

WHISTLEBLOWING – A THREAT TO CORPORATE CRIMES

A comparative overview of corporate law of USA and Pakistan



Whistleblowing is an effective tool to prevent corporate crimes and protect shareholder's interests in USA laws, while this concept is in evolutionary stages in Pakistan.

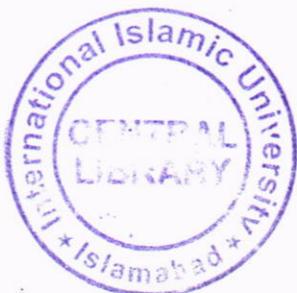
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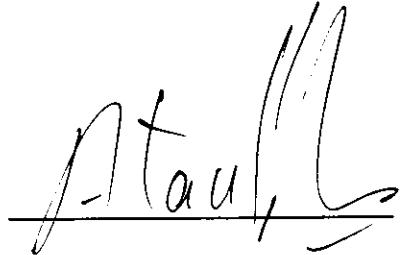
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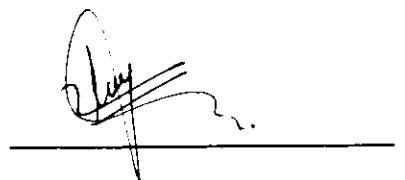


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Dedication

To my parents, my family members and all my well wishers

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Preface

The present work is my LL.M thesis submitted to the Faculty of *Shariah* and Law, International Islamic University, Islamabad in 2011. The subject matter of the thesis is whistleblowing which is an effective tool to eradicate corruption, especially from the public limited companies. There is no doubt in this point that corruption has contaminated the whole fabric of our society, including public companies, but the laws which are prevalent in our country come into action after the commission of a crime. After the commission of crime the only remedies available are either to impose fine on the culprit or to put him behind the bar.

Whistleblowing is a method by which the corruption can be controlled even before its commission. This research work explains that what is meant by whistleblowing laws and how these laws can be implemented in different organizations. This work also contains examples and cases from the United States of America where whistleblowing laws have been implemented since 1791. The legislation on this subject will surely be helpful to wipe out corruption from the country.

List of Abbreviations

1. Board of Directors (BOD)
2. Certified Public Accounting Firms (CPA)
3. Department of Labor (DOL)
4. Freedom of Information Bill (FOI Bill)
5. Freedom of Information Ordinance (FIO)
6. International Chamber of Commerce (ICC)
7. National Accountability Bureau Ordinance 1999 (NAB Ordinance)
8. Occupational Safety and Health Act, 1970. (OSHA)
9. Office of the Special Counsel (OSC)
10. Public interest Disclosure Act, 1989 (PIDA)
11. Sarbanes Oxley Act, 2002 (SOX)
12. Securities and Exchange Commission of USA (SEC)
13. Surface Transportation Assistance Act, 1982. (STAA)
14. The Merit Systems Protection Board (MSPB)
15. Union Carbide India Limited (UCIL)
16. Whistleblower's Protection Act 1989 (WPA).
17. Whistleblowing Protection Legislation (WPL)

Introduction

In this thesis, nature of the whistleblowing law and its implementation on the public companies and the government corporations, where the people have invested their valuable savings, will be discussed. This work is a comparative study of the whistleblowing laws in two regimes i.e., Pakistan and the U S A. The whistleblowing law is at infancy very nascent stage in the former while in latter country it is fully ripened. United States has different laws containing provisions pertaining to whistleblowing for the protection of the whistleblowers working in the public companies and the government corporations as well.

The first chapter introduces the whistleblowing concept and the jurisprudence behind it. It includes the definitions of the whistleblowing by different jurists and legal academicians and an overview of its literal and legal meanings. In the said chapter, among other details, the classification of the whistleblowing will be dealt with which includes internal whistleblowing regarding disclosure of corruption to the internal management or executives by an employee of the company, and the external whistleblowing for disclosure of information about the corrupt practices in the organization to the outside regulators of the concerned law enforcement agencies.

Furthermore, with specific relevance to whistleblowing, there are some corporate scandals of United States such as Enron, WorldCom, Tyco International and HealthSouth. The occurrence of these corporate scandals advocated the U S Congress to implement Sarbanes Oxley Act, 2002 (“SOX 2002”). SOX 2002 is aimed to bring more transparency into the affairs of the public companies, through disclosure requirements on the administration of the public companies and binding them to have a whistleblowing mechanism so that the investor’s equity may be protected.

In the second chapter discussion will be made on how the whistleblowing legislation protects the interests of shareholders in the public companies. This chapter acquaints us about the two pronged objects of the whistleblowing legislation that are, to coin a comprehensive procedure of disclosure of information for the whistleblowers; and to save

the whistleblowers from reprisal of the employers. It recommends the creation of an internal policy of the public companies about the disclosure of malpractices, making disclosures and providing safeguards to the whistleblower. It also tells us about the implementation mechanism of the whistleblowing legislation and the benefits thereafter, which the shareholders may have after the disclosure of information by the whistleblowers.

Third chapter deals with different pieces of legislation, promulgated in U S A to protect the whistleblowers in different organizations. It provides us with a brief history of this law in United States where it is fully developed and implemented. Following the first constitutional amendment, there appeared some precedents from the American judiciary providing tests for the implementation of the freedom of expression provisions of American Constitution.

Apart from the first Constitutional amendment there are some sub-constitutional pieces of legislation which contain whistleblowers protection provisions such as National Labor Relations Act, 1935, False Claims Act 1986, Occupational Safety and Health Act, 1970, Federal Coal Mines Health and Safety Act 1969, Surface Transportation Assistance Act, 1982, Whistleblowers Protection Act, 2007, and SOX 2002. In pursuance of these laws, the U S government has established different departments for the effective implementation of such laws.

Apart from piecemeal legislation in Pakistan on this subject, there is no remarkable legislative work which provide for the procedure and the ancillary matters of whistleblowing. In this backdrop, fourth chapter will deal with the available sporadic Pakistani legislation on the issue in hand. The corruption and like practices can be controlled through whistleblowing legislation, but the concept of whistleblowing is not well known in Pakistani legislative history. However, whistleblowers can be protected under Article 19 of the Constitution of the Islamic Republic of Pakistan, 1973. This Article conferred freedom of expression upon the Pakistani citizens. Besides the Constitution the *Freedom Information Ordinance*, 2002 is another sub-constitutional legislation which bounds to the departments of the Federal Government to provide information to the people

of Pakistan. The whistleblowing concept is somewhat alien but the concept of informer is available in our laws.

Informer is a person who provides information about some illegal act of a person to the regulators. The informer is also awarded keeping in view the utility of information and the money recovered made from the corrupt people. There is a difference between the whistleblower and the informer. The former is usually an employee of the organization who provides information relating to the inside corruption of the organization to the internal authorities or to the outside regulators. The later is an officer in any state department or staff member of any state department who provides information about the corruption of the masses to the high ups and is also awarded for this. There are some laws which contain provisions to reward the informers such as *Competition Ordinance, 2009 (Reward Payment to Informants Scheme)*, Reward to the informers under the *National Accountability Bureau Ordinance 1999*, (NAB Ordinance) and some orders from the tax regime.

Laws are made to regulate the human behavior which is changing day by day. It is need of time to promulgate the whistleblowing laws in the country because whistleblowing is a preventive measure adopted to control the crime before its commission. Most of the multinational and some other companies in Pakistan desirous of being enlisted on the US stock exchanges have whistleblowing mechanism, therefore, either the Pakistani laws should be amended to include the whistleblowing provision therein or new whistleblowing regime should be promulgated so that corrupt practices may be curbed.

Chapter # 1

Whistleblowing – Meaning and Concept

1.1 What is Whistleblowing?

“Whistleblowing” is an act of reporting a wrongdoing or malpractice within an organization either to inside authorities or to the external regulators e.g., the investigation and law enforcement agencies. Whistleblowing, generally, means disclosure about corruption or malpractices by an employee, whether working in a private organization or in a government corporation, to those who either have interest in it or who can control this corruption or malpractices. This corruption may be wrong done by his fellow employee(s) or other officials regarding business of the organization or corporation. “Whistleblowing is the deliberate, non-obligatory act of disclosure by an individual with privileged access to data or information of an organization, about a non-trivial illegality or other wrongdoing under the control of that organization to an entity which has the power to rectify the wrongdoing”.¹

1.1.1 Meaning

Literally Whistleblowing means disclosure of information, made in good faith and in the public interest, showing objectionable conduct which is otherwise not known to the management or to the regulators,² and whistleblower means someone who tells people in authority or the public about dishonest or illegal practice in business, or in government department etc.³ Whistleblowing can be said an act by which a whistleblower points out any irregularity, misconduct or corruption, which may cause harm to the general public or to the organization he is working in. The whistleblower makes this information

¹ Crowther, David and Capaldi, Nicholas, *The Ashgate Research Companion to Corporate Social Responsibility*, (Burlington: Ashgate Publishing Company, 2008), 181.

² <http://www.dayarayan.info/english-Glossary%20.php> (online accessed on 11-05-2010)

³ Longman Dictionary of Contemporary English, (New Delhi: Addison Wesley Longman Inc, 3rd Ed, 1998) 1633.

available firstly to inside high-ups or officials and secondly to the outside regulator(s), so that the wrong may be corrected.

The concept of whistleblowing has gained the attention of legislature, media, government and the general public for two reasons, firstly, whistleblowing is an action done more often, because mostly the employees do not want to place their jobs at risk, therefore they remain reluctant from making disclosure to the regulators. Secondly, whistleblowers have become attractive as a source of information.⁴ For these reasons, Bollywood made different movies on this subject such as "Serpico", "Silkwood", "Erin Brockovich", and most recently "Insider". The Time Magazine has also made whistleblowing a part of Western standard vocabulary through its December 2002 edition. This issue of the magazine discussed about the three women as women of the year 2002, who have blown the whistle. These are "Cynthia Cooper of WorldCom", "Coleen Rowley of the FBI", and "Sherron Watkins of Enron".⁵

1.1.2 Definition

Precise formulation of a comprehensive definition of whistleblowing should also be an integral part of every whistleblowing policy. It could vary from industry to industry and depending upon the nature of business, an entity is undertaking. However, for the purpose of general understanding of the term following definitions by different academicians might prove helpful.

Roberta Ann Johnson says,

There is an agreed upon definition of whistleblowing that has four component parts: "(1) *an individual acts with the intention of making information public;* (2) *the information is conveyed to the parties outside the organization who*

⁴ Wim Vandekerhove, *Whistleblowing and Organizational Social Responsibility*, (Hampshire: Ashgate Publishing Limited, 2006), 18.

⁵ Ibid, 17.

make it public and a part of the public record; (3) the information has to do with the possible or actual nontrivial wrongdoing in an organization; and (4) the person exposing the agency is not a journalist or ordinary citizen, but a member or former member of the organization".⁶

Hunt says,

"Whistleblowing is the public disclosure, by a person working within an organization, of acts, omissions, practices or policies perceived as morally wrong by that person and its disclosure is regarded as wrongful by that organization's authorities".⁷

Miceli and Near define whistleblowing as,

"The disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices, under the control of their employers, to the person or organizations that may be able to effect action"⁸

Whistleblowing has also been defined by Keenan and McLain as,

"The voluntary release, by a present or former organizational member, of illegal, unethical or illegitimate activities under the control of organizational leaders, to parties who are able to take corrective action."⁹

Ralph Nader thinks whistleblowing as,

⁶ Roberta Ann Johnson, *Whistleblowing: When it works and why* (Colorado: Lynne Rienner Publishers, Inc, 2003), 3 & 4.

⁷ G. Hunt, *Whistleblowing in Encyclopedia of applied ethics*, (California: Academics Press, 1998), 525.

⁸ Marcia P. Miceli & Janet P. Near, *Blowing the whistle: the Organizational & Legal Implications for Companies and Employees*, (New York: Lexington Books, 1992), 15.

⁹ Rufus, Robert J *Whistleblowing: Truth, justice and the American way*. Journal of applied Management and Entrepreneurship, http://findarticles.com/p/articles/mi_qa5383/is_200410/ai_n21342857/, (Oct, 2004), (accessed on 11-05-2009).

*“An act of a man or a woman who believing in the public interest overrides the interests of the organization he or she serves, and publicly blow the whistle if the organization is involved in corrupt, illegal, fraudulent or harmful activity”.*¹⁰

The definitions cited above reveal that whistleblowing means the disclosure of information, about some irregularity within the organization, which the public and the regulators don't have easily, because the information is disclosed by a person who has first hand information about the occurrence of some irregularity within the organization. It cannot be made obligatory on any person to disclose some information relating to some irregularity but whistleblower makes disclosure because he thinks that it is his moral obligation to point it out to some regulator so that it may be corrected. The basic purpose of whistleblowing laws is not to oblige whistleblowers to make disclosure, rather to encourage them to speak, and protect them from retaliation.

The above said definitions provide us with some basic elements of whistleblowing which are as follows:

- (1) Disclosure of information without any coercion by an employee whether current or former;
- (2) The information is non public (insider) which is non known to the public generally;
- (3) Release of information due to moral conviction;
- (4) external disclosure to the regulators;
- (5) disclosure relates to some inside corruption or illegal act; and
- (6) Corruption is against the public interest.¹¹

¹⁰ Ralph Nader and two others, *Whistleblowing: the report of the Conference on Professional responsibility*, (New York: Bantam, 1972), See also, David Lewis, *Whistleblowing at work*, (New Jersey: The Athlone Press, 2001), 1st Edition, p.1.

¹¹ Rufus, Robert (Oct, 2004) Whistleblowing: Truth, justice and the American way. *Journal of applied Management and Entrepreneurship*, J. www.findarticles.com (accessed on 11-05-2009).

We can say that whistleblowing is disclosure of inside corruption and malpractices by an employee, about the business of corporation.

1.2 Types of whistleblowing.

Another issue that arises while defining whistleblowing is whether it includes informing /reporting within the same organization in which the whistleblower serves. It is agreed by some academicians that informing/reporting outside the organization also comes under the definition of whistleblowing which may be termed as 'external whistleblowing'.¹² However, D. R. Kiran says that there are three types of whistleblowing. "According to him, whistleblowing can either be internal, like an employee or a former employee or a person attached closely to the organization, or internal (Cross) involving employees informing outside agencies directly about the immoral acts that are taking place in their organization, or external, like outsiders generally journalists, politicians and consumer groups, by publishing articles or informing to the regulatory agencies".¹³ Whistleblowing is of two types, internal and external whistleblowing. These both have a few differences and more similarities. Now we will discuss these both types of whistleblowing.

1.2.1 Internal whistleblowing

When an employee of the organization reports maladministration or financial irregularity, within the organization, either to his fellow employee or his immediate superior or other authorities of the organization, it will be an internal whistleblowing. Internal whistleblowing can be made through proper channels like informing the immediate boss, the information reaching the top person by such hierarchy. D. R. Kiran suggests that more common is to below the whistle directly to the Chief Executive, by passing the immediate bosses.¹⁴

¹² Marcia P and others, *Blowing the whistle: Organizational and other legal implications for the companies*, (New York: Lexington Books, 1992), 25.

¹³ D. R. Kiran, *Professional Ethics and Human Values*, (New Delhi: Tata McGraw-Hill Publishing Company, 2007), 137.

¹⁴ Ibid.

1.2.1.1 THE FOLLOWING ARE THE OBJECTIVES OF an internal whistleblowing:-

- To encourage the employees to speak to the inside regulators of the organization about some inside irregularity or corruption and illegality so that it may be controlled immediately;
- To lessen the expected loss to the organization which may occur in case the corruption is not brought into the notice of inside regulators; and
- To give an impression to the employees that their organization is serious to make an end of corruption from the organization.¹⁵

1.2.1.2 THE BARRIERS TO an internal whistleblowing system are as under:

- Disbelief on the internal corruption control mechanism;
- Misguided union solidarity;
- A sense that the management is not serious to curtail the corruption; and
- Fear of reprisal from the person against whom the whistle has been blown.¹⁶

1.2.2 External Whistleblowing

External whistleblowing means report of misconduct to the outside regulators who is legally authorized to control the corruption. In external whistleblowing the whistleblower may blow the whistle to the law enforcement agencies or outside regulators, keeping in view the nature and severity of the information. The External recipients of the information may be the government agencies, external anti-corruption hotlines, external counseling services, trade unions and members of parliament and the journalists.¹⁷ In short the reporting of internal corruption to the outside regulators of authorities is called external whistleblowing.

¹⁵ Carl R. Oliver and Frances J. Daly, *Encourage Whistleblowing (And more)*, This article updates a 2003 report by Lilanthi Ravishankar, www.scu.edu/ethics/publications/submitted/whistleblowing.html, accessed on 06-09-2009.

¹⁶ Ibid

¹⁷ A. J. Brown, *Whistleblowing in the Australian Public Sector*, (Australia: Australian National University Press, 2008), 86.

1.3 Whistleblowing and Corporate Governance:

Corporate governance means set of policies through which a corporation / company is governed, administered or controlled.¹⁸ Whistleblowing is an effective tool for governing a corporation in a magnificent way because the whistleblower may provide first hand information to the management of a company about irregularities, which are being committed in such a company. Objectives of a corporation can be best achieved, when management of a company is properly informed about its odds and perils.¹⁹ Observers believe that the management of the companies should reconsider their corporate governance system and restructure their organization and business management to include, *inter alia*,

1. The thorough protection of whistleblowers who are the source of information;
2. The elimination of ambiguous decision-making, and
3. The investigation of cases in which the people engage in illegal and unethical acts.²⁰

Whistleblowing, if made an integral part of corporate governance, it can be helpful to stop unethical practices from the corporations. As Edward Chow said,

“I would stress that good corporate governance is not just about transparency, it is also very much about personal honesty and integrity. No system can ever be 100 % fool proof against those who are determined to abuse it. Therefore, good individuals and corporate

¹⁸ http://en.wikipedia.org/wiki/Corporate_governance (online accessed on 11-05-2010)

¹⁹ Elaine Sternberg, *Just Business: Business Ethics in Action*, (New York: Oxford University Press, 2nd Edition 2002), 213.

²⁰ Julian Roche, *Corporate Governance in Asia*, (New York: Routledge Taylor & Francis Group, 1st Edition 2005), 283.

ethics and a clear sense of corporate responsibility are fundamental to good governance".²¹

1.4 Whistleblowing whether a legal or moral obligation?

As we have discussed earlier that the whistleblowing is a voluntary, non-obligatory act. No one can be made bound, legally, to report a wrongdoing, which he observes while working. It is the adherence, of a whistleblower to his own principles and values which encourage him to speak. Whistleblowing is a moral obligation to the extent that an individual is morally bound to prevent actions that would deteriorate the business and the objectives of the organization he is working in. generally the directors and the other executives have access to the information and they also have greater responsibility for what their companies do than other laborers. They are, therefore, under a greater obligation to blow the whistle when they observe some irregularity.²²

In short we can say that the whistleblowing is a test of loyalty and values of the whistleblower. These values are not written in any book, any statute, or any regulation, rather they exist in the mind of a whistleblower, which he reveals by blowing the whistle on a wrongdoing. Following are the examples of values of a whistleblower and their test.²³

1.4.1 Test of Loyalty, justice and inversion

Whistleblowing is a test to check that whether a person is loyal with his colleagues or with his organization in which he is working for gain. The employer or colleagues of the

²¹ Ibid, 284.

²² Elaine Sternberg, *Just Business: Business Ethics in Action*, (New York: Oxford University Press, 2nd Edition 2002), 212 & 213.

²³ K. R. Sawyer, *The Test Called Whistleblowing*, Paper Delivered to the National Conference of Whistleblowers Australia "Whistleblowing: Making It Work" September 11 2005, Adelaide, online accessed on 25-04-2009, from http://www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/1999-2/public_uni/submissions/sublist.htm.

whistleblower may be of the view that the whistleblower is disloyal with them or their organization, but, on the other hand he has to show his allegiance with his organization. It is justice for a whistleblower to blow the whistle. In this type of justice, the decision is pronounced by the conscience of a whistleblower and whistleblower has to obey the verdict without any hesitation. It is also a test of inversion, where the insider becomes outsider, where the friends become foe.²⁴

Whistleblowing is where people have failed, or about to fail to comply with a legal obligation to which they are subject.²⁵ The other important thing is that the whistleblowing laws are promulgated not to make the whistleblowers bound to blow the whistle. The purpose of whistleblowing law is twofold. Firstly it provides a comprehensive procedure to investigate a wrong doing, reported by the whistleblower and secondly to protect the whistleblower from reprisal. The whistleblowing laws are very helpful to eradicate corruption from the public and private organizations. Here are some cases which reveal that the world had to pay for non-complying with the principles of whistleblowing.

1.5 Corruption and whistleblowing

Corruption is considered as an act to deprive some person of a thing to which he deserves and to provide it to someone else who does not deserve it, or undue favour to some person either with remuneration (bribe) or without remuneration. The corruption, as we know, has contaminated not only to the government departments but also to the public companies in which the huge investment of general public is involved. In these organizations whenever an employee decides to report irregularities in his work place, be that to the pertinent authority (superior) or to the external parties or media, he has to face

²⁴ Ibid.

²⁵ David Lewis, *whistleblowing at Work*, (New Jersey: Transaction Publishers, 2001), 79. First published in 2001 by THE ATHLON PRESS, 1 Park Drive, London.

tangible risks.²⁶ Whistleblowing is considered as an effective tool to eradicate corruption from the companies and other organizations. The following table shows the fate of corporations, where no concept, like whistleblowing, was in existence.

1.6

TABLE OF CASES OF COST OF SILENCE²⁷

Scandal	Country	Date	Issue	Impact	Findings
Union Carbide India Limited	India	1984	Gas Leak Safety	3800 killed 40 total disability, 2,680 partial disability.	Workers together with local journalist, had raised concerns, but these had been ignored by the local authority
Clapham Rail Crash	United Kingdom	1988	Oil platform safety	35 killed, 500 injured	The investigation showed that the workers knew about the risky wiring but they kept quiet.
Piper Alpha	United Kingdom	1988	Oil Platform	167 Killed	The Cullen Report found that workers were

²⁶ Andres Gonzalez, *Governance for the 21st Century: the fight against corruption in Latin America*, (New Bruswik: Transaction Publishers, 2004), 167.

²⁷ Kirstine Drew, *Whistleblowing and Corruption, an International and Comparative Review*, research paper published in 2003, by Public Services International Research Unit (PSIRU), School of Computing and Management Sciences, University of Greenwich, Park Row, London, U. K, online accessed on 25-03-2009, from <http://www.u4.no/document/literature/drew2002whistleblowing-and-corruption.pdf>

			Safety		worried about their future employment and had not wished to raise safety concerns.
The Enron scandal	USA	2001	Fraud	Loss of jobs of the employees, equity of the shareholders, and pension and savings of employees.	Sherron Watkins disclosed her concerns in a 7-page letter to the CEO, Kenny Lay. However, she did not blow the external whistleblowing because till that time there was no comprehensive legislation for the protection of whistleblowers working in the public companies.
WorldCom	USA	2001	Fraud	Loss to the shareholders	Cynthia Cooper worked as the vice president of internal audit at

					WorldCom. She blowed the whistle but it was given no importance.
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Now for better understanding of the issues involved in these cases, we would discuss here the cases mentioned in the above table briefly.

1.6.1 Union Carbide India Limited (UCIL)

Union Carbide Indian Limited (UCIL) was an American Company. It was established in 1934 and it employed 9000 employees at 14 plants in five divisions. The UCIL was one of the big producers of batteries, carbon products, welding equipments, plastics, industrial chemicals, pesticides and marine products. UCIL, in 1970, established a pesticide plant in Bhopal, India. In December 1984 this plant gained worldwide attention as a result of its tragic catastrophe. The Bhopal disaster took place due the excessive emission of hazardous gases which caused the death of thousands of the surrounding inhabitants of the plant. The workers, media and the general public informed to the state administration of the Madhya Pradesh and Government of India about the emission of dangerous gases from the plant but they took no notice of it.²⁸

1.6.2 Clapham Rail Crash

Clapham Rail Crash took place due to the incorrect loose wiring work, during the stage of Waterloo Area Resignalling Scheme (WARS). The workers left the redundant wires connected at one end and bare at the other. On December 12, 1988 when a train left from Basingstoke to Waterloo, the driver saw that a signal changed from green to red,

²⁸ http://en.wikipedia.org/wiki/Union_Carbide_India_Limited (online accessed on 27-03-2010).

abruptly. He stopped the train and reported to the signalman at Clapham Junction. The driver was advised to proceed further. Being satisfied from the reply when the driver proceeded further, a late running train hit his train from behind at a speed of 40 mph, which was running under false proceeded signals. This tragic incident also claimed the lives of so many people.²⁹

1.6.3 Piper Alpha

The Piper Alpha oil platform had to face catastrophic explosions on July 6, 1988. At the time of explosion about 226 persons were working on the platform and 165 of whom died as a result of explosions. The platform was totally destroyed. The investigation revealed that the release of light hydrocarbon was the main cause of the incident which occurred when a pump was restarted after its routine maintenance.³⁰ Workers knew about the safety risks but did not report the same only due to the fear of job losses.³¹

1.6.4 Enron: Accounting Scandal

Enron (American based Company) started its business in 1986 as a result of merger of two natural gas companies. Its aim was to create a first nationwide natural gas conglomerate. Initially the US government regulated the construction of power plants and the rates to be charged for power. The large conglomerates made huge investments in gas and power industry when the Federal Government deregulated them in 1980s and 1990s, respectively.³²

The management and the Executives of the company committed different types of Fraud due to which it had to collapse. The first one is that it created different (Special Purpose

²⁹ http://en.wikipedia.org/wiki/Clapham_Junction_rail_crash, online accessed on 27-03-2010.

³⁰ http://www.aiche.org/uploadedFiles/CCPS/Resources/KnowledgeBase/Piper_Alpha.pdf, accessed on 06-03-2009.

³¹ <http://www.expolink.co.uk/whistleblowing-hotline/whistleblowing.htm>, online accessed on 06-03-2009.

³² Diane Lindstrom, *Enron Scandal* http://encarta.msn.com/encyclopedia_701610398_2/Enron_Scandal.html (online accessed on 25-06-2010)

Entities (SPEs). As per law the affairs of the SPEs are dealt with separately from those of the main company, but it did not happen in case of the Enron. Secondly, the Executives of the company were receiving handsome salaries from the company. They also did internal transactions with the company which were not disclosed to the general public, for the reason that the Company's external auditors, Arthur Andersen, were also working in co-ordination with the management and executives of the company. They coined a term of creative accounting, which priced high the value of its shares than the actual price. The price of its shares reduced, remarkably, from US \$ 200 to US \$ 1, each share.

Sherron Watkins was the one who observed all these irregularities³³. She wrote a memorandum articulating her concerns on the accounting policy of the company. She gave this document to Mr. Kenneth Lay who was then-CEO of the Enron, who later was made as defendant in various fraud and insider trading cases relating to the collapse of Enron. Mr. Lay assured to Sherron Watkins that he would take action on the issues which she pointed out in her memorandum. Being satisfied from the CEO she did not expose these cases to anyone else. This document was not made public until the congressional investigators released it six weeks after Enron filed for bankruptcy.³⁴.

The investigation revealed that the management of the company was fully aware of this whole sale corruption inside the Enron but they neither revealed it to the supervisors nor to the regulators, like Securities and Exchange Commission (SEC). It was believed that if these things were made known to the regulators, timely, the hard earned money of the people might have been saved. It was due to the collapse of the Enron that in 2002 US Congress promulgated Public Company Accounting Reform and Investor Protection Act.

This Act established a Public Company Accounting Oversight Board which was in the direct supervision of SEC. The board was empowered to form the accounting standards

³³ Time magazine's People of the Year in 2002, a reporter once observed that Watkins "has been hailed as a whistleblower so often it's starting to sound like part of her name.

³⁴ Jonathan Macey, *Getting the word out about Fraud: a theoretical analysis of Whistleblowing and Insider Trading*, <http://www.michiganlawreview.org/assets/pdfs/105/8/macey.pdf> (accessed on 20-11-2009).

and also check that whether the companies and Certified Public Accounting Firms (CPAs) are complying with these accounting standards or not. It was due to this enactment that the Chief Executive Officers CEOs and Chief Financial Officers (CFOs) of publicly traded companies were required to verify the accuracy of the financial statements of their companies, and if they verify any incorrect statement, they may have to go to the prison.³⁵

In addition to this the American Congress also decided to formulate a law for the adequate disclosure of information of the inside information to the general public, about any irregularity in the publicly held companies. Keeping in view the world known scandals Sarbanes Oxley Act, 2002 was promulgated. The promulgation of this Act is aimed at providing a system to report the supervisors and the outside regulators any irregularity or maladministration taking place inside the public companies. The Securities & Exchange Commission of the USA also made stiffer rules for the publicly traded companies.

1.6.5 WorldCom Scandal

The WorldCom Inc was a long distance telephone service provider company of the USA. The WorldCom acquired some other telecommunication companies during the 1990s, that boosted its business and revenues from \$154 million in 1990 to \$39.2 billion in 2001, and it was placed at number 42nd among Fortune 500 companies. This company had done different types of accounting irregularities, which resulted in its decline. WorldCom increased its net income and assets by transferring its current expenses to its capital account.³⁶

Ms. Cynthia Cooper, being vice president of the internal audit of WorldCom, noticed different accounting irregularities. She blew the whistle in 2002, on the largest corporate

³⁵ Ibid

³⁶ Bob Lyke and Mark Jickling, WorldCom, the accounting scandal, CRS report for Congress, updated August, 29, 2002.

fraud in the WorldCom. Cooper discovered different suspected accounting practices in company and she reported the same, in June 2002, to the audit committee of the Board of the WorldCom.³⁷ Cooper blew the whistle to save the interest of investor.

Later on through investigation it was discovered that the WorldCom was also involved in the accounting scandals. The WorldCom in its June 25th statement admitted that the company had classified over \$3.8 billion in payments for line costs as capital expenditures rather than current expenses. The internal auditors revealed this fact to the management of the company but they take no action against it.

The accounting mechanism of the WorldCom was questioned before its June 25 admission and in March 2002, the SEC asked for data from the company about a range of financial reporting topics including, “disputed bills and sales commissions, a 2000 charge against earnings related to wholesale customers, accounting policies for mergers, loans to the CEO, integration of WorldCom’s computer systems with those of MCI, and WorldCom’s tracking of Wall Street analysts’ earnings expectations”.³⁸

The Arthur Anderson, accounting firm, was its auditor. The company changed its auditors from the Arthur Anderson to KPMG, one year earlier from its bankruptcy. On 21st July the company applied for the bankruptcy protection and on August 8th the company declared that, in recent years, it has manipulated in its reserve accounts, affecting an additional \$3.8 billion. On June 26th, The U.S. Securities and Exchange Commission (SEC) charged the company with large accounting fraud and forthwith obtained stay order from the court and barred the company from destroying its financial records. The SEC also barred making payments to the company’s past and current executives, and demanded for an independent monitor of the company’s affairs. Keeping in view the corruption and the large investments of the people, hearings was held on 8th July by a committee on Financial services of the House of Representative, and on July

³⁷ <http://www.corporatenarc.com/cooper.php>

³⁸ Ibid

30th the Senate Committee on Commerce, Science, and Transportation. Investigations proved that many officials of the company were involved in this accounting scandal of the WorldCom.

1.7 Gist of Discourse

We can sum up the above discussion by saying that the whistleblowing is the disclosure of some information about the malpractice inside the corporation by an employee, whether current or former, of the company to his superior or to the regulators so that it may be corrected. The whistleblowing laws are aimed at protecting the employees of the companies from retaliation of the wrongdoers or his fellow employees. The world has to pay a heavy cost for not entertaining the wrongs pointed by the employees of the corporations, as discussed above.

As our discussion is with special reference to the U.S.A whistleblowing laws, the study of the Enron and worldCom reveal that in these cases the management of the companies was either silent or its voice was given no weight. It was after these major scandals that the legislature decided to implement laws for the whistleblowers in the listed companies i.e. Sarbanes Oxley Act, 2002. This law contains some provisions relating to the whistleblowing in corporations, which provide a mechanism to handle the information relating to the corrupt practices of the public companies and the protection of the whistleblower from retaliation.

Apart from the United States of America, there are other countries, such as Australia, France and United Kingdom which had also promulgated laws on whistleblowing and for the protection of the whistleblowers. The International Chamber of Commerce (ICC) also suggested member states to implement whistleblowing mechanism in public companies, and had also issued guidelines on whistleblowing for the member states to make the whistleblowing laws. In this respect the ICC has also formed ICC Rules of conduct on combating Extortion and Bribery, 2005.

Chapter No. 2

How Does Whistleblowing Work?

The white collar crimes, as we know, have tremendously been increased now days. People invest their savings in the public companies with a hope that the directors, officers and other employees of the company will protect their interest in the company and will make their investment in the company profitable for them. The investors also believe that the management and employees of the public companies will also work honestly and with due diligence for the investors keeping in view the applicable laws and regulations otherwise the interests of the investors would adversely be affected. The whistleblowing laws came into existence to control unethical behavior in an organization. The basic object of whistleblowing laws is twofold i.e., to provide a procedure to report an irregularity in an organization, and secondly, to protect from reprisal to those who identify irregularities, within the organization. The protection of the whistleblowers may guarantee that the interests of the shareholders would be defiantly protected. To make the whistleblowing laws fruitful a whistleblowing procedure is required. The details regarding requirements of whistleblowing procedure are given below.

WHAT SHOULD A WHISTLEBLOWING PROCEDURE CONTAIN?

The whistleblower may make disclosure to the different authorities in a company such as his immediate supervisor, seniors or higher level management, internal committees, outside law enforcement agencies, regulators and the media. Disclosure can be categorized in to internal disclosure to the management of the company, and external disclosure to the regulators or any other enforcement agency. Now I would discuss in detail that what ought to be whistleblowing procedure regarding these types of disclosure.

2.1 Whistleblowing Procedure Regarding Internal Disclosure:

Internal disclosures can be said to be the most appropriate channel to report the unethical and corrupt practices. The legislature should make such law which may encourage the whistleblower to make disclosure about the malpractices, so that it may be corrected. A well run organization should have an interest to know its internal malpractices with a view to correct them. The People would report malpractices, occurring, within their organization, when they would have trusted reporting channels that guarantee absolute confidentiality to the whistleblowers. The recent laws in different countries also require from the organizations to have procedure and policies to handle the information received from the whistleblowers.³⁹ To form a comprehensive whistleblowing procedure one should, *inter alia*, include the following things;

2.1.1 Creation of a policy:

The first step in the enforcement of whistleblowing law is creation of a whistleblowing policy. A sound whistleblowing policy should clearly define the procedure of reporting the malpractices in the organization, and a guarantee that the company will adopt appropriate measures to make the wrong correct and the whistleblower will not be retaliated at any cost.⁴⁰ A whistleblowing policy should encourage the employees to report the matter to the concerned authorities when they have any apprehension about wrongdoing. For this purpose the organization should establish a procedure. The policy may be made a part of the code of conduct of the company.⁴¹ The policy will reveal that how far an organization is serious to implement the whistleblowing laws, to protect the interests of the issuers and the shareholders as well. The whistleblowing policy should cover the following matters;

2.1.1.1 Individuals concerned with a whistleblowing policy:

³⁹ Marie Chene, *U4 Expert Answer, Good Practice in Whistleblowing Legislation (WPL)*, (U4 helpdesk, Transparency International, July 2009), 5.

⁴⁰ John R. Boatright, *Ethics and the Conduct of Business*, (New Delhi: Pearson Education Inc, 2nd Ed, 2007), 119 & 120.

⁴¹ *Whistleblowing and Codes of Conduct*, <http://www.freshfields.com/publications/pdfs/2006/15093.pdf> (online accessed on 11-04-2010)

The organization should make it clear, in its policy, that what are the people, who fall in the domain of the whistleblowing policy? The policy should provide cover to all the employees of the organization, whether temporary or permanent, on job or retired, who may disclose any wrong doing. A well reasoned whistleblowing policy should also cover the trainees, agency staff and contractors.⁴²

2.1.1.2 Matters to be covered under the whistleblowing policy:

The policy should be formed to deal with the following matters:

- Fiscal mismanagement or financial fraud;
- Non compliance of the legal requirement;
- Unhealthy and unsafe working condition;
- Harm to the environment;
- Unrestricted utilization of the organization's fund;
- Criminal act;
- Unethical practices or Immoral conduct; and
- Attempts to conceal the above mentioned illegalities.⁴³

2.1.1.3 Mode of reporting a wrong doing:

The organization should adequately state in its policy the mode of reporting any potential wrong doing. It may be raised verbally or in writing. It should be made easy and accessible for the whistleblowers to contact with their superior to report him any wrongdoing, subject to the condition that the information is not relating to the superior to who he is reporting wrongdoing. The individuals, who are interested to raise any concern

⁴² <http://www.suffolkprobation.gov.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?>

⁴³ David Lewis, *Whistleblowing at Work*, (New Jersey: The Athlone Press, 2001), 60.

regarding any wrongdoing, should also inform to the concerned person or reporting channel about the background & history of the apprehension, and the reason for their concern about the situation.

2.1.1.4 Safeguards, which a policy should contain:

- *Protection from harassment or victimization;*

It may be very difficult for the whistleblower to make disclosure of the information, relating to the corrupt practices to the management, due to the fear of retaliation from those responsible for the corrupt practices. The policy should bluntly state that harassment or victimization will not be tolerated at any cost. Further, the policy should narrate clearly that strict action will be taken against those, who would be indulged in harassing or victimizing the whistleblowers.⁴⁴

- *Confidentiality;*

The policy should promote confidentiality. The authorities who receive information should be bound to observe confidentiality regarding the information and the whistleblowers. Many times the people remain quite for the reason that if they are identified, they will be retaliated. The policy should also protect the identity of the person, who discloses any malfunctioning in the organization.⁴⁵

- *Anonymous Allegations;*

The primary purpose of whistleblowing is to point out some irregularity or mismanagement within an organization. Anonymous disclosure can be justified on the

⁴⁴ David Crowther & Nicholas Capaldi, *The Ashgate Research Companion to Corporate social Responsibility*, (Hampshire: Ashgate Publishing Limited, 2008), 181 & 182.

⁴⁵ K. Sasidharan & Alex K Mathew, *Financial Services & System*, (New Delhi: Tata McGraw-Hills Publishing Company Limited, 2008), 617.

ground that it may both protect the whistleblower from an irrelevant attack on the whistleblower.⁴⁶ One thing should be clear that a report, whether anonymous or from some known person, should be investigated properly. The policy may state that as an alternative, the whistleblower may opt not to reveal his identity. This would be another way to encourage the reporting of wrong doings and malfunctioning in an organization, although not legally very sound.⁴⁷

In addition to this the whistleblowing policy should also provide procedure to deal with malicious allegations. The wrongdoers should be dealt with an iron hand. At the same time the innocent employees should be protected from the useless blames. It is possible when the employer will make it clear that he will protect not only to himself but also to his staff from the false and malicious expression of concern by taking strict disciplinary action, where appropriate.⁴⁸

2.1.2 Attribution of roles & responsibilities to different reporting channels:

Managers:

The policy should also contain that any manager or supervisor who receives the information about the corrupt practices, under the procedure, must report the same to the Head of the body set up for the investigation of such disclosure immediately, who will, where appropriate, make it possible that the higher authorities like Chief Executive or other authorities have been informed;

Policy should speak out that the management of the said organization shall also ensure:

⁴⁶ Alan Malachowski, *Business Ethics: Critical Perspectives on Business and Management*, (New York: Library of Congress Cataloging in Publication Data, 2001), 315.

⁴⁷ <http://www.peopleinaid.org/pool/files/publications/whistleblowing-policy-guide-and-template.pdf> (online accessed on 15-09-2009)

⁴⁸ David Lewis, *Whistleblowing at Work*, (New Jersey: The Athlone Press, 2001), 60.

1. the cooperation of the staff of the organization with the investigating body and the Police, during any investigation;
2. to take immediate action to remove any weakness discovered in the internal control procedures;
3. to deal with an iron hand with those who are found guilty of any malfunctioning.
4. prompt action on the issue reported;
5. maintenance and preservation of full documentation of all evidence received; and
6. Assistance in any disciplinary proceedings.⁴⁹

2.1.3 Active participation of the top management:

The entire management of the company, from CEO to company Secretary, should make it clear that they are determined to encourage whistleblowing, and this message must be communicated by supervisors of all the departments in the organization at all levels. Moreover, they must be fully trained to promptly entertain the complaints of the employees by creating an open door policy.⁵⁰

2.1.4 Publicize the organization's commitment to promote whistleblowing:

The organization's commitment to curb the wrongdoing is very important to implement the whistleblowing procedure. The greater justice in the organization or in whistleblowing reporting channels encourage observers of wrongdoing to report it to someone powerful within the organization, but if the observers believe that the organization or its reporting channels are unjust, they report wrongdoing externally.⁵¹ The organization should have a culture of honesty and openness and it should inform its employees about the policy regularly. Moreover the organization's management should

⁴⁹ http://www.bournemouth.gov.uk/Library/Committee_Meetings/SB/Reports/12_July_2006/Whistle%20Blowing%20Procedure.pdf (online accessed on 17-07-2009)

⁵⁰ Lilanthi Ravishanker, *Encourage internal whistleblowing in an organization*, <http://www.scu.edu/ethics/publications/submitted/whistleblowing.html> (accessed on 25-04-2009)

⁵¹ Marcia P. Miceli and two others, *Whistleblowing in Organization*, (New York: Taylor & Francis group, 2008), 85.

promote their commitment to promote the whistleblowing through newsletters, speeches and memos. The employees who blow the whistle should be awarded publicly, it would serve two purposes one is by awarding the whistleblower and the second by making the other people know that the company management is serious to up root all types of evils before they become epidemic.⁵²

2.1.5 Investigate the matter properly:

The management of the company should try to investigate the allegations with due care and thoroughly, because some time crimes remain unchecked due the poor quality of investigation. The investigation involves identifying the company frauds and tracing any problems to the ultimate suspect. The management should properly inform the higher authorities about the allegation leveled by the whistleblowers and their findings after the investigation so that the higher authorities may take an appropriate action.⁵³

2.1.6 Evaluation of the organization's internal whistleblowing system:

In order to evaluate any company's internal whistleblowing system one should enquire about the opinion of the employees about the whistleblowing culture and its commitment to its values and ethics. For instance, the organization should conduct an annual survey of the employees asking different questions from the employees about the ethics and values of the company like: "Do you believe unethical issues are tolerated here" and "Do you know how to report an unethical issue". This kind of survey would enable the company's management to evaluate the usefulness of its internal whistleblowing system.

2.2 The barriers to a successful internal whistleblowing:

⁵² Lilanthi Ravishanker, *Encourage internal whistleblowing in an organization*, online accessed from <http://www.scu.edu/ethics/publications/submitted/whistleblowing.html> on 25-04-2009

⁵³ K. H. Spencer Pickett & Jennifer Pickett, *Financial Crime Investigation and Control*, (New York: John Wiley & Sons Inc. 2002), 82.

The barriers to a successful internal whistleblowing system have been discussed below;

2.2.1 The lack of Trust on internal system:

The lack of interest on the internal system of whistleblowing is one of the main reasons which curbs to the whistleblower from making a disclosure. This lack of interest on the internal system takes birth from the non serious behavior of the management or the employer, to curtail the corruption. Moreover, when the employee feels that another corruption case had been reported to the management, earlier, which remained uncurbed. These things make sure to the employee that the internal system of whistleblowing will not be helpful to investigate or curtail the corruption.

2.2.2 Misguided union solidarity:

As we have discussed earlier that the workers have the first hand information about any malpractice which may affect the interests of the public. They can act as the alarm system and make visible the frauds and malpractices which they observe during the course of their work. Unfortunately the workers who have information do not report to their superior because they are afraid to put their jobs at risk. The trade unions may play their positive role by creating a culture of openness in the work place, in making disclosure to the company's administration and ensuring that the policies of the company are fair and in the best interest of the employees and the employer. In this way they may also have the confidence of the employees. They can also help to change the culture by realizing the members that speaking up the concerns is important. Unions can provide moral support to those who have blown the whistle and played their role as watchdog.⁵⁴

It has been observed that the people who blow the whistle have a high level of integrity and are established in their career and domestic lives. In many cases the efforts of the whistleblowers have led to enormous suffering. Not only whistleblowers have been

⁵⁴ David Lewis, *Whistleblowing at Work*, (New Jersey: The Athlone Press, 2001), 116.

victimized at work but in many cases they have lost their jobs, social standing and income with consequential knock on efforts to their personal and family lives. Trade unions have a responsibility to seek ways to prevent such suffering and to ensure standards of conduct and the delivery of high quality of services. Negotiating an agreed policy and procedure on whistleblowing will help to protect employees from such victimization.⁵⁵

Some time the members of the trade union think that the whistleblower is doing an act which will be shameful for the issuer, therefore, they neglect the action initiated by the whistleblower. This policy should be changed and the unions should guide the other workers about the benefits and procedure of the whistleblowing so that the unlawful action of the other employees may be controlled or mended.

2.2.3 Non-serious attitude of the management:

Marshall Clinard, in “*Corporate Ethics and Crime: The Role of Middle Management*” says that the response of the organization towards the whistleblowers, who blow the whistle for the first time, was to retaliate him. Such type of practice created different problems for the organizations and the employees, as well. In a situation where the employee has a fear of retaliation, he would either decide to remain silent or would ask for the resolution of the problem through the mediums available to him outside the organization, rather than to seek assistance from the inside formal channels. These like choices may lead to a large number of undesirable consequences.⁵⁶

In order to establish an effective mechanism to resolve such like problems, it is very important to have the information of the organization’s experiences, understanding, and attitude of the management about the whistleblowing. The purpose to get such like

⁵⁵ Ibid, p. 117 & 118.

⁵⁶ John P. Keenan, *Whistleblowing and the Professional*, Ph.D, Executive Director, Leadership Programs, ACCEL Medaille College, 2 Hillsboro Drive, Orchard Park, NY. Publication Information: Keenan, J. P. and Krueger, C. A. (1992), 3.

information about the management is that these people are very helpful to set the ethical environment of the organization.⁵⁷

2.2.4 Fear of retaliation:

There are different types of laws in different countries relating to the protection for the whistleblower. These laws vary from each other depending on the type of industry, disclosure and the reporting channels to whom the whistleblowers make disclosure⁵⁸. One common thing in these laws is that they have been promulgated for the protection of the whistleblower, however, sometime these laws fail to protect the whistleblowers because of the mishmash gap filled approach.⁵⁹

It is generally observed that the society as a whole get benefits of the whistleblowing such as shareholders benefit from increased transparency in the corporate matters of the companies, better health and working environment, and employee as a group benefit from the judicious working conditions. On the other hand the whistleblowers that are the main source of all these benefits have to face different problems such as retaliation, physical violence and the termination of job.⁶⁰ The whistleblowers should be provided extra contractual protection to make them feel that the society is also careful about them.⁶¹ In addition to provide the encouraging atmosphere to the employees, the law should suggest a deterrent punishment for those who retaliate to the whistleblowers.⁶²

⁵⁷ Ibid. p. 4

⁵⁸ Richard Moberly *Protecting Whistleblowers by Contract*, Assistant Professor of Law & Cline Williams Research Chair, University of Nebraska College of Law; J.D. magna cum laude 1998, Harvard Law School. Published in University of Colorado Law Review 2008, Volume 79, Issue 4, p. 3.

⁵⁹ Ibid

⁶⁰ Alexander Dyck et al, *Who Blows the Whistle on Corporate Fraud?* (NBER Working Paper No. 3, 2007, available at <http://www.nber.org/papers/w12882>

⁶¹ ETHICS RESOURCE CENTER, *NATIONAL BUSINESS ETHICS SURVEY 1* (2007), available at <http://www.ethics.org/research/nbes.asp>. Employees who report these observations of misconduct serve an important monitoring function. A recent report found that tips uncovered more corporate fraud than any other source (such as government or internal investigations), and that employees provided almost two-thirds of those tips.

⁶² Ibid 58, p. 7.

2.3 Whistleblowing procedure regarding external disclosure to an authorized body:

The external whistleblowing is an alternative of the internal whistleblowing. When the whistleblower has exhausted the internal reporting channels and thinks that nothing has been done by the internal reporting channels, he can go to the outside regulators for the external whistleblowing. The external reporting can include a variety of persons such as the Ombudsman, a regulatory body such as the Securities & Exchange Commission, etc. some countries like South Africa and the United Kingdom also allow the whistleblowers to make disclosure to the union representatives or the legal advisors. In most of the countries the law authorizes to the whistleblowers to make disclosure only to the limited authorized bodies that have been entrusted these powers. In some countries there are some central agencies to whom the external disclosure is to be made, Canada is a glaring example having this type of agency where the Office of the Public Sector Integrity Commissioner is the agency to whom the external disclosure can be made.⁶³

The writers on the whistleblowing observe that the external disclosure should be permitted subject to some reasonable restrictions. The whistleblowers can make external disclosure;

- If they have apprehension that they would be victimized if they make a disclosure to the employer;
- If there is no prescribed regulator and the whistleblower believes that either the evidence would be destroyed or the harm may be caused to the people immediately if he does not make a disclosure;
- If they have already disclosed the matter to their regulator or the employer and no action has taken place to control the irregularity; or

⁶³ Marie Chene, U4 Expert Answer, *Good Practice in Whistleblowing Legislation* (WPL), U4 helpdesk, Transparency International, July 2009, p. 5.

- If they reasonably believe that the matter is exceptionally serious and contacting with the internal reporting channels is nothing but wastage of time.

The employees must be protected if they blow the whistle to another body, not for their personal gain but they have believe that the concern is true and it is reasonable to make its disclosure.⁶⁴

2.3.1 External disclosure to the public:

The final and most important resort of reporting is the media, because most of the legislations consider the media as the last reporting channel. In most of the cases the disclosure to the media is legally protected where the matter is so significant and involves some danger to the public health and safety and where the whistleblower has made internal disclosure but it was of no avail. Many of the critics feel this approach as too restrictive because of the role that media can play in public accountability and promoting transparency. It is considered by some authors that the whistleblowing protection legislation (WPL) does not cover the media reporting this can be said to be an indicator that “WPL aims more at dissent for a wrongful act rather than acting against wrongdoers”.⁶⁵

It is also said that the disclosure to the media and the members of parliament should also be encouraged and protected as a democratic corner stone. A negative aspect of reporting to the media may be that the whistleblower would directly contact with the external reporting channels bypassing the internal mediums of reporting. It would show a sense of distrust over the internal reporting channels which are also designed for amicable inside resolution of the problems. The general trend should be to promote the internal whistleblowing because it will save the honor of the organization and let the employees

⁶⁴ *People In Aid Policy Guide & Template, Whistleblowing, Revised 2008 Page 5, <http://www.peopleinaid.org/pool/files/publications/whistleblowing-policy-guide-and-template.pdf> (accessed on 25-09-2009).*

⁶⁵ Marie Chene, U4 Expert Answer, *Good Practice in Whistleblowing Legislation (WPL)*, U4 helpdesk, Transparency International, July 2009, p. 5 & 6.

know that their management will not spare any malpractice. Most of the laws in the world such as the Public Interest Disclosure Act (PIDA), in United Kingdom, also encourage the internal whistleblowing.

As we have discussed that PIDA encourages the internal whistleblowing and make it easy for the whistleblowers to get the legal protection. This internal disclosure so made will also helpful in the subsequent stage and will protect the whistleblower while making an external disclosure. In some cases it becomes impossible for the employee to make disclosure to the employer especially when the disclosure relates to the employer and there is no other reporting channel available to the whistleblower. In such like situation the whistleblower must be provided with an outside and reliable reporting channel. In such like situations the public disclosure, through media or any other source, should be readily protected where there is no inside effective reporting channel and the other reporting channels have been exhausted.⁶⁶

2.4 Objectives of the whistleblowing procedure:

The whistleblowing procedure is enforced to have the required objectives these objectives may be as follows;

- (a) To persuade the employees and other workers to make an immediate disclosure about the legitimate and genuine matter;
- (b) To set visibly a criteria which may authorize to the whistleblowers to make disclosure to the external bodies without being subjected to victimization or any other type of retaliation including dismissal from the job;

⁶⁶ Ibid

- (c) To give a chance to internal management to investigate the matter properly and take appropriate action to ensure that it was tried to resolve the matter indigenously;
- (d) To deal with the malpractices with high handedness; and
- (e) To promote the transparency and accountability within the organization.

These are the basic objectives which should be the part and parcel of each whistleblowing policy.⁶⁷

2.5 Benefits of whistleblowing procedure to the shareholders and employers:

Following are the major benefits of having an internal whistle blowing procedure,

2.5.1 Valuable Information:

The workforce of a company is considered to be a valuable source of information which can be utilized to point out and resolve the problems, before they cause a substantive harm to the reputation of the company and the interests of its stakeholders.⁶⁸ The ultimate beneficiaries of the whistleblowing are the investors and the shareholders, whose interests are protected through the disclosure of a wrongdoing by the whistle-blower. When the whistleblowing system exists in an organization, the investors feel free because they hope that their interests will be protected by someone from inside the organization so they should be carefree. Both the internal and external whistleblowing have their own benefits.

⁶⁷http://www.bournemouth.gov.uk/Library/Committee_Meetings/SB/Reports/12_July_2006/Whistle%20Blowing%20Procedure.pdf

⁶⁸ *Guidence for the audit committee*, prepared by the institute of charter accountants for England & Wales, downloaded from www.icaew.co.uk/technicalpolicy

2.5.2 Avoidance of negative publicity:

The internal whistleblowing system of a company provides an opportunity to the company to mend the problem internally and without having the negative publicity which the external whistleblowing may cause to the reputation of the company. A well structured internal whistleblowing system not only make the internal reporting channels more reliable but also have the confidence of the employees and they continue their jobs even after making disclosure of their concerns.⁶⁹

2.5.3 Prompt diagnosis of wrongdoing and its correction:

The internal whistleblowing may also facilitate the prompt diagnose of the problem and its speedy and effective solution and without disrupting the employees and employer relationship. It will also be helpful to reduce the misunderstandings between the employers and the employees and will also reduce the chance that the employee and the reputation of the company would not suffer harm unfairly.⁷⁰

2.5.4 Identification of those who are involved in corrupt practices:

Whistleblowing increases the chances of identification of those who are involved in corrupt practices. In a company the internal whistleblowing make possible for the management to exercise effective control over the affairs of the company and tackling the emerging risks.

2.5.5 An early warning system:

⁶⁹ www.gov.mb.ca/health/documents/cardiac/07prc6.pdf

⁷⁰ Secunda Kluwer, *Retaliation and Whistleblowers*: Proceedings of the New York University 60th Annual Conference on Labor Proceedings University Annual Conference on Labor Law International, 2008.

The whistleblowing can be said to be an early alarm system of a company. it enables the management of the company to know about some problem inside the company at its infancy stage and resolve it.

2.5.6 Anti-corruption tool:

Whistleblowing is an excellent anti-corruption tool because through whistleblowing the management of the company may have access to that information which other may remain secret from the company.

2.5.7 Other benefits:

- It provides information to the regulators and the general public and enable them to anticipate the risk and tackle with it;
- It is the reorganization of the rights, enshrined in almost all the constitutions of the world, that are freedom of expression, freedom of opinion, freedom of thought and information in the world of work. It boost up the liberty and motivate the workers;
- It can be closely linked with the right to have access to the documents, to have all democratic rights;
- It makes the decision making easy and possible because the decisions are made on the basis of some information and the effective medium to have first hand information is whistleblowing.⁷¹

⁷¹ http://ec.europa.eu/employment_social/labour_law/answers/documents/5_25_en.pdf

Chapter No. 3

Whistleblowing and American laws

3.1 Statutory Development of Whistleblowing in American Laws.

Brief History

The concept of whistleblowing laws existed in the American laws centuries ago, but it has been reformed considerably in the last fifty years. Before 1960s the corporations expected loyalty from the employees at any cost, and the employees could be fired by the corporations at any time. Only the government employees, making disclosure of some irregularity were protected because of their constitutional right to citizen agency policies, which was always upheld by the Courts. So far as the private industry is concerned, only a few had a mechanism for the disclosure of information, for instance the IBM claims to have an effective open door policy from its earliest days⁷² that allowed its employees to make disclosure of any information which they believe unethical or illegal. The IBM management is of the view that its open door policy is still an effective communication channel.⁷³ Due to the whistleblowing laws corruption has been controlled considerably but some time the problems remained concealed due to the lack of protection to the whistleblowers.⁷⁴

Recent Legislative History

In 1970s during the civil rights movement, U. S legislature made laws, to protect the employees working in the private sector, which contained some provisions for hiring and firing. Congress passed *Civil Service Reforms Act, 1978*, which protected to the civil servants but in 1989 the whistleblowing protection was extended to the employees of the

⁷² *Open Door* is essentially to deal with the employee grievances. When workers get satisfaction from their immediate manager, a machinist thinks that he is not being treated fairly, he can take the problem up the organizational ladder, to the chairman of the company, if necessary.

⁷³ A. Alavudeen and two others, *Professional Ethics and Human Values*, (New Delhi: Laxmi Publications (P) Ltd, 1st Edition 2008), 222.

⁷⁴ David F. Herr and two others, *Motion Practice*, (United States of America: Aspen Publishers 4th Edition 2004), 16-35

private industry through *False Claims Act*. This Act authorized the employees of the private industries to institute a suit from the State, and if he succeeds in the suit, he will be awarded 15 percent of the amount recovered from the wrongdoers, as a reward. Under these laws different enforcement agencies were also established such as "Equal Employment Opportunity Commission" and "the Occupational Safety and Health Administration". These bodies were authorized to receive complaints about the reprisal and take appropriate action.⁷⁵

In 1980s the American states began to provide protection to the employees of private enterprises against the "at will employment" doctrine. On the basis of this doctrine the management of the private enterprises could fire to the nonunionized employees due to any reason whatsoever including whistleblowing. The courts observed this doctrine against the public policy and started to provide protection to the whistleblowers.⁷⁶ Presently the most important American laws which provide protection to the whistleblowers are "*Sarbanes-Oxley, 2002*", "*Corporate Reform Act of 2002*". These laws provide protection to the employees working in the private sector organizations and *Whistleblowers Protection Act 1989*, as amended until 2007, which protects to the federal employees from reprisal.⁷⁷

3.2 Constitutional Protection first amendment:

3.2.1 First Constitutional Amendment, 15-12-1791:

The right of expression, which consequently adopted the shape of present whistleblowing laws, was granted to the Americans through the first Constitutional amendment in 1791.⁷⁸ It protects some of the most basic human rights of the American People, such as the

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Lilanthy Ravichanker, *Encouraging Internal Whistleblowing in an Organization*, (online accessed on 27-04-2009), from <http://www.scu.edu/ethics/publications/submitted/whistleblowing.html>

⁷⁸ "*Amendment 1, Freedom of Religion, Press, Expression*- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the peoples peaceably to assemble, and to petition the government for a redress of grievance".

freedom of religion, press and expression.⁷⁹ First amendment in US Constitution provides perhaps the first liberal legislation which confers on the citizens the right of free speech.⁸⁰ It declared the right of freedom of speech for the Americans. The principle driving this amendment is to provide liberty to the people to choose what the people want to do, and say what the people want to say.⁸¹ In 1968 the American Supreme Court held “the First Amendment protects the government employees who engage in speech on matters of public concern”.⁸²

This amendment in the US constitution protects to a public employee from the adverse action from the employer, when the employee makes a protected disclosure of information. Protected expression is

“An expression on a matter of public concern plus a favorable application of the balancing test,⁸³ public concern, traditionally, means any matter which relates to political, social, or other matter of interest to the community”⁸⁴.

The first amendment protects the employees who blow the whistle, either publically or privately to their superiors.⁸⁵ Whether any specific speech or disclosure of wrongdoing is protected disclosure vary from case to case analysis.

3.2.2 Leading American Supreme Court Cases:

The US Supreme Court developed several first amendment tests which include “the public concern test”, “the balancing test”, and “the causation test”. However, the Court

⁷⁹ <http://www.usconstitution.net/constnotes.html#Am1> (accessed on 14-12-2009).

⁸⁰ <http://www.scienceforthepeople.com/index.php?name=News&file=article&sid=76> accessed on 22-11-2009.

⁸¹ <http://www.thepetitionsite.com/1/Separation-of-Corporate-and-State>, accessed on 14-12-2009.

⁸² *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)

⁸³ *Ibid*, explaining the test requires a balancing between the interests of the public employer in free speech and the interest of the government in ensuring efficiency).

⁸⁴ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

⁸⁵ *Givhan v. Western Line Consolidated School District*, 439 U. S. 410, (1979).

has recently developed the official duty test.⁸⁶ An employee of the government department, who made a disclosure of information, for protection from retaliation under the first amendment, needs to establish that;

- His disclosure is qualified to be protected being protected speech; and
- This protected speech is the substantial and motivating cause for his discharge from his job.⁸⁷

In some other cases the Supreme Court observed that a public employee speech to be protected under the first amendment, it should pass a two prong test.

“Firstly, a Court should determine whether the speech can fairly be characterized as constituting speech on a matter of public concern and not just a matter of personal interest,⁸⁸ and secondly the Court must balance the interest of the employee as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of public service it performs through its employees”.⁸⁹

To seek the first Amendment protection, the disclosure of the employee must meet the test of *Mt. Healthy* case.⁹⁰ Under *Mt. Healthy* case an employee has the initial burden to demonstrate that the protected speech or the conduct was the main reason behind the adverse employment action. Once it is proved by the employee, the burden shifts on the employer and he has to prove through evidence that he would have taken the same action

⁸⁶ J Michael McGuinness, *Whistleblowing and free speech: Garcetti's Early Progeny and Shrinking Constitutional Rights of Public employees*, http://www.tourolaw.edu/lawreview/pdfs/_3_Whistleblowing_WWW.pdf (Accessed on 11-03-2009) p. 530 & 531

⁸⁷ *Ibid*, p. 532.

⁸⁸ *Connick v. Myers*, 461 U. S, 138, 147, (1983),

⁸⁹ *Pickering supra*, 395 U. S. 563 (1968).

⁹⁰ *Mt. Healthy City School District Board of Education v. Doyle* 429 U.S. 274, 287 (1977).

even in the absence of the employee's protected disclosure. Mt. *Healthy* test applied to test the legality of the employer's action under other wrongful discharge statutes.⁹¹

It was observed that the whistleblowing issue arises in the context of employer and employee relationship, the government has broader powers to this speech. The Court summarized it in *US vs. National Treasury employee Union*:

The Congress may impose restrictions on the job related speech of public employees that would be plainly unconstitutional if applied to the public at large. When a Court is required to determine the validity of such a restraint, it must arrive at a balance between the interests of the employee, as a citizen, in commenting upon the matters of public concern and the interest of the state as an employer.⁹²

The Court also developed some other tests which places the burden on the employee. In the first instance the employee has to prove that;

- The disclosure made by him is protected constitutionally, and
- This protected disclosure is the basic factor in the decision of the employer.

3.3 National Labor Relations Act, 1935.

National Labor Relations Act1935 (NLRA) a federal legislation aimed to protect the rights of the workers of the private organizations. It allows the workers to form their labor unions and engage in collective bargaining and they may also take part in strikes. The employees have right to freely express their views about the policy of their employers concerning their rights. The employees in the private sector, who believe that they have been discriminated or removed from the jobs illegally, may file complaints with the "National Labor Relations Board" (NLRB), within a period of six months of the

⁹¹ *NLRB vs. National Transportation Corp*, 462, US, 393 (1983).

⁹² *US vs. National Treasury employee Union*, () at 465-466

alleged unlawful termination or discriminatory activity. The Act says that it is not fair for an employer to terminate or discriminate an employee who filed a complaint or testified this Act.⁹³

This right of the employees is subject to certain limitations such as the D. C Circuit Court ruled out in the following words;

"We recognize and protect the confidentiality of any information concerning the Company, its business plans, its partners [i.e. employees], new business efforts, customers, accounting and financial matters"⁹⁴

3.4 False Claims Act 1863.

The special legislation on whistleblowing in the United States started after the enactment of False Claims Act. This law was promulgated in order to curtail the fraud, which was committed by the suppliers while making supplies of the war material to the Union government during the civil war.⁹⁵ This law is also known with the names such as Lincoln Law or the qui tam statute. This Act authorizes payments to the whistleblowers of a certain percentage out of the recoveries or damages won in the fraud cases that the whistleblowers expose through their evidence. The Act authorizes the whistleblowers to bring action against those who submits false claim to the government. This Act also restricts the wrongful dismissal of the whistleblowers.

⁹³ https://www.anapolschwartz.com/practices/whistleblower/article_41-nlra.asp

⁹⁴ <http://www.thefreelibrary.com/Laws+and+regulations+undergo+changes+at+federal,+state+levels.-a0172747096>

⁹⁵ *Getting the world out about fraud: A threatical analysis of whistleblowing and insider trading*, by Jonthan Macey, on line accessed from <http://www.michiganlawreview.org/assets/pdfs/105/8/macey.pdf> on 03-11-2009, p 1904.

This Act covers the cases of product substitution, mischarging / accounting fraud⁹⁶, and inaccurate estimates.⁹⁷ The Courts in the United States have declared that these acts amount to an offence under the False Claims Act. "Product substitution" mean an act of the contractors to submit a product that does not conform to the product contract.. Such substitution can occur by mismarking the products, deviating from the specification, and other types of the conduct that may indicate an intention to deceive the government in the performance of a contract. Such conduct may subject to the contractor criminal or civil sanction pursuant to the False Claims Act.

In "*United States v. National Wholesalers*",⁹⁸ the contractor indicated the government that it would supply brand name regulators, but instead manufactured the regulators itself and attached the false brand name labels before delivery. The Court found the contractor liable for a false claim even though the regulators were in fact equal. In another case titled *United States v. Aerodex, Inc*,⁹⁹ the Court found a false claim when the contractor knowingly substituted the aircraft bearings that differed from the contract specification, even though there was no proof that they were of the inferior quality.

Due to the proper enforcement of this Act so many settlements took place due to which the government got benefit of billions of dollars. The first very large settlement took place in 1992, with the National Health Laboratories, and it was of \$111 million. Other huge settlements took place with the SmithKline Beecham Clinical Laboratories of lab services \$325 million, "Blue Cross and Blue Shield of Illinois" of \$140 million, for improper processing of Medicare claims, National Medical Care of \$375 million, for

⁹⁶ Mischarging is the false description and the improper charging of cost to a government contract. The contractual remedy for mischarging is the disallowance of the costs, including all the costs incurred because of the mischarging. See at, Johan Cibnic, JR, and two others, *Administration of Government Contracts*, (Washington DC: Wolters Kluwer, Law & Business, 4th Ed, 2006), 143.

⁹⁷ Johan Cibnic, JR, and two others, *Administration of Government Contracts*, (Washington DC: Wolters Kluwer, Law & Business, 4th Ed, 2006), 142.

⁹⁸ *United States vs. National Wholesalers*, 353 US, 930 (1957).

⁹⁹ *United States v. Aerodex, Inc*, 469 F.2d 1003, (5th Cir 1972).

billing useless tests, and Beverly Enterprises, of \$ 170, for inflating the costs of treating Medicare patients.¹⁰⁰

Many health care specialists and researchers observe that the False Claims Act proved very helpful to control the health related frauds. The New York Times reported in 1999 that Medicare spending dropped first time in the history, the paper also observed that it was due to the proper implementation of the False Claims Act.¹⁰¹ It has been observed that a substantial portion of the government recoveries was given to the whistleblowers, under the provisions of this Act which allowed the private individuals to bring action on behalf of the U S government and have a share in the money recovered by the government from 10% to 15%.

3.5 Occupational Safety and Health Act, 1970. (OSHA)

The Occupational Safety and Health Act (OSHA) protected the employees from retaliation for exposing occupational hazards and reporting these hazards to the government, the press or the other authorities.¹⁰² In 1970, while enacting the whistleblower protection in OSHA, Congress recognized to the employees to be a valuable and knowledgeable source of information regarding the safety of the workplace and health related issues because the US Congress was fully acquaint with the proceedings of the federal and state departments responsible to control the occupational and safety regulations.¹⁰³ OSHA restricts an employer from discriminating an employee who reports any fatality, injury or illness related to work, under Section 11(C). OSHA also protects an employee who brings an action under this Act or otherwise exercises his rights given by the OSHA.¹⁰⁴

¹⁰⁰ http://www.accessmylibrary.com/coms2/summary_0286-27322430_ITM (accessed on 20-11-2009)

¹⁰¹ Ibid

¹⁰² Stephen M. Kohn, *Concepts and Procedures in Whistleblowing Laws*, (Westport: Greenwood Publishing Group, 2001), 225.

¹⁰³ *Reich v. Hoy Shoe Co*, 32 F. 3d 361, 367 (8th Cir. 1994).

¹⁰⁴ William Henry Yost, *Whistleblower Protection Program*, 22nd January 2008. <http://www.osha.gov/dep/oia/whistleblower> (accessed on 25-06-2009)

This Act is being implemented by The Department of Labor (DOL). This Act gives a right to an employee to request to the DOL occupational safety and health Administration inspection when he feels that the health condition is not in accordance with the OSHA standard that may cause harm to the employees or the public. It is also a responsibility of the DOL to inform the complainant about his action taken and findings of its investigation, if so requested by the employee. The DOL may also hold an informal review of a decision not to inspect.¹⁰⁵ A complaint under the OSHA should be in writing and clearly explain the grounds to be investigated. The employee can also request to the DOL or to the OSHA to keep his name confidential.¹⁰⁶

The Act provides that when an employee feels that he has been discriminated in violation of this Act, he may file a complaint with the DOL Occupational Safety and Health Administration. An employee can file a complaint within a period of thirty days of the alleged discriminatory action. On the other hand if the DOL observe that the employee has been terminated in violation of this Act, the DOL may file a suit in the Federal District Court, against the employer.¹⁰⁷

In “*Burnham v. Karl & Gelb*”, the issue before the Supreme Court was whether an employee can bring an action in the court for his termination in violation of this Act?. The court held that 29 U.S.C. §660(c) has provided a remedy to the employee, against his wrongful termination and that is to file a complaint with the DOL, and if the DOL is of the view that the employee has been discharged in violation of this Act, the department can file a suit against the employer, in the Federal District Court. It was held in this case that the employee cannot file a suit directly in the Court because he has the only forum of DOL by filling a complaint therein.

¹⁰⁵ Stephen M. Kohn, *Concepts and Procedures in Whistleblowing Laws*, (Westport: Greenwood Publishing Group, 2001), 226 & 227.

¹⁰⁶ See *Reich* supra, 368.

¹⁰⁷ https://www.anapolschwartz.com/practices/whistleblower/article_42-oshaw.asp (online accessed on 25-06-2009)

OSHA is a multi-purpose piece of legislation that not only protects the employees from the retaliation but it also protects the working environment of the workers. Some legal expert criticizes it for its weak statutory protection. For example, although the law protects to those employees who blow the whistle on unsafe working conditions, enforcement of employee's right under that Act is vested exclusively in the DOL. The employee has no right to file a suit, directly, in the Federal District Court under the OSHA.¹⁰⁸

3.6 Federal Coal Mines health and Safety Act 1969.

This Act is also known as the "Coal Act". The purpose of its implementation is to make stricter the safety standards and improvement of the working environment for the coal miners. This Act requires two annual inspection in the surface mines and four annual inspections in the underground mines, to analyze the working conditions for the employees, therein. Under this Act there can be inflicted criminal as well as monetary penalties on the persons who violate this Act. This Act provides a special procedure to improve health and safety standards for the miners and directs to their employers to pay monetary compensation who become totally or partially disable while working in the mines. It also directs to the employers to provide treatment to the miners who become sick due to inhalation of the coal dust. Subsequently this law was amended in 1977 through Federal Mine Safety and Health Act of 1977.¹⁰⁹

The Federal Mines Health and Safety Act provides that no miner, (representative of a miner or prospective miner) shall be discriminated or expelled from his job if he files a complaint or provided any evidence under this Act. It includes notifying the operator of

¹⁰⁸ Stephen M. Kohn, *Concepts and Procedures in Whistleblowing Laws*, (Westport: Greenwood Publishing Group, 2001), 226.

¹⁰⁹ Ida Kubiszewski (Lead Author); Cutler J. Cleveland (Topic Editor). 2008. "Federal Coal Mine Health and Safety Act of 1969, United States." In: *Encyclopedia of Earth*. Eds. Cutler J. Cleveland (Washington, D.C.: Environmental Information Coalition, National Council for Science and the Environment). [First published in the *Encyclopedia of Earth* 30-08-2006; Last revised 04-09- 2008; http://www.eoearth.org/article/Federal_Coal_Mine_Health_and_Safety_Act_of_1969,_United_States (online accessed on April 18, 2010)]

mine or his agent about the unsafe and unhealthy working condition at the work place. It also protects miners who have been transferred pursuant to the act. Under this Act the miner can file his complaint within a period of 60 days, from the alleged discharge or discrimination DOL.¹¹⁰

3.7 Surface Transportation Assistance Act, 1982. (STAA)

This Act is called “transportation funding and policy act”. It had been implemented in 1983. STAA encourages the employees to report the non compliance of the safety regulations by the commercial vehicles. The implementation of this Act in USA shows that the Congress has recognized that the employee working with the transportation companies have the first information about any violation of laws, and sometimes when they report these violations to the law enforcement agencies, they are threatened and they are also discharged. Protection was required to the employees working in the transport companies who reported the violation of laws by these companies.¹¹¹

The STAA provides protection to all the employees of the transport companies including mechanics, drivers, and freight handlers who report any violation, committed by these companies, to the concerned enforcement agencies.¹¹² This Act restricts an employer from terminating, or discriminating his employee, in any other way who;

- Refutes to work on a vehicle which does not meet the federal, state and local health and safety related regulations;
- Points out any vehicle violating safety requirement;
- Says that he had been exposed to significant hazards; or

¹¹⁰ https://www.anapolschwartz.com/practices/whistleblower/article_29-federal-mine-health.asp (online accessed on 25-11-2009)

¹¹¹ http://www.absoluteastronomy.com/topics/Surface_Transportation_Assistance_Act (online accessed on 30-01-2010)

¹¹² Section 405 of the Surface Transportation Assistance Act, 1982.

- Provides evidence, Testifies or in any other way participates in the proceedings relating to the safety;¹¹³

3.8 False Claims Act 1986. [Revised].

This Act was promulgated to amend the False Claims Act 1863. The basic purpose to amend this law was to make the recoveries easier for the whistleblowers and to encourage them by increasing the amount of reward under this Act, for pointing out any fraud of the government contractors. False Claims Act authorizes a whistleblower to file a suit on behalf of the government and subsequently the Justice Department can also join him in the suit. If the department joins him in the suit, the whistleblower will get 25% in case of success otherwise he will get 30%. The US Justice Department has observed that after introducing amendments in the False Claims Act, the number of cases filed has increased twenty fold.¹¹⁴

After amendment, False Claims Act covers to every industry dealing with the federal government. It has also increased the benefits for the whistleblowers by his reinstatement on the job with seniority and double back pay, interest on pay, fee of the attorney and the compensation for any type of discriminatory treatment with the whistleblower. In addition to the above mentioned benefits the legislature has also placed a bar on reprisal against the whistleblowers for exposing the government corruption.¹¹⁵ On the other hand the amendment has also increased civil and criminal penalties for those who submit false claims and at the same time relaxed the burden of proof on the government.¹¹⁶

¹¹³ *Whistleblower Protection under the Surface Transportation Assistance Act.* It has been funded from the US Federal Funds for the Occupational Safety and Health Administration, US Department of Labor, under grant number 46A7-HT51. <http://wiscosh.org/pdffiles/PWWSheets/surfacetransport.pdf> online accessed on 18-12-2009.p.1.

¹¹⁴ Marcia P. Miceli & Janet P. Near, *Blowing the Whistle: The Organizational & Legal Implications for Companies & Employees*, (New York: Lexington Books, 1992), 247.

¹¹⁵ Macey, Jonthan. *Getting the world out about fraud: A threatetical analysis of whistleblowing and insider trading*, <http://www.michiganlawreview.org/assets/pdfs/105/8/macey.pdf> (accessed on 03-11-2009), p 1904 & 1905.

¹¹⁶ Dennis J and two others, *Corporate Counsellor's Deskbook*, (United States: Aspen Publishers, 5th Ed, 2004), 17.5. http://books.google.com/books?id=F_wQBO4dsXsC&lpg=RA3-

This amendment also increased the percentage of reward to the whistleblower and the total amount which the government had to receive. The amended False Claims Act also imposes a compulsory fine, recoverable from those who submitted the false claims, from \$5000 to \$10,000.¹¹⁷ Whistleblower is required to file a complaint under his seal and also serve it upon the government so that if she is willing, she may join to the whistleblower. From the service upon the government, within sixty days, the government has to decide that whether she will become a major party to the complaint or not. If the government takes the primary responsibility of the case, even then the whistleblower remains a party to the case, however, the government is not bound by the acts of the whistleblower. In case the government does not become a party to the case, the whistleblower retains a right to continue the action, but without prior approval of the Attorney General, the whistleblower cannot dismiss his claim.¹¹⁸

Through amendment in the False Claims Act the percentage of reward for the whistleblower has been increased and at the same time the incentives for the government to intervene have also been increased. In short we can say that through this amendment the whistleblowing has been made charming even for those who otherwise may not be willing to come forward.¹¹⁹

3.9 Sarbanes Oxley Act 2002 (SOX):

The promulgation of Sarbanes Oxley Act of 2002 (SOX) shows that the US Congress has recognized the importance of whistleblowing legislation, especially for the identification and control of a wrongdoing, in the field of corporate laws. The main reason for the

PT798&dq=revised%20false%20claims%20act%201986&pg=RA3-PT798#v=onepage&q&f=false
(online accessed 25-04-2010)

¹¹⁷ Ben Depoorter and Jef De Mot, George Mason University School of Law: working paper series, *whistle Blowing*, The working paper is hosted by The Berkeley Electronic Press. <http://law.bepress.com/cgi/viewcontent.cgi?article=1012&context=gmulwps> (accessed on 21-11-2009) P. 6.

¹¹⁸ Ibid.

¹¹⁹ Elletta S. Callahan & Terry M. Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 285 (1992).

promulgation of this Act is the collapse of some corporate giants, in America, such as Enron and WorldCom.¹²⁰

Initially it was subjected to controversy and had been challenged for a number of reasons such as it is unconstitutional, it is very costly, especially for the small corporations, and the foreign companies. It was also said about SOX that it will reduce the foreign listings on the American stock exchanges.¹²¹ Some other commentators and legislators proposed amendments to SOX. The people heard different rumors about the implementation of this law and it was a question that whether this law will be able to encourage the observers of the wrongdoing to report it?¹²²

The Chief Executive Officer (CEO) and the Chief Financial Officer (EFO) of the Public Company were bound under SOX to verify the financial statements of their companies, before submission to the Securities & Exchange Commission (SEC). They were responsible to certify that all the company has prepared its financial statements in accordance with the “Generally Accepted Accounting Principles (GAAP)”. They believe that the reports, which they are certifying, are true and correct and do not contain any incorrect and wrong information. Moreover, certain limitation has been placed on the internal transactions, such as loaning to the directors of the company.¹²³

3.9.1 Whistleblowing

SOX contain three sections dealing with the whistleblowing, which protects the whistleblowers. These sections provide a variety of remedies to the whistleblowers. Here we discuss in distinctive headings the remedies available under the SOX.

¹²⁰ Terry Morehead Dworkin, *SOX and whistleblowing*

<http://www.michiganlawreview.org/assets/pdfs/105/8/dworkin.pdf> (accessed on 26-10-2009) p.1757

¹²¹ Harvey Pitt, *Sarbanes-Oxley is an unhealthy export*, Financial Times (London), June 21, 2006, available at <http://www.ft.com/cms/s/232bdc7a-00c3-11db-8078-0000779e2340.html> (online accessed on 31-01-2009)

¹²² Terry Morehead Dworkin, *SOX and whistleblowing* (on line accessed on 26-10-2009, available at <http://www.michiganlawreview.org/assets/pdfs/105/8/dworkin.pdf>) p. 1759

¹²³ Guy P. Lander, *What is Sarbanes Oxley?* (New York: McGraw-Hills, 2004), 3-6.

3.9.1.1 Prohibition against employment discrimination (Civil)

Section 806 of the SOX cast a civil liability upon the wrongdoers. It states that no issuer, covered under the provisions of the SOX, will demote, discharge, harass, threaten, terminate or discriminate to a whistleblower who reports some information, relating to any wrongdoing, within the company, to a person responsible to initiate action.¹²⁴ This section also contains a definition of whistleblowing as,

“the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action”.¹²⁵

The whistleblower, desirous to make disclosure under the SOX, must have reasonable believe that the information is relating to the covered violation. The SOX provides a procedure for its effective implementation relating to the whistleblowing. The SOX says that an employee having information about any irregularity must report to the Secretary Labor within 90 days, from the date of the alleged irregularity. The whistleblower may file a complaint in the Federal District Court, if the Secretary Labor does not give his final decision within 180 days, from the date of the filling of the complaint.¹²⁶

This section specifies internal whistleblowing as the most appropriate channel, whereas most of the Federal and the state laws only designate to the external recipient. This thing proves that SOX also favor common practice of internal whistleblowing because it is the most common type of initial whistleblowing. The recipient of the information has to conduct a prompt investigation and must try to correct the wrong as soon as possible, but with causing minimum disruption to the employer and employee relationship. The

¹²⁴ James R. Doty, *Corporate Governance 2004: preparing for the next wave of Disclosure & Board Changes*, (United States: Practicing Law Institute, 2004), 66.

¹²⁵ Marcia P. Miceli & Janet P. Near, *Blowing the Whistle* 15 (1992). This definition is broader than the definition of protected disclosure in most laws because they generally don't encompass ethics or “immoral” violations. The most common definition is a violation of a law, rule, or regulation.

¹²⁶ Guy P. Lander, *What is Sarbanes Oxley?* (New York: McGraw-Hills, 2004), 98.

internal whistleblowing is also very helpful to correct the misunderstandings between the employer and the employee without getting suffered from harm.¹²⁷

3.9.1.2 Prohibition against employee discrimination (Criminal)

The provisions of the SOX relating to the criminal liability for known and intentional retaliation make it distinct from the other whistleblowing legislations. The companies and individuals who intentionally retaliate the whistleblower, who provides information about any irregularity to the law enforcement agencies, are punished under section 1107 of SOX. In whistleblowing legislation the criminal penalties is not a new thing because in some countries like United States and Australia the persons, who retaliate the whistleblower, are penalized under the criminal laws. The criminal penalty under SOX for intentionally retaliating a whistleblower may extend to \$1000, 000 or imprisonment which may extend to ten years.¹²⁸ For the execution of this penalty the Congress has set a high bar that the whistleblower must be correct and he must prove the same through his intention.

Section 1107, which imposes criminal penalty on the retaliator, has been very broadly written because it covers the retaliation against whistleblower that has provided information under any of the federal law to the law enforcement body. This provision is broader enough to cover not only the companies but also the individuals within an organization, nonprofit companies, and the non-organization members. This section also provides definition of retaliation of its own which is,

“any action harmful to any person, including interference with the lawful employment or livelihood of any person. In terms of whistleblowing, this section has the potential to

¹²⁷ Terry Morehead Dworkin, SOX and whistleblowing (on line accessed on 26-10-2009, available at <http://www.michiganlawreview.org/assets/pdfs/105/8/dworkin.pdf>) p. 1760

¹²⁸ http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 (online accessed on 15-11-2009).

become the most important of all the SOX provisions because it could develop into a general whistleblower protection statute".¹²⁹

3.9.1.3 Corporate Responsibility

The SOX has also created requirements of corporate responsibility for the companies. This law has two sections which directly deal with the corporate responsibility, and these are sections 301& 307. Publicly traded corporations are required to have audit committee, under section 301 of the SOX. These committees are required to set a procedure to receive and entertain the complaints from the employees relating to suspicious auditing and accounting matters. These committees are bound to entertain all the complaints whether anonymous or non-anonymous. Under the whistleblowing provisions, reporting a matter to the internal committees is a fully protected activity under the SOX. The companies are not permitted to establish a procedure to entertain the internal complaints relating to the whistleblowing.¹³⁰

Under section 307 an attorney, whether in house or outside counsel, who represents a company before the SEC, is a whistleblower and is required to blow the whistle if he has some information about any irregularity in the company. An attorney, who observes any material violation of the securities laws or breach of fiduciary duty from the company, he is duty bound to report the matter to his chief legal officer or to the chief executive officer of the company. If the concerns of the attorney are not resolved by the above mentioned persons, he must report his concerns to the audit committee or any other similar committee of the company. Under the SOX all these reports are considered to be a protected activity.¹³¹

¹²⁹ Guy P. Lander, *What is Sarbanes Oxley?* (New York: McGraw-Hills, 2004), 98 & 99. See also, Terry Morehead Dworkin, SOX and whistleblowing (on line accessed on 26-10-2009, available at <http://www.michiganlawreview.org/assets/pdfs/105/8/dworkin.pdf> p. 1764

¹³⁰ http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 (online accessed on 15-11-2009).

¹³¹ http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 (online accessed on 15-11-2009).

3.10 Whistleblower's Protection Act 1989 (WPA).

The Congress passed Whistleblower's Protection Act (WPA) in 1989 to protect the employees of the Federal government who blowing the whistle. This Act significantly amended the whistleblowing provisions of the pre-existing Civil Service Reforms Act, 1978.¹³² The WPA is a law that protects a whistleblower from the reprisal of the federal government, and it provides redress to the employees who blow the whistle.¹³³ Under this Act two implementation agencies were established for the enforcement of this Act and they are "Office of the Special Counsel (OSC)" and "the Merit Systems Protection Board (MSPB)".

The law says "the employees of the federal government can seek protection as whistleblowers either by making disclosure to the special counsel, the Inspector General of an agency, another employee designated by an agency head to receive such disclosure, or to any other individual or organization". WPA authorizes to the employees of the Government corporations, who are in government job, to overlook the internal reporting channel of their organization and file their action directly in the Court.¹³⁴

WPA has substantially strengthened the protection to the whistleblowers in the federal government by making it easier for the employee to file an action before the Merit System Protection Board, by altering the burden of proof for the employees to prevail in the reprisal claims. The employee has a right to obtain attorney's fee and cost associated with the litigation. Under this Act the OSC has been kept independent from (MSPB).¹³⁵

¹³² Robert G. Vaughn, *Merit System Protection Board, rights & remedies*, (New York: Law Journal Press, 2003), 15-21.

¹³³ Paul Secunda, *Retaliation and Whistleblowing: Proceedings of the New York University 60th Annual Conference on Labor*, (New York: Wolters Kluwer, Law & Business, 2009), 444.

¹³⁴ Ibid

¹³⁵ Richard A. Gittins, *The Military Commander and the Law*, (United States Air force, 3rd Ed, 1996) 478.

In this WPA whistleblowing means making a disclosure of the evidencing relating to the illegal, and improper government activities. The whistleblowing protection may be sought at four forums or proceedings such as:-

1. Appeal of the employee to MSPB against an agency which has taken an adverse action against the employee. This appeal is also known as Chapter 77 appeal;
2. An actions instituted by the OSC;
3. An individually maintained right of action before the MSPB, known as Individual Right of Action (IRA), and;
4. Employee's grievances brought under the negotiated grievance procedures.¹³⁶

3.10.1 Elements to initiate action under WPA.

The WPA covers only to those cases which contains the following elements;

3.10.1.1 Covered Employee;

A covered employee may provide whistleblowing information to the special counsel to refer it to an appropriate agency. This Special Counsel, if considers that the information has been provided by a covered employee, he may send this information to any head of the agency and ask him for report. "Generally, current employees, former employees, or applicants for employment to positions in the executive branch of government in both the competitive and the excepted service, as well as positions in the Senior Executive

¹³⁶ Congressional Research Service Report and Issue Briefs, *The Whistleblower Protection Act: An Overview*, L. Paige Whitaker. P. 1. (Cornell University ILR School, 2007). Online accessed on 02-02-2009, from <http://opencrs.cdt.org/document/RL33918/2007-03-12>

Service, are considered covered employees". A disclosure made by the employees of the postal service and those of the American Security Agencies was not covered under this Act, but in 2007 the employees of the American Intelligence agencies such as Federal Bureau of Investigation & Central Investigation Agency were protected under this Act and protection of this act was also extended to them in 2007 through Whistleblower Protection Enhancement Act.¹³⁷

3.10.1.2 Protected Disclosure:

A covered employee, when reasonably believes that he has evidence of breach of any law, rule or regulation, or mismanagement of funds or fraud or abuse of authority or any substantial danger to the public health and safety, he may report to the concerned authorities subject to the condition that its disclosure is not prohibited or law does not require to keep it secret under any executive order. In addition to it, a disclosure made to any person specifically designated to receive the information from the whistleblower in a governmental agency is also covered under the protected disclosure. Moreover, an employee must have reasonable belief that it is true to merit it as a protected disclosure.

3.10.1.3 Disclosure to the members of Congress:

The WPA also covers to those employees who report a matter to the Congress members. This provision shows that the Congress has protected its right to receive even the confidential information from the employees of the federal government without any fear of retaliation to the employee.

¹³⁷ <http://opencrs.cdt.org/document/RL33918/2007-03-12> (online accessed on 25-08-2009)

Chapter No. 4

Whistleblowing in Pakistan

4.1 Business Environment in Pakistan and Malpractices

In Pakistan, like many other countries of the world, the business activities are carried out through different legal structures e.g. corporations, cooperatives, partnerships, sole proprietorships, limited liability companies etc. Lack of effective laws, rules and regulations and ineffective implementation of existing laws has provided a room for thriving the mal and corrupt practices in Pakistani business environment. The corruption and mal practices in the business atmosphere of Pakistan are found at every level ranging from adulteration in food items to the sophisticated white collar crimes. These corrupt practices have created innumerable hindrances in the socio-economic development of Pakistan and its subjects. The foreign investor is reluctant in bringing its investment in Pakistan due to lack of confidence in her legal system.

Like other countries, in Pakistan the management and ownership of the public companies rest with different bodies. The shareholders being owners of the company provide equity to the issuers and the management of the issuer is responsible to make that equity profitable for the shareholders and for themselves. Until the management of the company is corrupt, the companies earn good profit for their shareholders but where there is a conflict of interest between the interests of the shareholders and those of the management, the interests of the shareholders should not suffer. In the other countries of the world the whistleblowing law is also being implemented to visible the corruption in the public companies.

In Pakistan different laws have been promulgated to eliminate the corporate corruption. These laws provide procedures of their own for their effective implementation but none of them provide for the whistleblowing except the guidelines on *Reward Payment to*

Informant Scheme issued by the Competition Commission of Pakistan. Here we will discuss Pakistani laws which provide either for the expression of their views by the people or for providing information of some corrupt practices to the regulators.

4.2 Constitutional Provisions pertaining to the issue at hand.

Our constitution does not have any express provision relating to whistleblowing but the concept of Freedom of Expression coupled with access to information and public record have been provided to the people by the Constitution of Islamic Republic of Pakistan 1973.

Constitution confers upon the citizens of Pakistan the freedom of expression through Article 19¹³⁸, but this in the enjoyment of this freedom the constitution imposes some reasonable restrictions. Freedom of expression implies the freedom of communication by all lawful means. Moreover the courts has taken their views about this freedom of speech in broader perspective such as August Indian Court held

“The freedom of speech and expression carries with it the right to publish and circulate one’s ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject to such restrictions as could be legitimately imposed under the clause”.¹³⁹

The whistleblowing is the expression or revelation of some inside information to the management of an organization or to the outside regulator(s) by its employee. These both concepts are similar in the sense that they both recognize the basic instinct of human being that is a person’s right to express himself. The right of freedom of expression has

¹³⁸ 19 “Freedom of Speech, etc. Every citizen shall have the right of freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign states, public order, defense, decency or morality, or in relation to contempt of Court, commission of or incitement of an offence”.

¹³⁹ AIR 1962 S. C. 305

been used in our Constitution in broader sense. It also covers to the whistleblowing because the whistleblowing is also the expression or manifestation of some information which is not available to the regulator, therefore, it is clear that whistleblowing is a species of expression.

The basic purpose of freedom of expression is to allow the citizens to speak whatever they want, but subject to some reasonable restrictions imposed by law. If a whistle blower *bona fide* reports some irregularity to the administration of a corporation or to some outside regulator, such reporting comes under the domain of Article 19 i.e., freedom of expression, and if the reporter is penalized as a consequence of his reporting, he can invoke Writ Jurisdiction of the High Courts to redress his grievance. Hence, the Constitution provides adequate remedy to the whistleblower. One can safely conclude that in Pakistan the disclosure by the whistleblowers is covered under Article 19 of the Constitution, what is missing – a procedure for blowing the whistle and his subsequent protection.

Importantly, a new Article 19-A regarding right to information has been added in our Constitution through its Eighteenth Amendment.¹⁴⁰

The right of access to information regarding public importance has now become a “fundamental right” and any citizen, if denied such access, can invoke the jurisdiction of Supreme Court under Article 184(3), or of a High Court under Article 199(2), of the Constitution for the enforcement of such fundamental right.

4.3 Sub-constitutional Legislation:

¹⁴⁰ 19-A. “Right to Information. Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law”.

In Pakistani laws the concept of informer exists but here it is not so significant as whistleblowing is, in other countries. Here we will discuss the laws which resemble with the issue at hand:-

4.3.1 Freedom of Information Ordinance 2002.

Pakistan is the first country, in South Asia, which promulgated freedom of information legislation through *Freedom of Information Ordinance 2002* (FOI).¹⁴¹ The Freedom of Expression has been enshrined in Article 19 of the Constitution but right of access to information or right to know was unavailable to the Pakistan citizens. The August Supreme Court of Pakistan in 1993 while interpreting Article 19 of the Constitution held;

"The Freedom of Expression includes the right to receive information".¹⁴²

The FOI was enacted in 2002, and the purpose of the promulgation of this ordinance was to provide access to information to the people of Pakistan. This is a Federal legislation aimed at dissemination of information about the public documents to the general public. The ordinance provides a procedure to be adopted by a person who wants to get some information from any department of the federal government. Under this Ordinance each department of the Federal Government is required to designate an officer who shall be responsible to entertain the applications made under this Ordinance within 21 days. Only the citizens of Pakistan are entitled to get information under the provisions of this Ordinance. If the applicant, who wants to have some information under the provisions of this Ordinance, has any grievance, he may file a complaint to the office of the Federal Ombudsman, but if the matter falls within the domain of the Federal Board of Revenue (FBR), the complaint shall be filed in the office of the Federal Tax Ombudsman.

¹⁴¹ *Freedom of Information Ordinance 2002 and its implementation, Background, Concerns and Recommendations*, (Islamabad: Centre for Peace and Development Initiatives, 2009), 2. http://www.cfdi-pakistan.org/images/stories/publications/foi_o2002.pdf (Online accessed on 16-05-2010)

¹⁴² 1993 PLC 673 Supreme Court; *Independent Newspaper Corporation (Pvt) Ltd v. Chairman Fourth Wage Board and Implementation*.

The right to get information under this Ordinance is available to every citizen of Pakistan but this right has been subjected to some restrictions contained in section 15 of the Ordinance, which states that the access to information shall not be available to the public if its disclosure may cause any harm or damage to the national interests of Pakistan or to the conduct of international relations. It is worth mentioning here that the term "*Interests of Pakistan*" has nowhere been defined in the Ordinance which makes it unlimited. Under the cover of these words the departments of the Federal Government may refuse access to information to any citizen, which can make the provisions of this Ordinance redundant.

The object to promulgate this Ordinance is to let the masses know the policies which their rulers make for them. Though the freedom of information laws and the whistleblowing laws deal with the disclosure of information but these both laws vary from each other in the sense that in case former some outsider wants to get information from an organization whereas the later deals with the voluntary disclosure by some insider, either to the internal administration or the outside regulators, any how the basic purpose of these both is to disseminate information which is beneficial to the general public.

4.3.2 Freedom of Information Bill, 2008 (FOI Bill):

The FOI Bill, 2008 is under consideration of the present government. Earlier to this FOI Bill another bill known as the Freedom of Information Bill 2004 was tabled in the parliament by Ms. Sherry Rehman of Pakistan Peoples Party (PPP). The basic purpose to enact a new Freedom of Information law was to improve the existing law on the subject, on the one hand, and on the other hand to include the whistleblowing provisions therein.¹⁴³

¹⁴³ "Freedom of Information Bill, 2008: analysis and recommendations. This paper was submitted by the Consumer Rights Commission of Pakistan to the Ministry of Information & Broadcasting and to the

4.3.3 Code of Corporate Governance 2002.

The Code of Corporate Governance 2002 (the Code) has been promulgated to effectively regulate the listed companies. The object of this enactment is the protection of the interests of innocent shareholders and other stakeholders who despite investing their hard earned savings had no access to the accounts of the listed company. The laws containing similar provisions have already been enacted in the other countries, such as SOX in USA, to protect the interests of the shareholders. The effective enforcement of this Code is in the larger public interest, which is a prime consideration for the legislature and for the Courts.¹⁴⁴

The Code emphasizes the maximum disclosure of information to the regulatory body and the other stakeholders in a listed company. It has been made obligatory for the listed companies to have independent non-executive directors on their board of directors, who represent the minority shareholders and the financial institutions. According to the Code, the listed companies are bound to constitute an audit committee which shall be responsible for the audit mechanism of a company, both internal and external. Under this Code the board of directors (BOD) is required to appoint the external auditors of the listed company on the recommendations of the audit committee. The Code also direct to the external auditor to review the internal auditor's reports. The Code further states that all the external auditors of the companies in the financial sector shall be changed after five years and has made it obligatory for the auditors to comply with the International Accounting Standards and report the accurate position of the affairs of the company.

Ministry of Law, Justice and Human Rights government of Pakistan on 21st July 2008, page 2. http://www.crcp.org.pk/PDF%20Files/01_CRCP%20Comments%20FOI%202008.pdf (accessed on 25-05-2010)

¹⁴⁴ 2004 CLD 1433: *A. F. Ferguson & Co., Chartered Accountants v. "Securities & Exchange Commission of Pakistan" (SECP)*.

The disclosure of interests of the directors and other persons, affiliated with the listed company in any way, has also been made obligatory by the code. The purpose of insertion of these provisions is to make sure that the company is doing arms length transactions. Under the Code the listed companies are bound to disseminate the information to the Securities and Exchange Commission of Pakistan (SECP), concerning such affairs of the company which may adversely affect the interests of the shareholders such as merger or acquisition, any unforeseen loss of assets, production loss due to fire, lock out or strikes. The prime object of this provision is to make the stakeholders aware about the company position so that they may adopt precautionary measures to make their investments safe.

The BOD of the listed companies is appointed strictly in accordance with the requirements of the code. The representatives of minority shareholders and financial institutions also participate on the BOD of a listed company. The BOD of the listed companies has immense powers to manage the listed company's affairs. Under the Code of Corporate Governance the BOD plays an effective role in the policy formation and in the appointment of key officials including Chief Financial Officer (CFO) and the Company Secretary. The minority shareholder and financial institutions appoint independent non-executive directors on the company's BOD. All listed companies are bound to make sure the effective compliance of the code.

But this law does not address the issue of the one, who, in good faith, reports any wrong doing in the organization to the administration of the company or to the outside regulator, which may prove to be detrimental and fatal to the interest of stakeholders.

4.3.4 Competition Ordinance, 2009 (Reward Payment to Informants Scheme):

Guidelines on "*Reward Payment to Informant Scheme*" introduced by the competition commission of Pakistan, under the Competition Ordinance is, perhaps the first piece of any legal document containing the word whistleblowing. The Reward Payment to

Informant Scheme has been initiated in order to award the informants who provide any information about the cartel to the Competition Commission of Pakistan. The Commission shall reward to the informant at a scale from Rs. 200,000/- to Rs 10,00,000/- . The commission shall determine the amount of reward by taking into consideration the usefulness of the information. The identity of the informant shall be kept secret unless the informant agrees to give evidence in the subsequent proceedings. It is entirely the discretion of the Competition Commission to determine that whether the information is useful or not and what reward should be paid to the informant. These guidelines also authorizes to an employee to blow the whistle on an illegal activity of his employer.

Apparently these guidelines contain provision relating to the whistleblowing but these are drastically insufficient. These provisions do not provide a comprehensive procedure for the whistleblower to blow the whistle. These guidelines are also silent about any designated authority to whom the disclosure should be made and what sort of protection is available to the whistleblower. It has nowhere been mentioned in these guidelines that when the internal whistleblowing should be made and when the whistleblower should go for the external whistleblowing. The Competition Commission has been fully authorized under these guidelines to decide that whether the information provided by the whistleblower is useful or not and no other forum has been provided in these guidelines where the whistleblower may go in appeal against the order of the Competition Commission. In short, we can say that the provisions contained in the *Reward Payment to Informant Scheme* are immature.

4.3.5 Reward to the informers under the National Accountability Bureau Ordinance 1999 (NAB Ordinance):

Section 33-A¹⁴⁵ of the NAB Ordinance says that an amount of reward shall be paid to a person, known as informer, who provides any information to the NAB authorities or to

¹⁴⁵ Section 33-A of the National Accountability Ordinance, 1999 was inserted in the Ordinance through Ordinance, XXXV of 2001, w. e. f. 10-08-2001: PLJ 2001 Fed. St. 403.

any of its concerned agencies. The information must lead to successful investigation, prosecution, and recovery of the bank loans or FBR tax defaults. The amount of reward shall be paid in accordance with the usefulness of the information and amount recovered pursuant to the information. The Ordinance provides that the informer may be a government employee or any other person from the general public. The National Accountability Bureau (NAB) has framed Rules pursuant to Section 34 of the Ordinance to make recoveries and rewards under this Ordinance.

The Rules¹⁴⁶ provides for the establishment of a recovery and rewards fund.¹⁴⁷ The fund shall be managed by a committee.¹⁴⁸ The committee shall make recommendations to the Chairman NAB for sanctions of rewards and making other ex-gratia payments under the Ordinance. The rules further provide that the amount of fund shall also be expensed on the improvement of an anti-corruption national strategy, on hiring the consultants and experts, purchase of equipment and transport, and making ex-gratia payments under this Ordinance.¹⁴⁹ The level of reward under this Ordinance extends from 4% to 20% of the amount recovered under these rules.

4.3.6 Tax regime:

In 1980, the Government of Pakistan passed two orders to reward the informers who had provided information about the tax evasion.¹⁵⁰ The *Order for the grant of rewards to officers & staff* deals with the officers and staff of the tax department, known as the informers, who provide information about the tax evasion. The officers and staff of the tax department who informed about the tax evasion were entitled to ½ of the amount recovered from the evader or one year's salary of the recipient, whichever is the less.

¹⁴⁶ National Accountability Bureau (Recovery & Reward) Rules, 2002 (NAB Recovery & Reward Rules).

¹⁴⁷ Rule 4 of the (NAB Recovery & Reward Rules).

¹⁴⁸ Rule 3 of (NAB Recovery & Reward Rules).

¹⁴⁹ Rule 4 of the (NAB Recovery & Reward Rules).

¹⁵⁰ *Order for the grant of rewards to officers & staff*, 29th March, 1980.

The second order, *Order for the grant of rewards to non-official informers*,¹⁵¹ deals with rewarding the non-officials who provide information about the tax evasion. The informers were entitled to reward an amount from 25% to Rs. 50,000/- out of the amount recovered from the tax evaders. The only condition mentioned in the order is that the reward will be paid if the tax sought to be evaded has been recovered at least to the extent of the amount of the reward being paid.

The problem with these rules was that they were not uniform as the Federal Tax Ombudsman held in a *Muhammad Khurshid and another v. Secretary, Revenue Division, Islamabad*¹⁵² that the Reward Rules need to be improved it requires re-consideration. The Ombudsman recommended to the C. B. R to form a committee to reconsider the existing reward rules and give its finding to have comprehensive and uniform Reward Rules in respect of Sales Tax, Income Tax, Federal Excise and Customs Duty.

In 2006 the Government of Pakistan framed uniform rules to reward the informers of tax evasion, known as the *Unified Reward Rules, 2006*, pursuant to the order of the Federal Tax Ombudsman. These Rules are applicable to all the employees of the Federal Board of Revenue (FBR) who have got registered with the concerned Director General (DG) or the Collector as informers.¹⁵³ These rules are so comprehensive that they cover all the employees working under the control of the FBR. The scale of reward in case of anti-smuggling activities may extend from 50% of the value of goods confiscated to Rs. 130,000/- plus 10% of the value of goods.¹⁵⁴ In any other case, the amount of reward may extend to two months' salary of the informer, but in no case the amount of reward will exceed from two years salary of the employee or rupees two million in the whole service of the informer.¹⁵⁵

¹⁵¹ *Order for the grant of rewards to non-official informers*, 27th March, 1980.

¹⁵² 2008 P T D 1865: *Muhammad Khurshid and another v. Secretary, Revenue Division, Islamabad*.

¹⁵³ Rule 7 *Unified Reward Rules, 2006*.

¹⁵⁴ Rule 4 (b) *Unified Reward Rules, 2006*.

¹⁵⁵ Rule 4 (e) *Unified Reward Rules, 2006*.

Under these rules there has been established a Common Pool Fund (CPF). Fifty percent of the amount recovered from the tax evader is contributed in the CPF. The income of the CPF is spent on the welfare of the officers and staff and of the FBR i.e., for the housing of the employees and education of their children, financial help of the family members of the employees of the FBR and other alike activities.¹⁵⁶

4.4 Sarbanes Oxley and Pakistan:

The SOX is a comprehensive piece of legislation, implemented by the US Congress for the protection of interests of the listed company's shareholder. This Act is an external legislation to Pakistan but it is being implemented in Pakistan by some multinational companies or by those companies desirous of being enlisted on the US Stock Exchanges. Especially the provisions of the Act relating to the protection of the whistleblowers, transparent internal control and creation of a better audit environment are being implemented by the companies to increase value for the investors.¹⁵⁷ Pakistan State Oil Company Limited, MCB Bank Limited and Pakistan Petroleum Limited are the companies in Pakistan which have whistleblowing policies.

The Association of Certified Chartered Accountants Pakistan (ACCA) has also recommended that the provisions of SOX are good for the Pakistani business environment. These provisions should be implemented in Pakistan through some indigenous piece of legislation. It has also been recommended that the provision similar to SOX should also be incorporated in the revised Code of Corporate Governance.¹⁵⁸

¹⁵⁶ Rule 6 (b) *Unified Reward Rules, 2006*.

¹⁵⁷ *Sarbanes Oxley and Pakistan: Way Forward?* It is a discussion paper prepared by the Association of Certified Chartered Accountants Pakistan (ACCA). This discussion paper has been formulated after interviews from the stakeholders. This discussion paper also includes the impact of an external legislation on Pakistani businesses. <http://www.accaglobal.com/databases/pressandpolicy/pakistan/sox> (accessed on 14-05-2009).

¹⁵⁸ *Ibid*

4.5 Way forward

The above discussion makes it clear that the concept of informer exists in Pakistani laws. The term informer has been used to denote a person who provides information about the corruption of some person who does corrupt practices either against the government or against the general public. The informer is generally a person who provide information about the corruption of some outsider to the inside regulators. In whistleblowing, on the other hand, the whistleblower provides information about the corruption of some insider either to the internal administration or to the outside regulators. The concept of whistleblowing is alien to the Pakistani law but the concept of informer and rewarding the informer exists in Pakistani laws.

The concept of whistleblowing must also be inserted in Pakistani laws so that the inside corruption of the government departments and of the public companies may be brought on the surface. The legislature may pass a comprehensive whistleblowing law or may insert the whistleblowing concept in the existing laws through amendment. After the promulgation of the law on the subject or amendment in the existing laws the concerned government should be authorized to frame rules for the implementation of the whistleblowing laws and these rules should cover different things such as mode of reporting, forums of reporting, method of investigation, persons covered, and protection provided to the whistleblowers. We may hope that after the implementation of the whistleblowing procedure in Pakistan, the society can be cleaned from the stains of corruption remarkably.

Chapter No. 5

Conclusion

Whistleblowing is an effective tool to control corruption and unfair practices, generally from all public and private sector organizations and particularly from the large enterprises or commercial conglomerates. Most of the countries of the world have made laws on this issue that is why the whistleblowing laws are being implemented very successfully in the countries like United States of America (USA) and United Kingdom (UK). In developing countries this tool is properly implemented with sufficient legal mandate and enforcement mechanism and this is evident from their successes in eliminating several misdemeanors.

After the first constitutional amendment, when the right of freedom of expression was given to the people of United States of America, the whistleblowers became protected under the U.S Constitution. With a passage of time the U.S Congress enacted different laws relating to the whistleblowing especially for the protection of the whistleblowers and at the same time the U.S Courts provided different tests to provide relief under these statutes. The SOX was specially promulgated on the public limited corporations in U.S.A. It, *inter alia*, contains some provisions for the protection of whistleblowers. Its enactment was in the backdrop of two major corporate scandals/collapses of Enron and WorldCom.

As far as Pakistan is concerned it is a theo-democratic state. Here the legislation seeks guidance in all the matters from the principles as enshrined in the Holy Quran and Sunnah of the Holy Prophet (PBUH). Moreover, Pakistan has a written Constitution and these all sources empower the legislature to enact whistleblowing laws. Allah says: “And from among you there should be a party who invite to good and enjoin the right and **forbid the wrong**. And these are they who are successful”. (Underlined and bold for emphasis)¹⁵⁹

¹⁵⁹ Sure Al-Imran Aya No. 104, translation by Maulana Muhammad Ali, online assessed on 19-09-2011 from (<http://www.muslim.org/english-quran/quran.htm>)

At another place Allah says:

“You are the best nation raised up for man: you enjoin good and **forbid evil** and you believe in Allah.”¹⁶⁰ (Underlined and bold for emphasis)

We understand from the above versus of Holy Quran that Allah the Almighty also insists on the restraint of evil or wrong.

The Constitution of Islamic Republic of Pakistan, 1973 also contains Article 19¹⁶¹ which confers the freedom of expression on the citizens of Pakistan, subject to some restrictions. What is wanted a comprehensive sub-constitutional legislation on whistleblowing, which must cover, specially, the two aspects that are a comprehensive procedure for internal and external whistleblowing and a mechanism for the protection of whistleblowers. The existing regulators may also be empowered as external forums of whistleblowing such as, for the government departments Public Accounts Committee, for chartered accountants ICAP, and for the public listed Companies Securities and Exchange Commission of Pakistan.

In Pakistan, however, there is dire need of the whistleblowing laws but unfortunately there is no specific legislation for the protection of the whistleblowers. In Pakistani society, corruption is widespread and is at massive scale but this situation seems worse due to lack of legislation on this subject. The technological developments have also changed means of crime from violent to non violent and from deadly to sophisticated manners. The laws should be made so as to restrain all types of crimes. Whistleblowing law can be implemented in Pakistan either through new enactments or by incorporating the whistleblowing provisions in existing laws. The existing laws have very narrow scope in respect of whistleblowing; only piecemeal legislation can be traced out from different

¹⁶⁰ Sure Al-Imran Aya No. 110, translation by Maulana Muhammad Ali, online assessed on 19-09-2011 from (<http://www.muslim.org/english-quran/quran.htm>)

¹⁶¹ “Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of press, subject to any reasonable restriction imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality or in relation to contempt of Court, commission or incitement of an offence.”

laws. Whistleblowing laws can be very effectively implemented in the public companies and other governmental departments.

Recommendations

Legislation on whistleblowing can be done by opting any of the following two options:

1. **Making General Laws for Whistleblowing:** The legislature can make general laws for the protection of the whistleblowers in all institutions and organizational bodies whether governmental or private. The insiders, employees and related parties of an organisation have first hand information about the planning or occurrence of crime in an organization because they are ears and eyes of an organization. The whistleblowing laws should provide a sufficiently comprehensive mechanism to deal with the information provided by the whistleblowers. They can intimate the enforcement agencies about the commission of an offence in an organization but at the same time they have a fear, a fear of retaliation from those against whom they are blowing the whistle. The whistleblowers should also be adequately protected from retaliation and they should also be awarded for blowing the whistle.
2. **Incorporating Whistleblowing Provisions into Existing Laws:** The existing laws such as the Code of Corporate Governance, 2002 (Code) contains different provisions which are helpful to have check on public companies, by the Securities and Exchange Commission of Pakistan (SECP). The whistleblowing provisions can be incorporated in this Code then it will be more helpful to curtail corruption from the public companies.¹⁶² Reward Payment to Informant Scheme issued by the Competition Commission of Pakistan under the Competition Ordinance, 2009 contains some provision to reward the whistleblowers who provide information to the Commission about any malpractice. The whistleblowing provision, in this

¹⁶² The SECP has called recommendations from the different stakeholders and general public about the revision of the Code of Corporate Governance 2002. The author has suggested the SECP to incorporate the whistleblowing in the revised Code of Corporate Governance.

scheme, is very ambiguous because it does not provide a comprehensive procedure for the whistleblowing and about the benefits to the whistleblowers.

In Pakistan, different laws have been enacted by the legislature and under these laws different bodies are established for the enforcement of these laws but the implementation of these laws do not give the required results because the enforcement agencies do not have the first hand information of breach of law, the information which the insider employees of an organization may have. This information can only be provided by the whistleblowers. Moreover, the staff of these agencies should be properly trained so that they may handle the situation very carefully as and when required.

The Government Organizations and the Non Governmental Organizations should be encouraged to arrange seminars and workshops for the awareness of general public and officers and employees of different organizations about the importance of whistleblowing.

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