issues in Government. Temple University Press.

STAGES IN WHISTLEBLOWING



The 6 stages are self-explanatory. Typically these first 5 stages are the most common¹⁵. The sixth stage has been added by the author since we are of the opinion that without adequate protection the stages are incomplete.

Legislative Framework In The U.S.A Regarding Corporate Whistleblowing

The U.S. Congress enacted the Dodd Frank Wall Street Reform and Consumer Protection Act in light of multiple corporate scandals that hit the investors and shook investors' confidence. This legislation amended the existing Sarbanes Oxley Act to a very greater extent. The Securities Exchange Act, 1934 was amended and a new section 21F was added which provided for Securities Whistle-blower Incentives and Protections¹⁶. It provided for Securities Exchange commission to frame a whistle blower program whereby there is a scheme of providing financial rewards to individuals who come forward and provide information to SEC about possible securities violation. In pursuance of this scheme the very first award was given by the SEC in August 2012 of \$50,000 to a whistle blower whose information helped SEC to stop an investment fraud.¹⁷

Protection provided under the Sarbanes-Oxley Act, 2002-

This law was enacted after a no. of serious corporate frauds and business abuse became public in the early 2000s namely the Enron Scam and Global Crossing Scam. This seriously affected the interests of the shareholders and the reputation of the securities markets was seriously tarnished. It also raised the question of absence of corporate governance. It came to the light that the employees of these companies were aware of the activities but did not come forward. This prompted the U.S.

¹⁵Whistleblower, 'What you always wanted to know about whistleblowing' https://whistleblower-net.de/pdf/What_you_always_wtka_WB_EN.pdf

¹⁶Codified at 15 USC § 78u-6

¹⁷<Available at www.practicallaw.com/9-525-9018> accessed 30 October 2021

Congress to formulate a law which provided protection to the employees of the public traded companies from retaliatory action if they disclosed the corporate wrongdoings, it has been provided under S.806. The Sarbanes Oxley Act provides protection for violations such as fraud and securities fraud. In light of the 2008 financial crisis it also included the employees of the rating agencies or organizations such as Moody's Investors Service Inc. In respect of securities fraud where a company is engaged in practices that is illegal for the securities brokers and dealers. There is an obligation on the company that it must disclose the information about the financial health of the company such as detailed financial statements and any information that the investor would like to take into account while making decisions regarding investment. The Act provides protection to the employees who discloses such information or complains about the nondisclosure by the company against retaliatory action by the employer.

In the case of *Lawson v. FMR LLC*¹⁸, the U.S. First Circuit Court held that the employees of public traded companies are only included and not the contractor of public companies who report of the suspected fraud.

Protection provided under Dodd Frank Act, 2010-

Dodd Frank Act, 2010¹⁹ was a revolutionary legislation as it provided a safety net to the whistleblowers against the retaliatory action from their employer. It was an improved version of Sarbanes Oxley Act, 2002 which provided for protection to shareholders and holding public companies accountable and officials of the company who are engaged in wrongdoing.

Section 21F was added to the Securities Exchange Act, 1934 after the enactment of the Dodd Frank Act, 2010 was passed. It provided that any employer may not demote, suspend, harass or threaten the employee and take any retaliatory action against him if he provides information to the SEC about the employer according to the whistle blower rules, It also provided that if the employee makes disclosures that have been provided protection under the Sarbanes-Oxley Act he will be provided protection²⁰.

Section 21F (h) provides certain remedies to the employees if there is a retaliatory action against them by their employer. It provides the right to whistle blower to file a suit in federal court without the need for exhaustion of administrative remedies that are present. It also provides for reinstatement to the same position, double back pay and the cost that has been incurred in the litigation.²¹ It also provides for a limitation period for the filing of the claim that is 6 years from the

¹⁸ 670 F 3d 61 (1st Cir 2012)

¹⁹Securities Exchange Act § 21F (h)(1)(A)(i)-(iii)

²⁰Securities Exchange Act § 21F (h)(1)(B)(i)

²¹Securities Exchange Act § 21F (h)(1)(C)(i)-(iii).

date of the retaliatory conduct but it shall not exceed 10 years after the retaliatory conduct.

One of the essential requirements to be eligible for these anti-retaliatory protections is that the whistle blower must have a reasonable belief that the information relates to the possible securities violation and the information that is submitted shall be in accordance to the procedures that have been provided under Section-IV.²² Also, it casts a duty on the whistle blower that he is having a genuine belief that the information that he is going to disclose shows a “possible violation”. It becomes necessary to mention the case of *Egan v. Trading Screen, Inc.*²³ wherein the court held that the prohibition against the retaliation and private right of action will be available to the employee even if he did not provide the SEC the disclosed information.

It becomes important to mention that the anti-retaliation protections will be available only if the employee reports the possible securities violation to the SEC.

Also, the Dodd Frank Act increases the ambit of the employee protections in comparison to the earlier statutes. It extends its coverage to the employees of the subsidiary or the affiliate companies of public companies. It also includes within its ambit the foreign subsidiaries of U.S. public companies.²⁴

Understanding “Protected Activity”-

Both the legislations regarding the protection of whistle blowers provide that the company shall not indulge in anti-retaliatory action if the employee engages in “protected activity”. “Protected activity” means disclosures relating to securities fraud, bank fraud and violation against the rule or regulation framed by the SEC, or any provision of federal law which provides for protection of shareholders against fraud. However, the law explicitly nowhere mentions any particular language that must be followed by the whistle blower while making disclosures. It becomes important to understand the opinion of the courts regarding what should be the mode and what language should be used while making disclosures.

In the case of *Collins v. Beazer Homes USA, Inc.*²⁵, the court held that the absence of any specific language or reference which shall be used by the whistle blower means that Congress had not intended to include any specific language. Also, the court held that law intended to be more relaxed as to the burden placed on the whistleblowers when their complaints may benefit the company’s investors.

In the case of *Carter-Obayuwana v. Howard University*²⁶ District of Columbia Court of appeals held that it was not necessary for an employee to use a specific set of words while complaining.

²²17 CFR § 240. 21F-2(b)

²³10 Civ, 8202, 2011 WL 1672066, *5 (SDNY May 4, 2011)

²⁴Pub L 111-203, § 929A<<https://www.govinfo.gov/app/details/PLAW-111publ203>> accessed 25 October 2021

²⁵334 F Supp 2d 1365 (ND Ga 2004)

²⁶764 A 2d 779 (DC 2001)

The court held that the plaintiff is just required to alert the employer and make him aware that he is lodging the complaint against the illegal conduct.

In the case of *Lerbs v. Buca Di Beppo, Inc.*²⁷ the Department of Labour's Administrative Law Judge held that the whistle blower must state the particular activities that identify the respondent's conduct that the complainant believes to be illegal. The activity complained of shall be illegal and not merely different to industry practice.

Thus, to constitute protected activity, the activity must relate to securities fraud, bank fraud or wire fraud as they are clearly mentioned in both the legislations. If the activity complained of does not relate to either of these frauds then the disclosure will not come under protected activity.

Therefore, the legislations as discussed above created a favourable environment for the protection of the corporate whistleblowers. The legislations afforded them sense of security both financially and mentally that they would be protected if they report the illegal activities going on in their organisation. In the next chapter the legislative framework regarding corporate whistleblowing in India will be discussed.

Corporate Whistleblowing In India

In a country like India, which has not seen much development over the years for determination of transparency, whistle blowing is a very competent tool to understand and resolve the shortcomings of corporate governance. With increasing complaints by whistleblowers across India, the need for a strong legal regime for their protection is important. It is necessary to examine the current legal system to analyze the strength and level of protection provided to a whistleblower.

To simply understand the meaning of the term 'whistleblower' it can be said as any person who makes a 'disclosure'.²⁸ Defined as a written concern expressed in good faith by an employee, group of employees, or even a third party, a disclosure is based on actual facts and is not hypothetical. There was always a need to give meaning to the terms "whistleblower" and "disclosure."

Many recent charges of whistleblowers in publicly traded corporations require investigation. In September 2019, "Ethical Employees" reported that the Company's CFO and CEO had breached revenue recognition accounting laws. According to a statement made in October 2019, the Audit Committee appointed a legal company and an independent internal auditor to investigate the allegations.

²⁷2004-SOX-8

²⁸Bhavna Sunder, Payel Chatterjee & Sahil Kanuga, *Whistleblowing in India: Are we There Yet?*, <https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/whistleblowing-in-india-are-we-there-yet.html?no_cache=1&cHash=b5747c0cd8db654635cb5ee27689acaa>. accessed 19 April 2021.

A whistleblower complaint required by Regulation 30 of the SEBI (Listing Obligation and Disclosure Requirement) Regulation, 2015 was not published by the Bombay Stock Exchange (LODR). Deliberately failing to disclose under Regulation 30 of the LODR before the complaints' generic assertions were adequately investigated, the corporation issued a statement. In January 2020, the firm announced that the Audit Committee had concluded its inquiry and found no evidence of misconduct by the company or its officials, including the CEO and CFO. The announcement summarised the study's conclusions and scope.

Several other widely traded corporations have lately dealt with whistleblower charges. A renowned private bank was recently sued by a whistleblower for allegedly lending money to a company whose chairman had business ties to her spouse's husband.²⁹ A number of law enforcement agencies, including the Enforcement Directorate and the CBI, as well as tax officials, took civil and criminal proceedings against the former Chairman.³⁰

In another example, a whistleblower complained to SEBI about alleged financial irregularities at a major pharmaceutical company.³¹ But SEBI's investigation proved the claims were baseless. However, the case caused considerable price swings.

The Whistle Blower Protection Act, 2014-

The Whistle-blower Protection Act, 2011 was signed by the President of India on May 9, 2014. It was a momentous move since it gave for the first time anti-retaliatory protection and whistleblower protection. The Act requires the whistle-blower to reveal their identity, which has many flaws. It begs the question of how their identity will be protected if revealed.

Competition Act, 2002-

Section 46 of the Competition Act of 2002 imposes a lighter penalty on anyone who reveals information regarding a cartel believed to have engaged in anticompetitive conduct. This protection is only accessible if the individual discloses the offences in full and truthfully. Additionally, the information must be submitted prior to the investigation report. Regulation 3 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 serves as a backup to Section-46 and stipulates that the person who discloses the information must cooperate throughout the investigation and shall not destroy or conceal the documents in order to qualify for the lesser penalty. It is not a statutory entitlement of the complaint, and it is within the CCI's discretion to

²⁹Deepak Kochar, How a Whistleblower Complaint sank ex-ICICI Bank CEO & MD Chanda Kochar, <https://www.business-standard.com/article/news-ians/the-fall-of-chanda-kochhar-how-it-began-from-whistleblower-s-complaint-119012401277_1.html> (accessed 20 April 2021).

³⁰Rashmi Rajput, RoC files Prosecution plaint against 4 companies of Chanda Kocchar's Husband, <<https://economictimes.indiatimes.com/industry/banking/finance/roc-files-prosecution-plaint-against-4-companies-of-chanda-kocchars-husband/articleshow/69404937.cms?from=mdr>>accessed 20 April 2021).

³¹Jayshree P. Upadhyay, Ashwin Ramarathinam, Sun Pharma Shares Plunge over 12% on Whistleblower Complaint, Available at: <https://www.livemint.com/Money/qXOKBGC82bg2QD8i19IPIK/Sun-Pharma-shares-slump-to-six-year-low-on-report-of-fresh-a.html> (Last Visited: 18th April 2021).

impose a punishment on the individual who disclosed the information. Before reducing the sentence, numerous elements are considered, including the stage at which the individual comes forward, the quality of the information, the full facts and circumstances of the case, and the evidence already in the hands of the CCI.

Protected Disclosure Scheme and Whistle blower Policy-

The Reserve Bank of India in the year came up with the Protected Disclosure Scheme³² in the year 2007, for Private Sector Banks and Foreign Banks. It allows the employees of the bank, stakeholders and customers and public to lodge complaint against the unfair practice of the bank. It was formulated because the Central Vigilance Commission which was established by the Central Government was limited to public sector enterprises and there was a need felt for a regulatory mechanism for ensuring transparency in banks. This Scheme was meant to cover all complaints including corruption, misuse of office, fraud, and noncompliance with laws and regulations such as the Banking Regulation Act, 1949 and the RBI Act, 1934.

Listed Companies and the law

By law, certain firms must have a "vigil system" to report legitimate concerns.

It further adds that such a process should be complemented by proper safeguards against victimisation. The method must also be published on the company's website and in the annual report.³³ According to the Companies and (Meetings of Board and its Powers) Rules, 2014, a director or employee who makes several frivolous complaints may be reprimanded by the audit committee or a director appointed to serve on the audit committee. The Securities Exchange Board of India ("SEBI") requires listed companies to adopt and communicate a whistleblower policy to workers so they can report unpublished price sensitive information leaks. SEBI has also devised an incentive plan to encourage 'Informants' to report violations of insider trading restrictions.³⁴

Regulation 30 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR") requires listed businesses to notify stock exchanges of material events.³⁵ With the Companies Act of 2013, the Ministry of Corporate Affairs has published the Companies (Auditor's Report) Order, 2020 ("CARO 2020"). A foreign corporation as defined by the Companies Act of 2013 is subject to the Order. CARO 2020 requires additional due diligence and disclosures from eligible firms' auditors to increase financial transparency. Following the amendments, corporations must now share information with auditors, including whistleblower reports received throughout the year. The auditor frequently asks how the company handled such

³² RBI Guidelines No: RBI/2006-2007/328 DO DBS.FrMC.No.BC.5/23.02.011/2006-07

³³ Section 177, Companies Act, 2013; Rule 7, Companies and (Meetings of Board and its Powers) Rules, 2014.

³⁴ Chapter IIIA, Securities and Exchange Board of India (Prohibition Of Insider Trading) Regulations, 2015.

³⁵ Regulation 30, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

complaints, as well as the nature and value of the complaints. In such situations, Indian law is useless. The strategy drives such an approach. Regardless, a whistleblower report is normally evaluated and examined based on the issues listed. These demos help the company to move on from the issue and get ahead of schedule before a controller arrives.

It's not just the company's management that must establish anti-fraud rules and processes; it's also up to the review panels to do so. Directors of a company with trustee obligations must, among other things, work in the best interests of the company, its shareholders, investors, and the local community. Using this method, they must execute crucial exposures as needed.

Depending on the issue, the investigating team may change. There is no magic recipe. To protect legal privilege, legal counsel may conduct such investigations, collaborating with forensic teams as appropriate. The statutory auditor's information gathering methods have evolved. The statutory auditor rarely asks the firm or even the investigative team for a lengthy explanation to ensure the accusations were adequately probed. The statutory auditor is not satisfied unless the steps they detailed are executed to their satisfaction.

Issues

Under Indian law, listed corporations and several other types of companies must provide a whistleblower policy that adequately protects whistleblowers. Then comes the duty to swiftly notify the stock exchange of material events, such as whistleblower allegations.

Notably, unlisted private enterprises are not required to maintain a whistleblower policy or to protect whistleblowers" (except the specific classes of companies prescribed under the Companies Act). However, some large multinational firms have created global best practices and whistleblower programmes. These policies are voluntary, and failing to create or follow them has no legal consequences. Implementing CARO 2020 could help solve this issue.

While the intent of the law and the guidelines are good, the process for evaluating informant concerns and ensuring guidelines compliance is unclear. For example, it's unclear when or how to reveal informant complaints before the stock exchange.

It is also unclear how an internal examination of whistleblower complaints should be conducted. While the Companies Act 2013 and its rules need a vigil system and proper safeguards for whistleblowers, they do not specify how such a mechanism should operate or how complaints should be investigated. Again, implementing CARO 2020 may help address this by requiring the statutory auditor to review how each whistleblower complaint is handled.

Interestingly, a former Tata Consultancy Services employee complained to SEBI about the surveillance system itself.³⁶ These examples highlight the need for more clarity in the application of whistleblower policy and the investigation of complaints.

Whistleblower protection is one of the major discourse that needs to be taken care of and in this regard the confidentiality be given most importance. Once the scope of whistleblower and activities to be reported under whistleblowing policy are discussed, it becomes imperative to make structured authority that must be segregated according to the class of information and hierarchy of official involved in the information reported by whistleblower. There are as many as structured procedures for the dissemination of information reported by whistleblower but the safest is the only option as the safety of whistleblower is the foremost priority of the whistleblower policy and its success on corporate level be ensured on the basis of the protection they conceive to the whistleblowers. After making a viable policy and structure of functioning at the corporate level, it becomes imperative to implement it with the similar aspiration as of its inception and in the said task, the governmental contribution will hike the standards of compelling sanction attributable for effective implementation of the said whistleblowing policy. On the very outset, it is also retrievable that the government agency must be shaped as alternative and/or substitute forum for addressing whistleblowing policy issues on the corporate level that must be administered by the Ministry of Corporate Affairs. The major issue of thrust was to craft a whistleblowing that must swathe an unidentifiable set of private entities that are often hidden by virtue of their modus operandi and the set of activities they are involved. There are as many as NGO's and private firms that involve in many economic activities and are yet wholly or partially relaxed with the framework of whistleblowing and hence their inclusion in the corporate whistleblowing policy mechanism will assure their transparent functioning that would be in public interest.

Criticism Of Whistleblowing

The basic argument is made is that whistle blowing in *not in the best interest of the company*. This policy goes against the interest of the company as it hampers a free decision making by the board and implementing it because it is a basic principle of the business to take risks. Higher the risks higher are the profits. But if high risks are taken which does not result in profits and the company incurs losses which will be termed as scams or may also result in a huge profit for the company.

³⁶Raghu Krishnan & Reena Zachariah, TCS vigil mechanism is under SEBI Watch, Available at: https://economictimes.indiatimes.com/tech/ites/tcs-vigil-mechanism-is-under-sebi-watch/articleshow/70442467.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Visited: 17th April 2021)

Reduces risk

“Awareness of the benefit of risk communication within a framework of mutual responsibilities clearly defined in their Value Statements and /or Codes of Conduct...”

When there is an overhanging apprehension of whistleblowing it is clear that the amount of risk which a company will be willing to take will subsequently reduce. The board of directors will not be able to take any decision in the interest of the company with a free mind because even if some decision is made which involves high risk and can lead to a crash, a person who thinks that he is thinking in the best interest of the company can easily leak the information and stop the company on “ethical” ground to move in that direction. If there is reduce in risk taking it will lead to reduce in profit maximization for the company.

As a consequence, the company will not grow and stagnate as risks are the essence of the corporation. But this is only to criticize internal form of whistleblowing which can be done by the employees or the management of the company and not external whistleblowing which is done by auditors, as they can be a useful tool for keeping a check on the activities of the company. A strong internal system should be made through which any discrepancies could be resolved and there is no requirement so approaching an outside agency.

Employee confidence

“...These type of whistleblowing employees, who “blow the whistle” properly, and for the right reason, are the very ones that the prudent employer wants to retain, and certainly not drive away.”³⁷

‘Right reason’ is the key word here. It is difficult to ascertain that the employee is doing it because there is an actual need to blow the whistle because there will be greater harm or if it is to satisfy some personal interest. There is always risk of loyalty in the organization. The employer will always be apprehended as there will be distrust, friction and discord which will in turn effects the efficiency. It might be beneficial in a long-term if a fair and just policy which is also flexible in nature is established but it will only cause apprehensions and strain the employer-employee relationship which leads to an unhealthy environment. The board will not be as willing to share the ideas or involve the management or any factor of the company, of expansion or new investments as there will always be this fear of information going in wrong hands or if a greater risk has been taken, a fear of reporting.

It does not matter how strong the policy of a corporation is the whistleblowing employee will

³⁷ Frank J. Cavico, ‘Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical. And Pragmatic Analysis’ p.no 90 (45 S. Tex. L. Rev. 534 2003-2004)

always have to face consequences and hardship even if right thing is done. That does not mean that they should not do it because of apprehension of sanction or the consequences but it should only be done if it is against the public at large. In other words, it should not hamper the growth of the company. The employee should be sure of what he is doing because a false or mistaken accusation will be a very big cost to the company. e. negative publicity.

a. **Future Difficulties**

There is always a real risk to the employee who has ‘blown the whistle’ along with his/ her family as they will be affected by job loss which will lead to financial crisis and the whole career of the employee will be in trouble. It will be painful on a personal level emotionally, financially and even publicly. An employee doing such an act will be tagged as disloyal by the co-workers in turn affecting the efficiency to work. Whistleblowing should be taken as the last resort as it puts on stake the company’s goodwill and the whole career of the whistleblowing employee.

b. **Determining ‘Morally Right’**

Morality, as a philosophy is very subjective in nature. It is difficult to determine what is good or bad, just or unjust. Here the morally right will be informing or reporting any illegality or fraud in the corporation which will harm the public. I agree with informing certain dysfunctionalities like if some harmful medicines made by the corporation which will affect the health of the public or even infringement of any kind of privacy rights which the corporation is crossing but the public is unaware. But blowing the whistle for the kind of investments the corporation is investing into or the fund it has been raising- precisely the risks it is taking. If this is done then the growth or company will be dead. The major factor which makes a corporation or business reach great heights is the risk taking. While doing this the company will at times face losses or even gain profits which will further lead to enhancement in business. It is this risk factor of the company which will in turn benefit the shareholders creditors as well as the board.

“A Harvard Business School study cautioned that: *‘A world class tool is no guarantee of world class conduct....A code is only a tool and like any tool, it can be used well or poorly-or left on the shelf to be admired or to rust.’*”³⁸

This is a very prominent observation made by the Harvard Business School, that although there is

³⁸ L. Paine et al., ‘Up to Code: Does Your Company’s Conduct Meet World Class Standards?’ (2005) (83) Harvard Business Review 122 at 123

lot of advantages of whistleblowing as most of the scholars state as it improves the flow of information and also a strong whistleblowing policy of a corporation may attract shareholders as it will give them a sense of confidence. But, this looks good and stands right only in theory; if we look at the practicability then a strong whistleblowing policy can actually drive away potential investors as it hampers risk taking. It will be difficult for them to disclose any crucial information to the company. We can also say that it can be a very easy tool in the hands of an adversary as it can be easily be used to the disadvantage of the company.

Leaking information and passing on the same to other parties can be done in name of whistleblowing. Hence, a strong but flexible policy should be adopted keeping in mind both pros and cons of the subject and the consequences thereto. This tool should be used carefully and with great caution.

c. Utilitarianism

*A consequentiality-based ethical theory like utilitarianism is clearly far broader than focusing simply on how the consequences of an action affect oneself. As a matter of fact, it's a far broader assessment of how an activity affects a much broader spectrum of constituents. Also known as "stakeholders" If an action's effects on the target party are unclear, the utilitarian approach seeks to learn more about the situation.*³⁹

Jeremy Bentham propounded the theory of 'utilitarianism', which deals with greater good and also focusing on the consequences of an act. The consequence is the key factor here as which in case of whistleblowing is not advantageous for both the company whose whistle has been blown as well as not for the employee who is doing this.

The company will face serious consequences as the goodwill of the company will be damaged, because of this damage in the most precious asset of the company ("goodwill") there will be further issues with the investors, trusting the future of the company in turn leading to no growth of the company. It will also hamper future prospects for the employee blowing the whistle of getting a job. It is often a company's retaliation to throw the employee out of the company or serious consequences are faced and, in such environment, it is not healthy for that employee to work in such environment.

This argument is not made in context to when a whistle is blown for public benefit or which helps save health hazards but for the corporation having too-liberal a whistleblowing policy which can lead to stagnation of a company as risk taking is inversely proportionate to a strong whistle blowing policy.

³⁹ Frank J. Cavico, 'Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, And Pragmatic Analysis' p.no 89 (45 S. Tex. L. Rev. 534 2003-2004)

d. Confidence of a Third –party is affected

Third parties who include the creditors and other companies which are willing to invest in the company will also be not interested to be associated with the company because the whistle blowing will hamper the goodwill of the company.

The Whistle Blowers Protection Act, 2014, has not been notified. It introduced a method for reporting unlawful, unethical, and illegitimate behaviors within the organization. The Act only applies to public sector and government companies. The Act protects whistleblowers who report situations of corruption or power abuse. However, the Act does not protect private sector whistleblowers from retribution. Whistleblowers face retaliation since they are protected under the law only to a limited extent.

The necessity to construct a vigil method for directors and workers to express genuine concerns is only applicable to listed firms, and it is up to the companies to choose and formulate the vigil mechanism. The internal management of the company is in charge of formulating mechanisms and handling information.

Also, there is no monetary incentive which is provided to the whistle blower. It is pertinent to note that in the United States, the monetary incentive which is provided to the whistle blower has encouraged whistleblowers to come forward with the complaints of corruption and other wrongdoings in the company. It was reported that in the year 2012 that the Office of Whistleblower received more than 3000 tips and these included tips from foreign countries also.⁴⁰

One of the pertinent issues with the present Whistleblower Protection Act is that it does protect anonymity. Therefore, it can be concluded that in India, there is absence of adequate protection to the whistleblowers.

Therefore, by the above stated reasons it is easy to say that the model of whistleblowing has failed and is not in the best interest of the company. A better and proper model should be devised which keeps intact the goodwill of the company and even the integrity of the employee in the company. If strong whistleblowing policies are made then the board will always be under apprehension and it will not be a very friendly environment to work in that organization as there is no confidence between the people working in the corporation.

⁴⁰<http://www.corporatecrimereporter.com/news/200/seccohenwhistleblower06122013/> accessed on 29 October 2015.

Conclusion

The employee, before going for 'blowing the whistle' must approach the management or the board through internal channels and raise concerns he has, this will help the company as well as the employee if the problem is resolved internally without any harm to company's goodwill and the employee's future. Approaching through internal channels is a better idea than going to a public forum and breaking the pot. The concept seems very individualistic and it shows a vested interest of someone rather than getting something good out of it. It is seen as more of a nuisance, a threat of exposure. It makes the working of a corporation very unstable in nature as it is not uniform. It may destroy the credibility and integrity of the employee which leads to psychological harm.

Whistleblowing is more of a duty than a right. Again, making it an individual concept. The concept of internal whistleblowing is not a very healthy procedure to follow for a work environment, rather a strong external whistleblowing can be established which can keep a bird's eye view on the functioning of the company.

There are proper well established laws regarding whistleblowing in USA and other jurisdictions like Australia which are not currently passed by the Indian government. A faint recommendation under company law and SEBI Regulation, which does not bind anything on the company or the board. It is actually in the benefit of the interest of the company that they can make their own policy of whistleblowing which will suit the size, nature and values of the organization.

It can be concluded by saying that whistleblowing as a tool for uncovering corporate scandals and frauds looks like a great option in theory but practically it is backed by a lot of flaws and loopholes. It is not in the best interest of the company and not even in the best interest of the employee. A more flexible approach to whistleblowing should be adopted by the corporations and proper internal channels should be devised so that whistleblowing is not required at all.

Both companies and the law might be regarded to play a role in encouraging whistleblowing. Companies must ensure that whistleblowers have the right culture, top-level management support, and high-level corporate leadership. Furthermore, the government must not only draught but also ensure that laws controlling whistleblowing processes and systems are implemented. In general, the level of whistleblowing activity is likely to be influenced not only by legal protections for whistleblowers, but also by regulatory responses to whistleblowing.

The current legislation regarding protection of corporate whistle-blowers excludes private and unlisted companies. There is over reliance on the self-initiatives of the company which prevents the acceptance of international standards and practices since companies according to their comfort implement mechanisms for protecting and facilitating whistleblowing within their organisation.

There is uneven balance of powers in vigilance committees which comprises of internal members and in turn discourages the employees to report the legal and ethical violations within the company. It becomes important for the board of directors of a company to act as responsible upholders of trust and confidence and it is also the duty of the stakeholders to spearhead the adoption and implementation of whistleblowing mechanisms that are effective. It is the requirement of time that a robust legislation with provisions to ensure vigil mechanism in case of unlisted companies is implemented in India. It needs to be ensured that the whistleblowing complaints are not at the discretion of management.

It also becomes imperative to take guidance from the U.S regime and formulate legislation that provides for separate entity to overlook the complaints of whistleblowing.

