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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

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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.



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.

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THE ETHICAL IMPERATIVE AND IMPACT OF WHISTLEBLOWING: A BRIEF ANALYSIS

AUTHORED BY - VANSHITA KALRA
& KUNAL JIGYASI

ABSTRACT

Whistle blowing is an act of disclosure of information by people within or outside an organization which is not open to the public. The disclosure is generally of activities that are unethical in nature. This mechanism is a step towards taking a positive step to combat corruption that is being caused by those unethical activities. A whistleblower is the one who blows whistle on the acts of crime, corruption, and unethical conduct. Several commissions were appointed to suggest the formulation of legislation for protection of whistleblowers as whistleblowers are subject to a lot of victimization. There have been instances of murders of whistleblowers, hence it was necessary to formulate legislation for it.

Corporate governance and whistleblowing go hand in hand. Corporate governance serves as the ethical foundation guiding a company's operations. At its core, it revolves around identifying the most effective and efficient means to instil transparency within the organization. This, in turn, empowers the company to make informed strategic choices that prioritize the welfare of its shareholders. Notably, corporate whistleblowing assumes a crucial role within the framework of corporate governance. This article would provide an insight into the whistleblowing mechanism along with its link to corporate governance.

INTRODUCTION

A 'Whistleblower' is an individual who discloses wrongdoing within an organization either to the public or to those in positions of authority. This act of blowing the whistle often exposes the whistleblower to potential reprisals or retaliation from the person or entity against whom the allegations are made. The purpose of a whistleblower policy is to provide protection to such individuals, safeguarding them from any form of retaliation or harm as a result of their disclosure.

In India, the term 'whistleblower' is defined as an individual who makes a public interest disclosure. A "public interest disclosure" refers to a specific disclosure made by an individual that involves illegality, criminality, breaches of the law, miscarriages of justice, threats to public health and safety, damage to the environment, and includes attempts to conceal such wrongdoing in any governmental establishment or public or private enterprise. This definition makes it clear that once the legislation is enacted, it will provide landmark protection for whistleblowers, even extending to private enterprises. However, it's important to note that there is currently no official definition of a whistleblower in existence.

There is also a concept of internal whistleblowing as well as external whistleblowing. Internal whistleblowing refers to when an employee or personnel reports conduct or illegal activities within their department or organization to their immediate or designated superior. This form of whistleblowing is typically seen as positive because it allows for an internal mechanism to address and rectify problems, thereby improving the administration and addressing any illegal activities within the organization.

On the other hand, external whistleblowing involves disclosing information about illegal activities within the department or organization to external parties, such as the media or law enforcement authorities. This type of whistleblowing is more serious and can potentially harm the organization against which the disclosure is made.

LEGISLATIONS FOR WHISTLEBLOWERS IN INDIA

Whistleblowers often confront significant repercussions for their courageous act of reporting wrongdoing. They may lose their jobs or face isolation within their organizations. Some whistleblowers even face criminal charges for violating laws or employment agreements. In extreme cases, whistleblowers may encounter physical threats to the extent of risking their lives.

One condition that can foster corruption is the absence of mechanisms that allow instances of fraud and malpractice to be exposed by individuals who act in the public interest, without jeopardizing their own safety or well-being. Such individuals, commonly referred to as 'whistleblowers' in legal terms, require institutional protection against retaliation from the parties they expose. Ensuring the anonymity of whistleblowers is therefore crucial for any such mechanism to be meaningful and effective.

1. Whistleblower protection Act, 2014-

In a communication dated August 24, 1999, Shri N. Vittal, who served as the Central Vigilance Commissioner (CVC) at that time, addressed the Law Commission of India, expressing his concerns regarding the protection of individuals who, at great personal risk, expose corruption or misconduct by public officials. In his letter, he referred to a speech given by then-Prime Minister Shri Atal Bihari Vajpayee, where he strongly criticized the unchecked rise of corruption. Shri Vittal urged the Law Commission of India to draft legislation aimed at safeguarding the identities of whistleblowers and emphasized the need for a zero-tolerance approach, not only from the public but also from government officials.

Responding to this request, the Law Commission of India, in its 179th report, formulated the 'Public Interest Disclosure and Protection of Informers) Bill 2002. This bill drew inspiration from similar legislation in the United Kingdom, Australia, New Zealand, and the United States, aiming to protect whistleblowers.

The Second Administrative Reforms Commission, in its 4th report on 'Ethics in Governance,' also reiterated the necessity of enacting legislation to protect whistleblowers. Subsequently, in April 2006, the Ministry of Personnel authorized the Chief Vigilance Commission (CVC) to receive complaints of corruption involving government officials and initiate preliminary investigations.

Following the tragic murder of Satyendra Dubey, the government introduced the "Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010." It was passed by the Lok Sabha in December 2011, later renamed as the Whistleblower Protection Bill. After extensive deliberation, the Rajya Sabha finally approved the bill on February 21, 2014, and it received presidential assent on May 9, 2014. However, despite these developments, the Act has not been enforced. An amendment to the Act was introduced in the Lok Sabha in 2015 through "The Whistleblowers Protection (Amendment) Bill, 2015."

The primary intent of Parliament in formulating this legislation was to establish an effective mechanism to protect whistleblowers' identities and to provide an efficient channel for lodging complaints. It's important to note that the Act's scope is limited to the public sector and excludes the private sector. The Act is designed to shield whistleblowers from victimization or harassment, thus encouraging employees to report wrongdoing, fraud, or corruption.

Nevertheless, the Whistleblower Protection Act, 2014, has certain shortcomings, including the absence of a procedure for complainants to appeal orders issued by relevant authorities. The 2015 proposed amendments made it mandatory for complainants or whistleblowers to disclose their identities, thereby excluding anonymous complainants under this Act. This proposed amendment was based on Section 8(1) of the Right to Information Act, 2005. The last proposed amendment restricted disclosures falling under specific categories.

2. Recommendations by N.R Narayan Murthy committee-

The Narayana Murthy Committee, in addition to other recommendations, highlighted the need for an "internal policy on access to audit committees." This policy aimed to allow individuals who observe unethical or improper practices to approach the independent audit committee without the necessity of informing the Board. The committee proposed replacing the word 'board' with 'supervisor' in this context. It was also suggested that there should be a mechanism to make employees aware of this privilege.

The committee made a mandatory recommendation: Employees witnessing unethical or improper practices (not necessarily legal violations) should have the ability to approach the audit committee without notifying their supervisors. Companies should ensure that this right is communicated to all employees through internal circulars or similar means. The company's employment and personnel policies should include provisions to protect whistleblowers from unjust termination and other prejudicial employment practices.

To monitor compliance with this recommendation, the committee suggested that companies should periodically affirm (at least annually) their adherence to this requirement. The committee also emphasized the importance of enhancing the independence of internal auditors by subjecting the appointment, removal, and terms of remuneration of the chief internal auditor to review by the Audit Committee.

As a result, the committee made another mandatory recommendation: Companies should annually confirm that they have not denied any personnel access to the company's audit committee regarding matters involving alleged misconduct and that they have provided protection to whistleblowers from unfair termination and other prejudicial employment practices. This affirmation should be included in the Board report on Corporate Governance,

which is required to be prepared and submitted with the annual report.

The Whistleblower Policy aimed to empower the Internal Auditor and grant them some independence while also providing a mechanism for personnel who witness unethical or improper practices to approach this independent internal auditor without fear of unfair termination or other unfair employment practices.

However, the corporate sector did not respond positively to this proposed change (Mandatory Recommendation), leading to widespread protests from industry and corporate entities. Under pressure, SEBI eventually reclassified this suggested "mandatory" corporate governance measure as "non-mandatory." As a result, the "whistle-blower policy" now appears as a non-mandatory recommendation under the Listing Agreement.

3. Clause 49 of SEBI's listing agreements-

The Listing Agreement is a contractual arrangement between a recognized stock exchange and a company listed on that exchange. It outlines various listing conditions, the violation of which could lead to the delisting of the offending company. One of the clauses within the Listing Agreement is Clause 49, which incorporates corporate governance measures recommended by various committees on corporate governance.

The Listing Agreement stipulates the establishment of a Whistleblower Protection mechanism starting from December 31, 2005, as a non-mandatory requirement. It states:

"The company may create a system allowing employees to report concerns to the management regarding unethical behavior, suspected or actual fraud, or violations of the company's code of conduct or ethics policy. This system should also include provisions to protect employees from retaliation and provide a direct channel to the Chairman of the Audit Committee in exceptional cases. Once implemented, the existence of this mechanism should be appropriately communicated within the organization."

Once this mechanism is implemented by the listed company, it becomes subject to reporting requirements. The company is required to submit a corporate governance compliance report that includes disclosures about the Whistleblower policy and an affirmation that no personnel has

been denied access to the audit committee.

Furthermore, the Audit Committee is tasked with the responsibility of reviewing the functioning of the Whistleblower mechanism if it exists.

In India, the Corporate Governance Statute only provides for internal whistleblowing through a clause in the listing agreement and offers protection exclusively to employees. This policy is not applicable to unlisted companies as they are not bound by the terms of the listing agreement.

NOTABLE CASES

When conscientious employees uncover instances of misconduct or unethical practices within their organization, they often find themselves compelled to voice their concerns, even though they are aware that whistleblowing can be perilous, potentially jeopardizing their job security and exposing them to the risk of harassment or retaliation. Nevertheless, they are willing to take these risks to reveal any wrongdoing. But they also get subjected to victimization in a way that the question arises on their safety.

A few cases that led to need for a proper legislation for protection of whistleblower were-

1. Satyendra Dubey case-

Satyendra Dubey, a young project manager employed by the National Highway Authority of India (NHAI), was appointed as the project director for the Golden Quadrilateral Corridor Project. While overseeing this project, Dubey uncovered several irregularities within the financial department. In response, he took the courageous step of suspending three engineers who were involved in these irregularities. Additionally, he exposed the NHAI's blatant disregard for established guidelines, which allowed for sub-contracting and the use of substandard materials by engineers.

Subsequently, Dubey was transferred to another NHAI project in Gaya. It was during this time that he realized the corruption was not isolated to one location; rather, it was a widespread issue involving numerous high-ranking officials and influential politicians. Committed to his principles as an honest employee, Dubey wrote a letter to then-Prime Minister Shri Atal Bihari Vajpayee, outlining his concerns about the financial discrepancies and various irregularities,

including the use of inferior materials and subcontracting. In his letter, he explicitly requested that his identity remain confidential.

The letter, along with supporting documentation, was forwarded to the Ministry of Transport and Highways. Consequently, Dubey faced severe criticism from the NHAI's vigilance officer. Tragically, on November 27th, Satyendra Dubey was found deceased. While the exact cause of his death could not be directly linked to the corruption he had exposed, suspicions arose that he may have been killed while resisting a robbery.

2. Manjunath Shanmugam-

Manjunath Shanmugam, an employee of the Indian Oil Corporation, served as a marketing manager. During his tenure, he took decisive action by ordering the temporary closure of two petrol pumps in Lakhimpur Kheri, situated in Lucknow, after uncovering their involvement in selling adulterated fuel. His order mandated a three-month shutdown for these petrol pumps. However, when he discovered that they had resumed operations within just one month, he conducted an unannounced inspection with the intention of shutting them down again. Tragically, during this surprise raid, he was brutally murdered by the petrol pump owner and several members of the local criminal syndicate.

3. Infosys whistleblower case-

On October 21, 2019, the Chairman of Infosys made an announcement stating that, following a comprehensive investigation by the audit committee, no substantial evidence was found to support the allegations made against CEO Salil Parekh and CEO Nilanjan Roy. Chairman Nandan Nilekani, in a press release, revealed that the company had received complaints from a group of employees who referred to themselves as the "Ethical Employees." These employees had accused both executives of engaging in financial misconduct and employing unethical practices to boost the company's profits.

The chairman explained that in response to these complaints, the audit committee, in collaboration with independent legal counsel, conducted a thorough inquiry. Their findings indicated a lack of concrete evidence to substantiate any claims of financial impropriety. The evidence presented to them, including video recordings and emails, was deemed to be

unsubstantiated and without merit.

4. Lalit Mehta-

Lalit Mehta, an engineer by trade, played an active role in advocating for 'The Right to Food' campaign within the Palamu district of Jharkhand. Mehta brought to light instances of corruption within the Mahatma Gandhi National Rural Employment Guarantee scheme's operations. He initiated a social audit of the program, collaborating with economists to uncover irregularities. Tragically, before he could fully expose the extent of the scandal, Mehta was tragically murdered. On May 15, 2008, he was assaulted while riding his motorcycle in the Chhatarpur district of Madhya Pradesh.

KEY SHORTCOMINGS OF THE POLICY

A nation cannot establish a strong corporate governance framework by creating numerous regulatory bodies while excluding a specific sector and making it non-mandatory for them to adopt the framework. To be effective, any law or regulation should have clear and unambiguous scope and coverage.

The legal framework concerning whistleblowing is still evolving in India. Having a whistleblowing policy in place is not detrimental to a company; in fact, it can be beneficial when implemented efficiently and effectively.

Trust forms the foundation of the whistleblowing policy's success. Companies should foster an environment where employees are encouraged to report any wrongdoing to the appropriate authorities. There are several challenges, such as trust issues, lack of awareness about the whistleblower policy, misconceptions about the reporting process, and more, that organizations need to address to ensure the policy can effectively deter misconduct at an early stage.

One significant limitation of the Whistleblower Protection Act, 2014, is its exclusion of private companies from its scope, rendering Clause 49 of the SEBI Equity Listing Agreement non-mandatory for them. This Act only applies to companies listed on stock exchanges. It also lacks provisions governing the internal procedure for investigating complaints. The proposed amendment, which requires whistleblowers to reveal their identity, raises concerns about

potential victimization and harassment, potentially discouraging employees from reporting concerns. Additionally, the Act does not contain specific provisions regarding compensation in cases where whistleblowers face harassment or victimization.

SUGGESTIONS

Whistleblower policies are formulated with the aim of furthering public policy objectives and fostering transparency within organizations of various kinds. These policies are designed to break down the barriers of silence surrounding illegal activities in both corporate and public entities. They are primarily intended to safeguard employees who expose corporate misconduct, unlawful practices, internal fraud, and instances of discrimination, shielding them from retaliation. The promotion of such transparency is vital for ensuring public accountability in corporations, government bodies, and nonprofit organizations.

In India, there are several challenges, both general and specific to corporate governance, that hinder the effective implementation of a 'whistleblower' policy mechanism. Some of these issues can be examined under the following categories.

1. Silence of The Companies Act,2013

The Companies Act of 1956, a foundational piece of legislation governing the corporate sector in India, notably lacks provisions for the protection of whistleblowers. There is a need to find a harmonious balance between the provisions of the Companies Act and the guidelines set forth by SEBI (Securities and Exchange Board of India). One area where these two frameworks appear to be in conflict is the disclosure of interests of directors.

Under the Companies Act, it is stipulated that a director with a conflict of interest may not be allowed to cast a vote on relevant matters. However, SEBI's guidelines do not provide specific direction on this issue, creating a potential discrepancy between the two sets of regulations.

2. Protection of whistleblowers in private and hybrid entities

The issue at hand pertains to whether whistleblower protection should extend to private companies that are not bound by the listing agreement. Furthermore, this question also

encompasses hybrid entities like joint ventures. It's important to recognize that whistleblower protection serves a broader purpose beyond merely exposing corporate irregularities; it also encompasses matters of public interest, such as environmental concerns and the safety of workers. Given this expanded scope, the whistleblower policy should not be limited exclusively to listed public companies.

In essence, the argument here is for the extension of whistleblower protection to encompass private companies and hybrid entities, as they too can potentially be involved in activities that impact public welfare and require transparency and accountability. Expanding whistleblower protection beyond the confines of the listing agreement ensures that concerns related to public interest and ethical conduct can be reported and addressed effectively across various sectors of the economy.

3. Misuse of the policy

The misuse of whistleblower policies can have significant repercussions. With just one phone call to the media, a video on YouTube, or a letter to the right public official, a corrupt company can be exposed and face severe consequences due to the actions of a whistleblower.

There is a crucial role for the designated authority, currently the Central Vigilance Commission (CVC), to distinguish between malicious troublemakers and genuine whistleblowers.

While it's possible that investigating false charges could burden honest officials, it is a necessary step. If India aims to combat corruption at higher levels and protect honest citizens, then the existence of fraudulent cases needs to be acknowledged and addressed to safeguard real whistleblowers. Implementing measures to check frivolous complaints, such as imposing hefty fines, can help instill confidence in the whistleblower mechanism and ensure that it serves its intended purpose effectively.

4. The need to make it a mandatory provision.

The necessity for a mandatory recommendation for a whistleblower policy should be understood as distinct from Corporate Social Responsibility (CSR) measures.

Corporate governance measures should not be viewed as a part of CSR; instead, they should be regarded as an essential commitment to uphold the highest standards of ethical, moral, and legal business conduct.

Making the whistleblower policy mandatory is imperative to ensure the protection of employees who come forward in good faith to report wrongdoing. Such a policy serves as a safeguard against reprisals or victimization. It is not merely a social responsibility but a fundamental requirement to maintain transparency, accountability, and ethical conduct within an organization.

CONCLUSION

In conclusion, corporate governance is an indispensable requirement for any company's functioning. A robust corporate governance framework enables transparency in operations and encourages the policy of complete disclosure, thereby strengthening relationships with stakeholders and employees. It serves as a guarantee for the company's stability and growth.

An effective Whistleblowing Framework plays a crucial role in promoting accountability within a company. It encourages employees to report concerns to the relevant authorities, facilitating the early detection and prevention of wrongdoing, malpractice, corruption, or fraud. This, in turn, helps in safeguarding the company's reputation.

Over the past few decades, the world has witnessed scandals like the Harshad Mehta Scam, the Satyam Computer Scam, the Satyendra Dubey murder Scam, and the Ranbaxy Scandal, which have had far-reaching negative consequences. Therefore, it is imperative for companies to protect ordinary individuals from becoming victims of such scandals.