

Independent Directors : Modern Vivishana In Corporate World

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Abstract

Whistle Blowing as a practice is an emblem of valiance and a sincere effort to promote "Freedom Of Trade", an initiative brought about by globalisation. But what doesn't remain unknown is that with all such developments in the Indian economy corruption and fraud have become rampant. Many scholarly opinion exist that one of the effective mode of curbing such malice is whistle blowing. The paper at the very beginning has tried to bring about an analogy with Hindu mythology and present scenario in the corporate world and has discussed in length .Various initiatives have been taken in the recent years to strengthen the concept which has been reflected in both Narasimha Committee and Kumar Mangalam Birla Committee reports. The recommendation of these committees laid down the foundation of the omnipotent "Clause 49" . The major loopholes of Clause 49 couldn't address the basic needs of whistleblowers which included protection for their whistle blowing and lack of binding effect on both unlisted as well as listed companies. Efforts have been made by legislature in removing the above mentioned fallacies in Section 177(9) to constitute a vigil mechanism for certain companies. The paper taking the present corporate scenario tries to identify who will be apt in the company to be a whistleblower which is demonstrated through various management theories. The studies lead to the clear conclusion that an independent director is well suited for the job and his position is well designed by the Parliament so as to deal with the retaliatory actions as well. The above proposition is also illustrated by reviewing the various Whistleblower policies of top tier companies of India. The paper also has discussed at the end how fallacies in this regard can be addressed by putting forward some of authors' recommendations

INTRODUCTION

Vivishana was not only the foe of his own brother but also the righteous person who stood for the truth at the right time thereby creating history for all times to come. Now the question arises do we have a Vivishana in all spheres of society? The answer is subjective. Standing in today's world where corruption, scams is the new culture the need for a Vivishana to eradicate the evils arises the most. The corporate arena in particular, faces such evil to a huge extent. So how can this problem be addressed? History shows that one of the important ways to deter such practices is by blowing the whistle. Eminent heroes like SherronWatkins,Cynthia Cooper³ have set the practice in motion. But history also witnessed, the severe retaliations that these unsung heroes had to undergo. The need thereby arises to look for a person apt in a company for pursuing this practice further. Study of various corporate legal framework help one understand that the position of independent director is tailor made for blowing the whistle. But certain lacunae still remains in the present law that deters an independent director from embracing whistle blowing. Some recommendations are hence provided so as to pacify such lacunae and help such an independent director be an independent whistleblower.

EVOLUTION OF WHISTLEBLOWERS: THE UNSUNG HEROES

The idea of Globalisation was developed in the corporate world with the sole motive to promote the concept of 'Freedom of Trade'but with the cut throat competition, these extended goals have led to more and more frauds, illegitimate practices and corruptions. The only way to curb these difficulties is by 'proper flow of information'. In order to start with the present topic, inference can be drawn to the famous character of Vivishana of Ramayana⁴.He is an emblem of rectitude and had the determination to pursue the path of truth. He vehemently opposed his brother's

³Janet P Near & Michael T Rehg& James R Van Scotter& Marcia P Micelli,DOES TYPE OF WHISTLEBLOWING AFFECT THE WHISTLEBLOWING PROCESS, 14 Business Ethics Quaterly 19 (April,2004).

⁴Nimisha Bhargava &Dr. Mani K Madala,AN OVERVIEW OF WHISTLEBLOWING:INDIAN PERSPECTIVE,IJRSET, 4 IJSRET 337 (February 2015).

activities and when he felt that his voice would remain unheard, he switched over to support Lord Rama, though the practice still continues of accessorising "shatru" or enemy with "Vivishana", so as to label him a traitor. Our society though can sustain without a Vivishana but the task of unveiling information in corporate arena so as to deter evil, can be done none other than such a person. Whistleblowers are nothing but a modern adaptation of this old mythological character.

Whistle Blowing, which is considered as a western idea, has been developed from the practice of English police officers who would blow their whistle when they noticed any crime. Though several attempts have been made to define whistle blowing but certainly there is no generally accepted definition of the term. However, there are some definitions which are widely used and often quoted. One of the first one was given by a consumer activist, Ralph Nader who explained whistle blowing as "an act of a man or a woman who, believing that the public interest overrides the interest of the organisation he serves, blows the whistle that the organisation is in corrupt, illegal, fraudulent or harmful activity."⁵

Another explanation of Whistle Blowing was written by Marcia P. Miceli and Janet P. They referred to whistle blowing as "the organisational member's (former or current) disclosure of illegal, immoral or illegitimate practices under the control of their employers to persons or organisations that may be able to effect action".⁶

Accordingly from the above mentioned definitions, it can be easily construed that accountability is one of the basic tenet of whistle blowing thereby also providing such heroes protection from all probable sanctions. So whistle blowing ideally should extend the security to those employees who disclose the truth, being driven by their conscience and that ultimately attracts the confidence of the investors as well as employees. Thus it can be safely concluded that the insider/ outsider who reports illegal practices or misconduct to people and appropriate authorities is recognised as

⁵www.whistleblowing-cee.org/about_whistleblowing/-(Last accessed as on 24/09/2016 00:09).

⁶*Id.*

'whistle blower'. Such revelations could be made either to the general public or to those who are in a position of authority.⁷

Whistle blowing is an activity mainly associated to an insider. A whistleblower not only reflects a character of virtuousness but such a person also needs to be courageous enough to expose the wrongdoings of his organisation thereby turning a blind eye to the obstacles that he might face. The most valiant whistleblowers in recent times include Cynthia Cooper of WorldCom, Sheron Watkins of Enron, Daniel Elsberg employed by the Rand Corporation⁸, Shanmugan Manjunath, Marketing Manager of Indian Oil Corporation. History of whistle blowing has time and again shown that whistleblowers are avenged for such acts and sometimes such a brave act has cost them their lives. In order to develop an idea about whistle blowing and its value at present, when corporate scams are rampant, it is important to discuss the contribution of these unsung heroes to the whistle blowing history.

Cynthia Cooper⁹ is one of the persons whom the Times magazine termed as their "persons of the year". He reported about the falsified accounts at WorldCom to the Audit Committee which resulted in dismissing the Chief Financial Officer of the company. This person was later prosecuted for using illegal accounting procedures.

Sheron Watkins¹⁰ is among the highly praised persons in the Whistle blowing arena. She exposed the fraudulent accounting practices that took place in Enron and reported it to Kenneth Lay, Chairman of Enron thereby warning him. He along with the CFO and others are now under investigation. She had also exposed to the media her constant threats by the Chief Financial Officer of Enron who wanted her fired and her computer seized after her act of disclosure¹¹. Her name has almost been synonymous with whistleblower but one stigma that forever lies with her is that the primary attributes of whistle blowing was not complied by her and naturally it failed to alert the public.

⁷Chanjyot Kaur, WHISTLE BLOWING : AN ANTI-CORRUPTION TOOL, 1 Internal Journal of Advanced Research in Management and Social Sciences 50 (November 2012).

⁸Supra Note 2.

⁹Supra Note 1.

¹⁰Id.

¹¹<http://www.forbes.com/2002/02/14/0214watkins.html>--(Last accessed as on 24/09/2016 01:09).

ShanmuganManjunath¹² is one of the foremost persons who has set the culture of whistle blowing into practice. He was an IIM graduate and was the Marketing Manager of Indian Oil Corporation. He detected the petroleum racket at IOC outlet of Lakshikherpuri in UP. He ordered shutting down of two pumps in the area and conducted a surprise raid. His act of bravery cost him his life .

On basis of the revelations or disclosures about the malpractices, whistleblowers can be divided under two categories :

Internal Whistleblowers : They report illegal practices or misconduct to a superior, subordinate or fellow employee within the organisation. Under these circumstances, people who believe or accept to stop the unaccepted behaviour within the organisation take the initiative to be a whistle blower so that eradication of such malpractices can take place.¹³

External Whistleblowers are those who report about misconduct to outside entities. These include lawyers, the media, law enforcement, watchdog agencies or local, state, federal agencies depending on the nature of the misconduct.¹⁴ Research shows that external whistle blowing is more effective than internal whistle blowing¹⁵ because of the extra risk external whistleblowers undergo which thereby subjects him to more severe retaliation than internal whistleblowers. This in the long run brings in adverse publicity of the organisation.¹⁶

The act of whistle blowing doesn't need any extra amount of skill. It just needs a complete and uncomplicated honesty. While discussing the real need of whistle blowing, one important question time and again rises in our mind is , in the present circumstances are whistleblowers really secure? The answer to this question in majority cases would be a big no. The need thereby arises to think of a way so that more people can be pulled in for practicing whistleblowing thereby saving the huge amount of public from the after-effects of the debacle of big organisations that happens as a result of the illegal activities.

¹²*Supra*Note2.

¹³*Id.*

¹⁴*Id.*

¹⁵Carmen Apaza&YongjinChan ,Impact Of External Whistleblowing On Uncovering Corruption: A Comparative Study5 (September 2008) (unpublished manuscript) (on file with author).

¹⁶*Id* at 9.

THE PRACTICE OF WHISTLE BLOWING IN DIFFERENT FIELDS

Whistle Blowing In Public Sector Undertakings (PSU)

Whistleblowing in public spheres can be both internal and external. Internal here would be when a public servant blows a whistle to some higher authority within the organisation, whereas external would imply when any person including any employee or a commoner person brings into picture the corruption prevalent in the government bodies. The Right to Information Act, 2005 mainly helpful for the latter is one of the major weapon in the hands of the public that have made the access to public information easy thereby reducing corruption. Scholars opine that this statute democratizes whistle blowing.¹⁷ But such revelation of information by any insider or employee also carries with it a major fetter which is also furthered by the Official Secrets Act, 1923 that forbids citizens to seek certain kind of information that is prejudicial to the security of state. Similar jurisprudence is present in Section 8 of the Right to Information Act, 2005. Thus any insider giving such information would be held guilty under the Official Secrets Act, 1923.¹⁸ In 2012, the Act was criticized in Supreme Court by Swatanter Kumar J¹⁹ who opined that the entire development of the Official Secrets Act has shrouded thereby hindering the public to get access to any information under the policies thereby framed.

Whistleblowing in the corporate sector

The practice of whistle blowing is one of the major upcoming trends of recent times in the corporate arena, which is nothing but a replica of whistleblowing in the public sphere. This practice is now been heavily associated with corporate governance and can be regarded as its basic tenet. Corporate governance and whistle blowing can be understood by analysing the role of Sheron Watkins and Cynthia Cooper. But one basic mistake they made is that they were too late in exposing the wrongdoings of their companies. Had they taken the responsible step a bit earlier the new generation

¹⁷Nikhil Varshney & Amartya Saha, WHISTLEBLOWER BILL, 2010, 1 (1) NSLJ 79 (2012).

¹⁸Section 3, The Official Secrets Act, 1923.

¹⁹Namit Sharma v Union of India, (2012) 13 SCC 716 (India).

would have known Enron and Worldcom for their contribution to the public and not for defrauding the public.

In order to determine whistle blowing and their significance in the corporate world the main issue that rises is what happens to the loyalty that is expected of each employee by virtue of the non disclosure agreement that they sign before they start with their job?The best answer to this question which most whistleblowers resort to is that the organisation has acted in such a detrimental manner that owed loyalty has been forfeited and no disloyalty has been perpetrated.²⁰The non disclosure agreement that any employee enters into is not unqualified and it does not impose on the employee unlimited obligation thereby forbidding him from reporting immoral acts.²¹At this juncture an important quote needs to be considered by Edward Thurlow(1731-1806)

"Did you ever expect a corporation to have a conscience when it has no soul to be damned and no body to be kicked".

The above quote leads us to the conclusion that corporations have no bodies and in order to save them from any major debacle whistle blowing is the best way which in turn also promotes good corporate governance.

IMPEDIMENTS TO THE PATH OF WHISTLEBLOWING

The act of whistle blowing involve an intentional disclosure of nonexistent or hidden information sources or channels to which whistle blower has privileged access, and because of which whistle blowers are always facing two dilemmas : a conflict between personal and organisational values, and a conflict between obligations owed to an organisation and to parties beyond it. Though an individual's principle and sense of morality are strong reasons to convince him to blow the whistle but the fear of retaliations, halt an individual to do the same.

At this juncture regard can be made to the proverb "If you play with fire, you'll probably get burned". It is very usual that whenever a body corporate functions on

²⁰*Id.*

²¹CV MURTHY,BUSINESS ETHICS,207 (3rded. Himalaya Publishing House 2015).

malpractices such doesn't remain hidden for long to the employees and members of the organisation. But they prefer not reporting it because firstly they lack the courage and secondly they are indifferent towards such malpractice. Whistleblowers and motivators of whistle blowing have time and again said that this act doesn't need any extraordinary skill but an extra amount of courage to step into the fire. The so called fire referred to in the proverb mentioned above that embraces this person is fatal and can come in various forms. Delaportas Et Al cited example in history that reveals that retaliation can be in the form of persecution, lower performance assessments, downgrading, retaliatory transfers and removal from office.²² According to Carrol and Buchholtz 90% of the people who opt for whistle blowing are victim of negative outcomes as a result of which many take refuge to medication so as to reduce their stress while some even opt for suicide.²³ Whistle blowers are often addressed as heroes or as saints of secular culture.²⁴ Even though the examples of Frank Serpico, Dr. Stephen Bolsins, Cynthia Cooper, Sherron Watkins, Satyendra Kumar Dubey and others are often given to motivate employees to blow the whistle but the fate they had because of the disclosure avert employees to blow the whistle. Whistle blowers are often terrorized that if they blow the whistle they may be subjected to retaliation, such as intimidation, harassment, dismissal or violence by their fellow colleagues or superiors.²⁵ Therefore, whistle blower protection is essential to encourage the reporting of misconduct, fraud and corruption. Effective protection for whistleblower, support an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures.²⁶

²²*Supra* Note 2, at 336.

²³*Id.*

²⁴Mathew Bouville, *WHISTLEBLOWING AND MORALITY*, Journal of Business Ethics 9 (2007).

²⁵OECD report on Whistleblower Protection: Encouraging Reporting, 3.

²⁶*Id.*

LEGAL PROTECTION FOR WHISTLEBLOWERS

Antecedent to the various Whistle Blowers' protection statutes, there were laws to protect military personnel against any unfair retaliation when reporting misconduct. The persecution of Marven and Shaw by a navy commander named Esek Hopkins was the first whistle blower protection case in the United States where it was held that 'it is the duty of all the people in service of the United States, to inform the authorities when they are witness to misconduct'.²⁷ Some of the statutory protection provided to the whistle blowers are referred below :

Public Interest Disclosure Act 1998 - It is an Act of the Parliament of the United Kingdom that protects whistle blowers from detrimental treatment by their employer. This Act states that a worker has the right not to be subjected to any detriment by his employer on the ground that the worker has made a protected disclosure.²⁸ However if an employee does suffer a detriment, he is permitted to make a complaint before an employee tribunal.²⁹

Sarbanes Oxley Act of 2002 - It is a United States federal law which was enacted as a reaction to a number of major corporate and accounting scandals, including Enron and Worldcom. This Act provides penalties for retaliation against whistleblowers. It states that whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to commission or possible commission of any federal offence, shall be fined, imprisoned not more than 10 years, or both.³⁰

False Claims Act 2005 - This Act contains a provision that protects a whistleblower from retaliation by his employer. It applies to any employee who is discharged, demoted, suspended, threatened, harassed or discriminated against in his employment as a result of employee's lawful acts in furtherance of a false claims

²⁷<http://commonlegalquestions.com/index.php/2014/04/05/the-history-of-the-whistleblower-protection-act/> (Last accessed as on 24/09/2016 01:19).

²⁸Section 2, Public Interest Disclosure Act ,1998.

²⁹Section 3,Public Interest Disclosure Act 1998.

³⁰Section 1107, Sarbanes Oxley Act 2002.

action. The whistle blower may bring an action in the appropriate federal district court and is entitled to reinstatement with the same seniority status, two times the amount of back pay, interest on the back pay, and compensation for any special damage as a result of the discrimination.³¹

Revised Clause 49 of the Listing Agreement amended on 2003 by the Narayan Murthi Committee explicitly mandated all listed companies to maintain a vigil mechanism so as to report unethical concerns in the company. This mechanism as stipulated should also help provide adequate safeguards against victimisation of any individual who reports such concerns. The company is also mandated to disclose such details in its website.³²

Whistle Blowers Protection Act 2011 - This is an Act of the Parliament of India which provides a mechanism to investigate alleged corruption and misuse of power by public servants and also protect anyone who exposes alleged wrongdoing in Government bodies, projects and offices. Chapter V of the Act deals with protection to the persons making disclosure. It provides that if any person is being victimised or likely to be victimised on the ground that he had made disclosure then he may file an application before the Competent Authority seeking redress in the matter and such authority shall take action as deemed fit and may give suitable direction to protect such person from being victimised or avoid his victimisation.³³

Whistleblower's Protection Amendment Bill 2015³⁴- This is an initiative taken by the Parliament to dilute many provisions of the present 2011 Act, which include disallowing any disclosure that are included in the ten categories listed in the bill some of which are information with regard to cabinet proceedings, intellectual property and economic and scientific interests and security of the nation and also includes information that are covered under The Official Secrets Act, 1923. So if any

³¹False Claims Act 2005.

³²Report of SEBI Committee on Corporate Governance (February 8, 2003) -Also available at <http://www.sebi.gov.in/commreport/corpgov.pdf>- (Last accessed as on 25/09/2016 01:19).

³³ Section 11 of Whistle Blowers Protection Act 2011.

³⁴<http://www.mondaq.com/india/x/433216/Whistleblowing/The+Whistleblowers+Protection+Amendment+Bill+2015>-(Last accessed as on 25/01/2016 01:19)

such information falling under the aforesaid categories is received by the appropriate authority then such has to be reported to the government authority who would take the necessary measures.

In a PIL that was filed after Indian Engineering Service Officer was killed after exposing corruption in the Supreme Court filed by a NGO Parivartan for seeking a direction for an effective whistleblower protection programme. The apex court while hearing the case recently directed the centre to spell out the necessary directions for the protection of whistleblowers. The court further discussed about the lacunae that still prevails as far as whistleblower protection in India is concerned³⁵.

Though whistleblowers are protected under various laws but still they may get a cold shoulder or be treated as a 'rat' or a 'snitch'.³⁶The society disdains disloyal persons and so is the condition of the whistleblower. The motive therefore lies in finding an appropriate person whose position is tailor made to whistle blow. Keeping in mind the corporate arena the perfect person to whistle blow is an independent director which will further be elaborated by the subsequent sections of the paper.

EVOLUTION OF INDEPENDENT DIRECTORS IN INDIA

The literal meaning of the word "independent" means free from control or not relying on others. Though keeping in mind a limited company, importance of independence is not much overemphasized³⁷ The Kumar Mangalam Committee defined independent director as those who apart from receiving director's remuneration do not have any other material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which

³⁵Amit AnandChoudhury,*Set Up System To Protect Whistleblowers:SC To Government*,Jan 7 2016 , Also available at -<http://timesofindia.indiatimes.com/india/Set-up-system-to-protect-whistleblowers-SC-to-government/articleshow/50475061.cms>--(Last accessed as on 24/01/2017 01:19).

³⁶<http://smallbusiness.chron.com/hazards-whistleblowing-effects-workplace-15733.html>--(Last accessed as on 24/09/2016 01:19).

³⁷DR,K.R CHANDRATRE,CORPORATE GOVERANCE-A PRACTICAL HANDBOOK,53 (1st Ed. 2010).

according to the Board may affect their independence of judgement.³⁸ The Companies Act 1956 did not lay down any compulsion for the appointment of an Independent director, though Clause 49 of the Listing Agreement applicable to all listed companies have explicitly mandated the appointment of independent directors for listed companies. At this juncture it is to be seen who after all is the independent director independent of? The answer to this question is that they must be free from the promoters' substantial authority, benefits and interests with the company and from a third party.³⁹

After the debacle of Satyam, 340 independent directors resigned from different Indian companies as a resort to save their reputation.⁴⁰ This basically pointed towards a change in the Act of 1956⁴¹ and the giant Indian Companies. Various initiatives were taken for the betterment of corporate governance and one of the major heads for such development was independent directors. The Confederation of Indian Industry Task Force on Corporate Governance, the Council of Institute of Company Secretaries of India and the National Association of Software and Services Company have put in efforts for the abovementioned objective, a consolidated version of which are listed below⁴²:

- **Nomination committee**-All the three reports proposed a nomination committee to appoint such independent director. The strength of the board should be independent directors in majority.
- **Executive sessions**-The independent directors should always hold executive sessions outside in absence of the presence of management.

³⁸Report of Kumar Mangalam Birla Committee on Corporate Governance - Also available at <http://www.sebi.gov.in/commreport/corpgov.html> - ((Last accessed as on 24/10/2016 01:19)

³⁹<http://www.caclubindia.com/articles/story-of-independent-directors-24336.asp>-(Last accessed as on 24/09/2016 01:19).

⁴⁰*Id*-(Last accessed as on 24/09/2016 01:19).

⁴¹ The Companies Act 1956.

⁴² Emerging role of independent directors-Also available at http://shodhganga.inflibnet.ac.in/bitstream/10603/43939/11/11_chapter%206.pdf -(Last accessed as on 24/08/2016 at 01:38).

- **Access to Management and Other Resources**-The independent directors should be provided with the systems, procedures and all other necessary information for discharging his duties.
- **Remuneration**-The Ministry held the opinion that directors should be paid appropriate sitting fees but not stock options.
- **Director Training**-All newly inducted directors are to be properly trained

The introspection that followed the Satyam Case has resulted in inception of the concept of independent directors. The roles and duties of independent director are structured in such a way that they may be capable to act independent without having any material pecuniary relationship with the company and its promoters or its directors. Independent Directors are generally expected to protect the interests of the shareholders, employees and creditors⁴³ by performing the roles and duties as set out in 'Code for Independent Directors' described in Schedule IV of the Companies Act 2013. Some of the roles and duties of independent director provided in the Code includes :

It is thus clear that each and every role assigned above are designed in such a way that they can function both as independent director and a whistleblower. The need now arises to delve more in detail as to how both are related and the rationale behind it.

INDEPENDENT DIRECTORS AND THEIR INDEPENDENCE AS PER THE COMPANIES ACT OF 2013

The position of independent director is designed in such a manner that every functional area of a company can function without any predilection or exercise of fraud. Some examples that can be cited in this regard are

- Audit committee should have at least two thirds of its members as independent directors⁴⁴
- Office of Chairman and CEO cannot be held by the same individual⁴⁵

⁴³*Id.*

⁴⁴Section 177 of The Companies Act ,2013

⁴⁵Section 203 of The Companies Act, 2013

- No independent director is entitled to any stock option⁴⁶
- The Corporate Social Responsibility Committee that is to be constituted under this Act should have among its members at least one independent director.⁴⁷
- Any independent director will be liable for all acts or omission or commission by a company which has occurred with his knowledge and with his consent or connivance or where he had not acted diligently⁴⁸
- Independent director like other directors cannot be appointed by retirement by rotation basis⁴⁹

The above instances emphasizes the omnipotent role that law thrusts on any independent director thereby embodying upon him the duty to monitor performance of the company and raise red flag like the age old English police officers used to do whenever there arose any iota of suspicion in any matter in the company

THEORIES DRIVING AN INDEPENDENT DIRECTOR TO BE A WHISTLEBLOWER

The reference made above can help one conclude that independent director holds a higher and an auspicious position . This facilitates them to make himself aware of the maladies of the company from the minutes of the meetings, audit reports, consolidated financial statements etc. Even though they possess information but what generally lacks is motivation. The discussion below of certain theories would help draw an inference as to how independent director is apt for the position of a whistleblower

⁴⁶Section 197(7) of The Companies Act, 2013

⁴⁷Section 135 (1) of The Companies Act, 2013

⁴⁸Section 149(12) of The Companies Act, 2013

⁴⁹Section 149(13) of The Companies Act, 2013

Maslow's Need Hierarchy

Behaviour of any individual is dependent on his needs. Maslow has correctly pointed out that in any organisation, man is driven by five basic needs. At the bottom of the pyramid lies his physiological needs while at the summit is his need for self actualisation. It is needless to say that no independent director would lose sleep in thoughts of getting his hunger met. So the major problem that any independent director faces while being a successful whistleblower is his safety needs and esteem needs. It is nothing but obvious that the statute itself has vested him with such unique duties that he would never have either of the needs unfulfilled. But for a valiant independent director to blow the whistle what is necessary is to be at the summit of his needs i.e. self actualisation because once any employee is at this stage he has all his other needs fulfilled. As Maslow puts it "this need might be phrased as the desire to become more and more of what one is, to become everything that one is capable of becoming."⁵⁰ If the independent director has this in mind of becoming more and something beyond the duties vested in him by law without fearing the consequences none but him can be a better person to whistle blow

Herzberg's Motivation Theory

Fredrick Herzberg's theory bears resemblance to that of Maslow. He was of the view that there are two sets of factor that propels any employee in an organisation, one being hygiene factors the other being motivational factors. Hygiene factors are nothing but the physiological needs which are generally met if seen with respect to any independent director. While on the other hand the motivational factors consists of the higher level needs, which are also somewhat realised. Legislative intention while creating such person for any company was also to see that there remains no iota of dissatisfaction among them be it either in respect of motivational or hygiene factors. All this leads to only one conclusion, which is nothing but in favour of independent director being a whistleblower.

⁵⁰L.M PRASAD, PRINCIPLES AND PRACTICES OF MANAGEMENT, 564 (9th Ed. 2015).

Vroom's Expectancy Theory

Victor Vroom was of the view that people will be motivated to do things to achieve some goals to the extent ,that they expect that certain actions on their part will help them achieve the goal.⁵¹ In this aspect, Section 149(8)⁵² should be taken regard to, which explicitly mandates every independent director to abide by Schedule IV wherein it is laid down that it is the duty of every independent director to ascertain and ensure that the company has an adequate and functional vigil mechanism and that the interest of the person using the mechanism are not prejudicially effected. Moreover the independence of every such independent director is not be constricted to only promoters but also viewed from the perspective of vulnerable stakeholders who cannot otherwise get their voice heard.⁵³ Therefore if the goal of every independent director be the goal of achieving the duty imposed as above he also can be said to have fulfilled this theory. What a layman understands as expectancy is also incorporated in this theory. What basically his expectancy is based on is having in mind the public interest or the interest of the stakeholders because all his other interest that he should be worried about are somewhat met by virtue of his position.

Self Interest Theory

This theory basically propagates the view all men however altruistic they might portray themselves to be are basically driven by their own self interest.⁵⁴ So now the basic question that arises is, why at all would any independent director blow the whistle when apparently he can derive no benefit for himself ? The answer to this question can be drawn by looking into the analysis discussed of the last theory. So if Section 149(8) is looked at, it can be clearly said that he has the duty to deter

⁵¹*Id.*, at 571.

⁵²The Companies Act 2013.

⁵³A RAMAIYA,GUIDE TO COMPANIES ACT,2839 (14thEd. 2014).

⁵⁴ Modern relativism and Self Interest Theory- sites.saschina.org/jaukmath/files/2015/08/Moral-Relativism-and-self-interest-theory-15j8kcj.pdf-(Last accessed on 24/08/2016 at 00:38).

unethical behaviour and nothing can be more better than the practice of whistleblowing. If seen from that point it can therefore be reasonably said that if any independent director whistle blows all he is doing is giving effect to the duty imposed on him by virtue of Section 149(8) read with Schedule IV.

CHALLENGES FACED BY INDEPENDENT DIRECTOR

Independent Directors are commonly presumed to blow the whistle by reporting unethical or fraudulent practices. But then it must be kept in mind that, doing the right thing never meant that right things would happen to them. Independent Directors who are conferred with greater powers and responsibilities in the governance of a company and are portrayed as shining example of whistle blower within an organisation are also encountered with certain hindrances which are analysed below :

Professional Responsibility v. Organisational Loyalty

According to Agency Theory, an agent who assume the role of a principal in a particular business transaction is expected to represent the best interest of the principal. But sometimes the agents may not perfectly act in principal's best interest which may become a source of conflict. As per the Code for Independent Director, it is presumed that an independent director shall exercise his responsibilities in a bona fide manner towards the interest of the company. On the other hand he is assigned with the role to safeguard the interests of all the stakeholders. Thus if an Independent Director blows the whistle to safeguard the interest of the shareholders he is violating his liability towards the company. So there is always a moral dilemma faced by independent director when it comes to spilling the beans.

Lacuna in Companies Act 2013

With the intention to maintain the independence of an Independent Director, Section 150 of the Act of 2013⁵⁵ was introduced, which deals with selection of Independent

⁵⁵The Companies Act 2013.

Director from a data bank which is to be maintained by any body, institute as notified by central government. But as this section has not yet been enforced, even now most of the companies have tendency to choose those whom they already know. Nobody wants to get a stranger on Board. This in a way affect the independence of the Independent Director.

Retaliatory Action

Whether any action will be taken against the wrongdoer is highly dependent on the power of the wrongdoer i.e., whether the organisation depends on the wrongdoer for some resource.⁵⁶ When an organisation is highly dependent on the wrong doing for its survival then it cannot afford any change.⁵⁷ It is in such circumstances that the top management respond negatively to the whistle blower by taking retaliatory action, so that the organisation's dirty linen is not aired in public.⁵⁸

The impediments leads to one basic doubt that what protection does these independent directors get even if they show their valiance and blow the whistle? The concerned authorities have addressed this question by providing certain legal framework.

MEASURES TAKEN TO PROMOTE WHISTLE BLOWING

Section 177(9) of the Companies Act 2013 mandates every listed company, every other company which accepts deposits from public and every company which has borrowed money from banks and financial institutions in excess of Rs 50 Crores to constitute a vigil mechanism. Further Clause 49 of the Listing Agreement as referred to before which has been recently amended provides for mandatory requirement for all listed companies to establish a mechanism called the 'Whistle Blower Policy' for directors and employees to report concerns of unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy.⁵⁹

⁵⁶ Janet P. Near, Marcia P. Miceli; *Effective Whistle Blowing* , 20 The Academic of Managemnet Review 681.

⁵⁷*Id.*

⁵⁸*Id* at 680.

⁵⁹*Supra* note 34.

At this juncture for better understanding of the contents of any whistleblower policy the authors have highlighted certain key aspects of the whistleblower policy of two major listed companies in Indian arena.

Whistle Blower Policy & Vigil Mechanism of TATA POWER⁶⁰

As per the policy all employees and directors of the company are eligible to make protected disclosure which may be in relation to matters concerning the company or any other TATA Company. Some of the key aspect of the policy include :

All protected disclosures concerning financial or accounting matters should be addressed to the Chairman of the Audit Committee of the company for investigation.

The identity of a subject will be kept confidential to the extent possible given the legitimate needs of law and the investigation.

No unfair treatment will be meted out to a whistleblower by virtue of his/her having reported a Protected Disclosure under this policy. The company, as a policy, condemns any kind of discrimination, harassment, victimisation or any other unfair employment practice being adopted against Whistleblowers.

The identity of the Whistleblower shall be kept confidential to the extent possible and permitted under law.

Any other Employee or Director assisting in the said investigation shall also be protected to the same extent as the Whistleblower.

Whistleblower Policy and Vigil Mechanism of Reliance Industries

At this point if an analogy is drawn with the Code of Conduct of Reliance Industries Limited⁶¹ the following salient features can be carved out :

⁶⁰Whistle Blower Policy and Vigil Mechanism of Tata Power -Also available at

<https://www.tatapower.com/aboutus/pdf/whistle-blower-policy-and-vigil-mechanism.pdf>-(Last accessed on 24/09/2016 at 00:39).

⁶¹<http://www.ril.com/getattachment/3724d19a-8a2b-4a6e-898a-a5c7f01aaf01/Code-of-Conduct.aspx>-(Last accessed on 23/09/2016 at 00:38).

It is managers responsibility to encourage employees to speak up whenever they are aware of possible violations of the Code of Conduct.

Managers should make sure that no one experiences retaliation for speaking up or co-operating in an investigation.

The company does not tolerate retaliation. They consider acts of retaliation to be misconduct. If anyone has experienced retaliation he may contact the Ethics & Compliance Taskforce.

The company have established the Ethics & Compliance Taskforce to process and investigate Protected Disclosures, which includes fraudulent practices, corruption and breaches of the code of conduct.

The Company treat the identity of the Whistleblower and the fact that a Protected Disclosure has been made as confidential.

By observing the salient features of both the policy it can be safely concluded that more or less all companies adhere to a similar framework while framing their whistleblower policy and the rules enshrined in the Policy though not an exact carbon copy but has quiet similarity.

Now in order to examine the effectiveness of whistle blowing policies, the illustration of Entrust Securities PLC can be cited. A whistle blowing policy has been developed in the company to provide a channel for employees, clients and general public to raise issues on breaches of any law, or other ethical concern shared by them⁶². With the help of this policy the Independent Director at Entrust had blown the whistle last year when they got hold of the company's financial woes through an internal grapevine and after verifying the truth of the information three of them wrote a letter to Central Bank.⁶³

It thus goes beyond saying that if such a practice has taken place in a country like Sri Lanka, India has absolutely no reason to avoid it.

⁶²Annual Report of Entrust Securities PLC (2013-14).

⁶³DuruthuEdirimuniChandrasekera, *Independent Directors blew whistle on Entrust*, The Sunday Times, January 24, 2016- also available at <http://www.sundaytimes.lk/160124/business-times/independent-directors-blew-whistle-on-entrust-180110.html> - (Last accessed as on 24/09/16 at 10.07).

Centralised Database of IT and ITES employees

Ethics is a system that defines what is right and what is wrong and which plays an important role in the decision making of an individual. A person's ethics are developed as a result of his family, school, community and other influences that help him to shape his personal beliefs.⁶⁴ So it is mandatory for a company to verify employee's background before recruiting them. But it is sad to see that in a growing economy like India, companies are often seen in a mad rush to hire in the hundreds. The tight timelines for hiring and cost-consciousness often tempt recruiters to go easy on checks and verification of the employees, even though with the increase in number of white collar crimes emerging, it is required that companies should conduct background checks on prospective employees. On the other hand companies such as Tata Consultancy Services, Infosys Technologies and Wipro maintains a centralized database of IT and ITES employees and a third party verified information on education, experience history and personal details of these professionals to curb out the possibility of corporate fraud.⁶⁵

GAP AREAS

- As has been discussed earlier that there remains a constant question if the independence of the independent director is a myth or reality. Adding to the discussion above it is to be noted that the directors are nothing but a representation of the promoter's interest in the board. Whatever might be penned down in the official documents it would be quite absurd to think that howsoever honest such a person be he would never go against the person who appointed him and expose the maladies of the company.
- Most of the annual reports show that this issue attains a complex structure when it comes to a publicly held corporate structure. The qualifications of

⁶⁴<http://jsmith.cis.byuh.edu/books/powerful-selling/s07-business-ethics-the-power-of-d.html>-(Last accessed on 24/09/2016 at 00:08).

⁶⁵ <http://qz.com/308888/the-secret-behind-background-checks-in-india-and-why-they-fail/>-(Last accessed on 24/09/2016 at 00:35).

such a director are not shown even though they are designated to be the same.⁶⁶

- Empirical studies have also shown that independence does not lead to improved firm performance and may even be associated with sub optimal performance⁶⁷
- It is a known fact that when CEO or CFO is indulged in fraud there is nothing that an independent director can possibly do even though they are professors of corporate governance⁶⁸
- Independent directors are higher officials of the company. Their basic motto is the betterment of the company. Even though the letters of law attribute him a very different position than others in the organisation, it is nothing but absurd that such a high official would take such an initiative which in ordinary parlance would mean nothing but tarnishing the name of the company. Independent director would never try and earn the label of a traitor with respect to his organisation
- Independent directors rely on internal auditor, the director of compliance or internal general counsel to administer the whistleblower's programme. This procedure is completely fallacious one as they are nothing but employees of the company and participate in incentive compensation plans that may be adversely affected by the whistleblower complaint.⁶⁹

⁶⁶INDRAJIT DUBEY,CORPORATE GOVERNANCE,132 (1st Ed. 2008).

⁶⁷ Romano,Robertta,*THE SARBANEY OXLEY ACT AND MAKING OF QUICK CORPORATE GOVERANCE*, 114 Yale Law Journal 1521.

⁶⁸VikasDhoot ,*Satyam had a Whistleblower Policy since 2005*, Financial Express, March 29, 2009 -Also available at <http://www.financialexpress.com/archive/satyam-had-a-whistle-blower-policy-since-2005/440221/> (Last accessed on 24/09/2016 at 00:37).

⁶⁹FREDERICK D LIPMAN,*WHISTLEBLOWERS :INCENTIVES,DISINCENTIVE AND PROTECTION STRATEGIES*,233(1st Ed.2011).

RECOMMENDATION

- **Right to Information Act**⁷⁰ : The object of the Whistle Blowers Act and that of the Right to Information Act are dissimilar. When a whistle is blown by a whistle bower, he takes on severe personal risk and sacrifices to safeguard the interest of the citizens from corruption and other forms of maladministration in public institutions, thereby providing a whistle bower with safe alternative to silence is the foundational principle of every whistle bower protection law.⁷¹ But on the other hand, in cases of corruption where public interest is involved, it is almost paradoxical to keep the identity of a whistle bower anonymous as revelation of identity becomes mandatory in this case under Right to Information Act. Therefore to overcome the problem, an amendment is required to be made the provisions so that both the act can be harmoniously read.
- **Celebrating Whistle Blower Appreciation Day** :The Washington DC and the Council of IGs, the OSC and OSHA have taken an important first step in publicly recognising a National Whistleblower Appreciation Day to reflect on the contribution and sacrifices whistleblowers have made, and to take action to support whistleblowers.⁷² The same practice should be started in India to change the culture that views whistleblowers as the enemy.
- **Development of confidential hotlines** : If the whistleblower blows the whistle in public it creates uncertainty within the organisation as a result of which it may want to buffer itself from the challenging member by persuading the member to disavow the compliant or by discrediting the

⁷⁰Dr.Vijay Kumar Singh, *WHISTLE BOWER'S POLICY CHALLENGES AND SOLUTION FOR INDIA WITH SPECIAL REFERNCE TO CORPORATE GOVERNACE* , 3 GJLDP 37(October 2013).

⁷¹ <http://scroll.in/article/727173/if-amendments-to-whistleblowers-act-are-passed-there-may-be-no-one-left-to-protect>-(Last accessed on 24/09/2016 at 00:45).

⁷² <http://www.whistleblowers.org/component/content/article/88-general/1636-whistleblower-day-celebrated-by-us-senate-and-three-federal-agencies>-(Last accessed on 24/09/2016 at 00:35).

member.⁷³ So it is always better to promote Internal Whistle blowing as the chances to disregard the complaint is less. In order to promote effective internal whistle blowing within an organisation, facility of a 24*7 confidential hotlines should be provided in every organisation, which would be an ethical way to stop wrong doing that can be profitable, save the firm's reputation, and protect from legal and legislative reactions to wrongdoings.⁷⁴

- **Incorporation of Bonus System** : Whistle blowing would be more prevalent if a well structured bonus system is constituted which would grant more immunity to such whistle blowing directors and also facilitate in collecting incentives for their act of bravery.
- **Misuse of the Policy**⁷⁵ : In order to curb corruption several ways of whistle blowing is made available, such as blowing whistle over phone calls or by uploading video on youtube or by writing letters to public officials. But these amenities have both advantage and disadvantages. In a system where we have Cynthia cooper and SherronWatkins who blowed the whistle against the illegalities being practiced around them and became heroes of the country, there are concerns like Reddys who utilised the whistle blower policy for their personal gain and for satisfying personal vendetta. Thus in order to overcome such problems, designated authority should be appointed who would spot the genuine whistle blower.⁷⁶

⁷³Janet P. Near and Tamila C. Jensen ,*Correlates of Whistleblowers' Perceptions of Organisational Retaliation*, 27 Administrative Science Quarterly 19(March 1982).

⁷⁴Marcia. P. Miceli, Janet P. Near and Terry Morehead Dworkin ,*A Word to the Wise: How Managers and Policy-Makers can Encourage Employees to Report Wrongdoing*, Journal of Business Ethics 380 (2008).

⁷⁵Supra Note 63.

⁷⁶SuchetaDalal,*Whistleblowers and Troublemakers* ,The Financial Express,May 10,2004 <http://www.financialexpress.com/archive/whistleblowers-and-troublemakers/59675/0/>-(Last accessed on 24/09/2016 at 00:30).

CONCLUSION

Napoleon had said " The world suffers a lot not because of the violence of bad people but because of the silence of good people". The whistleblowers silenced by the powerful in today's scenario would lead to nothing but another Enron or Satyam debacle. What therefore is desired, at this juncture is that if more employees especially the independent directors be likeSheronWhatkins or Cynthia Cooper,deterring corporate scams would not be a distant history. It has been emphasized time and again that whistleblowers are unsung heroes, so what now is needed is to recognise such heroism and not make it a taboo but an act of valiance. The first section had the discussion of how a whistleblower bears resemblance with Vibhishana from Ramayana. If independent directors of each company shun their lanka and extend their support for the good then the world would be saved from the acidousRavanai.e. the corporate scams. The framework of the corporate should be so designed in a way that they would not be associated with the common phrase of "gharkashatruVibhishan" but the friend of the larger public.This dream can only be pursuedif independent directors of all companies take a step forward and indulge in the practice of whistle blowing whenever any iota of suspect arises in their mind of a practice of whistleblowing.