

**WHISTLE BLOWING IN CORPORATE GOVERNANCE:
LEGAL POSITION*****C.L.V.SIVAKUMAR*****Asst. Professor, VIT Business School, VIT University, Vellore, India.****ABSTRACT**

To identify the most effective mechanisms for detecting corporate fraud we study all reported fraud cases in large across the world. We find that fraud detection does not rely on standard corporate governance actors (investors, employees, executives, auditors and end users), but rather takes a village, including several non-traditional players (media and industry regulators etc.). Differences in access to information, as well as monetary and reputational incentives help to explain this pattern. In-depth analyses suggest that reputational incentives in general are weak, except for journalists in large cases. By contrast, monetary incentives help explain employee whistle blowing for effective administration of corporate body of public and private thereby to serve the society in true spirit.

Key Words: Mechanism – Corporate Fraud – Reputation – Whistle Blowing - Accountability

INTRODUCTION TO “WHISTLE BLOWING”

Sometimes the cost of such valiant efforts is just too high to pay the quantum of compensation. The term 'whistle-blowing' is a recent appearance into the public and corporate affairs, although the phenomenon itself is not new. It refers to the process by which insiders go public with their claims of malpractices by or within, organizations - usually after failing to remedy the matters from the inside

The term whistleblower derives from the practice of English *bobbies*, (in England, one of the most prominent was the Thames River Police, created by the powerful West India Trading Company in 1798. The Thames River Police, numbering about 80 full-time men was so effective. World's first permanent police force was the vision of 41-year old statesman Robert Peel, later a two-time Prime Minister of England. As the founder of the police force, the men on patrol became known popularly as "peelers" or "bobbies." The former nickname faded away and the moniker "bobbies" lives on today. The British police, popularly known as "bobbies," wear a uniform that is nonmilitary in appearance. Their only regular weapon is a short, wooden truncheon, which they keep out of sight and may not employ except in self-defense or to restore order. Police on a dangerous mission may carry firearms for that specific occasion) who would blow their whistles when they noticed the commission of a crime. The blowing of the whistle would alert both law enforcement officers and the general public of danger.

Legal encyclopedia explains whistle blower as a person, who discloses, usually an employee, in a government agency or private enterprise; to the public or to those in authority, about mismanagement, corruption, illegality or some other wrongdoing.

India has recently passed a bill in the Parliament in the name of Freedom of Information Bill in 2003. However, it does not have a Whistleblowers Act recommended by the Constitution Review Commission in 2002. Moreover a draft bill on public disclosures recommended by the Law Commission lies in cold storage. Satyendra Debye's death merits attention and a subsequent Public Interest Litigation urges the Supreme Court to direct the Centre to evolve a system to ensure protection to anybody who complains to the government against corruption.

WHISTLE BLOWING LEGISLATION: OBJECTIVES

Employees have the best access to information on illegal or unlawful practice and are usually the first to recognize wrong doings. The overarching goal of whistle blowing legislation is to provide employees with a safe alternative to silence and to empower employees to report wrongdoing by providing adequate legal protection. A secondary benefit of whistle blowing legislation is to the word whistle-blow is commonly understood to have the meaning to ‘go’ or to ‘start’ or to ‘move’. In effect the word has a meaning of an act of moving. In the subject of tackling corruption this word has a different meaning and sense. It means to ‘say openly’ of an inside matter by an insider to an outsider. More elaborately, to speak to the open world, either to the superior or to the public, about a matter which an insider sensed, heard or saw and which he among others inside are knowing, but have no moral courage or morality or honesty to speak out, for a good cause, without any illegal or unlawful motives. So the intention of the Whistle-blower is important. Whistle blowing must be with a good intention for a noble cause.

LEGISLATION PROTECTING WHISTLEBLOWERS

Developed countries such as the U.S., U.K. and Australia have introduced legislation relating to whistle blowing. In the U.S., the Sarbanes-Oxley Act 2002 requires the audit committee to establish rules for (1) the treatment of complaints received by the company regarding accounting, internal accounting controls or auditing matters, and (2) the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters. It also contains civil provisions that protect whistleblowers employed by publicly traded companies from discrimination, and criminal provisions prohibiting retaliation against employees of both public and private companies who whistle-blow to a law enforcement officer.

In the U.K., the Public Interest Disclosure Act (1998) provides protection for employees in the public, private and voluntary sectors for a broad range of disclosures. Qualifying disclosures are disclosures of information which the employee

reasonably believes tends to show one or more of the following is either happening now, has happened in the past, or is likely to happen in the future.

- A criminal offence
- A breach of a legal obligation
- A miscarriage of justice
- A danger to the health or safety of any individual
- Damage to the environment
- Deliberate covering up of information which tends to any of the above Disclosures which are protected include those made to the employer or through internal procedures, a prescribed person as defined under the legislation, a legal adviser or a Minister.

Australia recently amended its Corporations Act to provide protection to officers, employees, and contractors and their employees. The Act provides protection against any retaliation against a whistleblower and gives them a civil right, including the right to seek reinstatement of employment. It also provides qualified privilege against defamation and precludes contractual or other remedies being enforced including civil and criminal liability for making the disclosure. Secrecy provisions in any employment will not preclude whistle blowing. Disclosures which are covered include those made to the securities regulator; the company's auditor or a member of the audit team; a director, company secretary or senior manager of the company; and any other person authorized by the company to receive revelations of this kind. Interestingly, whistleblowers must give their name before making the disclosure in order to receive protection under the Act.

CASE FOR WHISTLEBLOWING LAW IN INDIA

The term 'whistle-blowing' is a relatively recent entry into the vocabulary of public and corporate affairs, although the phenomenon itself is not new. In the case of Satyendra Dubey, he was one of those rare young men who was completely and uncomplicatedly honest. He didn't know he was a hero. An engineer from Indian Institute of Technology, Kanpur and working for National Highway Authority of India probably never knew the word but died for simply doing the right thing. Gunned down by the mafia in Gaya on early November 27 morning, nearly a year

after he had complained of corruption on the Golden Quadrilateral project to the Prime Minister's office. Knowing the dangers that surround honest people bucking the whole corrupt system, in his letter, Dubey had requested that his name be kept secret, a request that wasn't honoured-the letter was sent from the PMO to the Ministry of Road, Transport and Highways and then to the National Highway Authority of India, with which Dubey was working as Deputy General Manager. His death speaks volumes about the growing nexus between politicians and mafia and also highlights the illegal procedures/ways involved in awarding contracts and also the allegedly fraudulent pre-qualification bids in connection to big development projects.

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Corruption exists all over the world and thrives at all layers of government. Officers who refuse to enter the bandwagon are victimized. In India, the Tehelka expose involving defense deals had not only victimized the reporters involved in the undercover operation but also harassed virtually anybody associated with the portal. In this case, the owner of the Global capital who owned a share in the portal was imprisoned without any concrete charges framed against him. All this was due to the fact that the expose had caught some of the high ups in the ruling coalition taking bribes on camera! More recently, the Labour Government in England had found a scapegoat in Dr David Kelly who was considered a 'mole' in the Ministry of Defence in order to draw public attention away from the Iraq war. He was named as the source of a disputed BBC report claiming the Downing Street had "sexed up" evidence of Iraqi weapons of mass destruction so as to drive the country into the war with Iraq.

The need and urgency of a whistleblowing act cannot be overemphasized even as Satyendra Dubey's death sparked off widespread public protest. Both in unlettered societies with meager resources as also in the developed world, there is an urgent need both for access to information by the public along with an act that would provide protection to all those who blew the whistle. It is time that the authorities took cognizance of the fact that money associated with development works that usually comes from the tax payers pocket lands up in corrupt hands. In the process development takes the back seat. India cannot afford to lose its money nor its resources. The real heroes of today's world are honest people. They are few and far between. They are the ones society is longing to follow. But everywhere it sees them fail. Yet the world, and developing countries especially cannot afford to lose its honest officers who stand up against all odds and risk their lives. It is time the government thinks about cleaning its system by providing protection to all those ordinary people who dares to bare open facts and has a stake at country's future. Mere assurance from the Prime Minister that the guilty wouldn't be spared is not enough either to the citizens or to Dubey's family. If the government really means business it has to go about demonstrating that there are systems in place for good people to rely on. We need a fast and efficient judiciary to handover judgments in fair and impartial manner with or without political and social pressure, and a clean and unbiased police that will come to the aid of those working on the right side of the law; we also need public knowledge about the constitution and rule of law; and laws that will encourage people in both urban and rural areas to come forward without any fear to usher in an era of transparency, accountability and participation in the governance of the country. We need a system, a society where a person can do its duty without fear and the head held high. If the government really intends to deliver such a nation, then it is time the government pulled up its sleeves and makes concrete efforts to pass a whistleblowers act. It follows that no measure to curb government and corporate transgressions in India or elsewhere will bear fruit unless legal immunity and protection against retaliation is given to responsible and conscientious whistleblowing.

WHISTLEBLOWING: IMPLEMENTATION AND ISSUES

Often, legislation requires that disclosures be made in good faith and with reasonable belief to receive protection. For example, the Australian Corporations Act requires that the person making the disclosure has reasonable grounds to suspect that their revelation indicates the company or an officer or employee has breached corporate legislation and to act in good faith. It states that where a person has a “malicious or secondary purpose in making a disclosure”, the good faith requirement would not be met.

In addition to legislation, various codes of corporate governance include recommendations to put in place whistleblowing arrangements. For example, the revised Singapore Corporate Governance Code (2005) recommends that “The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The academic committee’s objective should be to ensure that arrangements are in place for the independent investigation of such matters and for appropriate follow up action.”

WHY TO HAVE A WHISTLEBLOWING POLICY?

Whistleblowers, those individuals who call attention to possible wrongdoing within their organizations, are the subjects of much controversy. Some say that whistleblowers are noble characters, willing to sacrifice personally and professionally to expose organizational practices that are wasteful, fraudulent, or harmful to the public safety. Others suggest that whistleblowers are, by and large, disgruntled employees who maliciously and recklessly accuse individuals they feel have wronged them in order to attain their own selfish goals.

The truth, as is often the case, probably lies somewhere between these two extremes. Whistleblowers do call attention to genuine abuses of power by decision-makers in business and government. They do often suffer retaliation for their ethical resistance. However, whistleblowers may often be wrong in their accusations and their motives are not always pure. Their actions can disrupt a workplace, and may cause serious harm to individuals wrongly accused.

KINDS OF WHISTLE BLOWING IN AN ORGANISATION

In common phenomenon the word Whistle Blowing is basically categorized in two kinds:

1. Internal whistleblowers
2. External whistleblowers.

Internal whistleblowers report the misconduct to a fellow employee or superior within their company. And, External whistleblowers report the wrong doings to outside society or authorities in the organization.

Whistleblowers are commonly seen as selfless *martyrs* for public interest and organizational accountability; others view them as useless people trying for personal glory and fame.

While pointing the wrongdoings whistleblowers need to be protected from

- Co-employees from the same organization
- Outside corrupt officers
- Unions
- Politicians and their followers
- High level officers, and
- Others who are interested in Corruption.

As corporate India debates ways and means to strengthen the corporate governance of the companies, post Satyam's case, experts preferred to say that a *whistle blowing* policy is the best way to prevent corporate frauds in the interest and welfare of the public at large. The important point to keep it in mind is that it should be implemented in spirit, and not just in form.

EFFECTIVE WHISTLE BLOWING: SUGGESTIVE PRINCIPLES

It is to the corporate world to set proper mechanism in adapting vibrant vigil in encouraging the whistleblowers with such principal principles as follows:

1. To ensure that this Policy is adhered to and to assure that the concern will be acted upon seriously.
2. Ensure that the Whistle Blower and or the person processing the protected disclosure is not victimized for acting upon the principle.
3. Treat victimization as a serious matter including initiating disciplinary action on such person(s).
4. Ensure complete confidentiality.
5. Not attempt to conceal evidence of the Protected Disclosure;
6. Take disciplinary action, if any one destroys or conceals evidence of the Protected Disclosure made or going to be made.
7. Provide an opportunity of being heard to the persons involved especially to the subject.

WHISTLE BLOWING: IT'S APPLICATION

The Policy covers malpractices and events which have taken place suspected to take place involving:

1. Abuse of authority
2. Breach of contract
3. Negligence causing substantial and specific danger to public health and safety
4. Manipulation of company data/records
5. Financial irregularities, including fraud, or suspected fraud
6. Criminal offence
7. Perforation of confidential or propriety information
8. Deliberate violation of law or regulation
9. Wastage/misappropriation of company assets
10. Breach of employee Code of Conduct or Rules
11. Any other unethical, biased, favored, imprudent event

Further, the policy should not be used in place of the Company grievance procedures or be a route for raising malicious or unfounded allegations against colleagues.

DEMERITS IN APPLYING WHISTLE BLOWING

1. While it will be ensured that genuine Whistle Blowers are accorded complete protection from any kind of unfair treatment as herein set out, any abuse of this protection will warrant disciplinary action.
2. Protection under this Policy would not mean protection from disciplinary Action arising out of false or unwanted allegations made by a whistleblower knowing to be false or bogus with a *mala fide* intention.
3. Whistle Blowers, who make any Protected Disclosures, which have been subsequently found to be *mala fide* or *malicious* shall be liable to be prosecuted under Company's Code of Conduct.
4. Manner in which concern can be raised in order to protect the overall interests of the corporate may not be achieved on a common program.

CONCLUSION

Given the prevalence of corporate misconduct in the recent past, whistle blowing incidents have been on the rise. A 2002 article in *Business Week* called 2002 the "Year of the Whistleblower" and quoted Stephen Meagher, a former federal prosecutor who represents whistleblowers, as saying that "the business of whistle blowing is booming." This trend is likely to be bolstered by the provisions of the Sarbanes-Oxley Act, which for the first time, accords legal protections to whistleblowers in publicly traded companies. This means organizations will have to institute rigorous policies to allow employees to bring unethical and illegal practices to the forefront. Companies will have to train managers and executives on how to encourage openness, not unlike the sexual harassment training of a decade ago. Putting processes in place will not be quick, but it is certainly necessary given the increased public scrutiny of corporate behavior.

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