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The Quest of Information Warriors – Critical Analysis of Protection of Whistleblowers

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ABSTRACT

The Right to Information Act 2005 came into force on 12 October 2005 with the basic aim of good governance. RTI is probably one of the most discussed legislations having a great impact throughout every sector, whether it be the educational institutions, administrative institutions, or even the whole governing body. The RTI act 2005 is very progressive legislation covering not only the government bodies but even the private institutions having somewhat relation with connections to the funds from the government keeping in mind the public welfare. This legislation has a direct over-riding effect on the other legislation, increasing the accountability of the government wherever it is in the public interest. Even though the Right to Information as a large is in favour of the public, but if we see at its ground root level most of the officials are not happy with this type of disclosure and interference. One of the major problems with regard to the disclosure of the information is the protection of Whistleblowers, one who brings to light any scandal, scam, malpractice or incident of corruption. Thomas M. Devine, University of California rightly said that "Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private". The method of research adopted by the researchers in this paper is doctrinal. The researcher here in this paper will be discussing the primary ideology behind the Right to Information concerning the whistleblowers, highlighting certain major case laws and the major happening with regards to whistleblowers and discussing the government's success and failure with regards to the Right to Information.

Keywords: Right to information, Good governance, Progressive legislation, Protection of Whistle Blowers, Government Institutions.

I. Introduction

Boisjoly being called as the representative of whistleblowers by Myron Peretz Glazer and Penina Migdal Glazer in their extended examinations of sixty-four whistleblowers. 'The whistleblowers, Exposing Corruption in Government and Industry'. His case was parallel to

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different cases that have gotten the media's consideration like as the case in Toronto of sick children being challenged to the drug industry by Dr. Nancy Olivieri and concerning the advertising industry, the case of Hugh Salmon or the famous example of Enron, US energy company which was around about after one and a half-decade of this event, where around about in mid-2001, an official of Enron, Sherron Watkins, who was an executive wrote to Kenneth Lay, CEO of company warning about the accounting malpractices. On which Enron bosses remain inactive and didn't act on her call, as a result of which after four months Enron filed for bankruptcy.²

So, let's discuss what happened in the Boisjoly case – the development in the area of science and space was at pace in the 20th century, NASA being the institution of one of the superpowers was individually ruling the field. The space shuttle 'challenger' busted just after the 73 seconds of take-off and taking away the life of all the 7 astronauts with the explosion on 28 January 1986. Here the moment got the heat when the committee which was appointed to investigate the event, The Roger Commission pointed out and contended in the conclusion that, "the explosion occurred due to seal failure in one of the solid rocket booster joints." The boosters of the rocket used in the dispatch of the challenger was developed by Morton Thiokol. The creators of the boosters and the engineers at Morton Thiokol were having serious distress regarding the O-ring seals. As it was evident from the year before situation, where senior scientist Roger Boisjoly with having experience of 25 years in the fields of aerospace as an engineer and being considered as the leading expert in the United States on O-rings and rocket joint seals, around about in January 1985, observed several snags during the unseasonably cold weather while watching the launch. On to this when he did the technical search and did an inspection of the solid rocket booster after it was recovered from the Atlantic Ocean, he found some issues with the O-rings where he observed black marks that were a clear-cut result of that the hot combustion gases had escaped. Based on these observations and reports, an investigation institution Seal Erosion Task Force was appointed to look into the matter, but the conclusion was not so fruitful and satisfactory, and due to the frustration expresses by Morton Thiokol engineers over lack of improvement in summer of 1985, Boisjoly made it into the notice of the company by warning the management about the

² TNN, Where the law stands on whistleblowers in India, (Feb 20, 2020, 11:03 AM), https://economictimes.indi atimes.com/news/company/corporate-trends/where-the-law-stands-on-whistleblowers-in-india/infosys-episode/s lideshow/71770940.cms

³ Boisjoly, Russell P., Ellen Foster Curtis and Eugene Mellican: 1989, 'Roger Boisjoly and the Challenger Disaster: The Ethical Dimensions', in Deborah C. Poff and Wilfrid J. Waluchow (eds.), 1999, Business Ethics in Canada, third edition (Prentice Hall Allyn Bacon Canada, Upper Saddle River, NJ).

issue that the seal could fail and can result into the loss of human life.4

NASA's agreement with Morton Thiokol in writing proved that the temperature range for the boosters of rocket between 40- and 90-degree Fahrenheit. Whereas, the matter of the fact the temperature on the date of launch or can more evidently call the date of accident i.e., January 28, 1986 was 30 degrees, two degrees below freezing. The official documents showed, on which the Roger commission found that the four senior executives of Morton Thiokol while overruling the contentions of engineers gave a clear hand to the launch, on which the disagreement of Boisjoly to the decision could also be observed from a journal entry he made in the office.

Everything got clear like water when on February 25th, Boisjoly disclosed by exposing the disagreement with Morton Thiokol's management about the issues with the O-rings and not being fit for the launch and testified for the same before the commission. Concerning this, if we see the outer purview, he was in names awarded and given the title of seal coordinator for design efforts, but in a practical scenario, he was discarded and isolated from NASA. He was also being referred and accused of "airing the company's dirty laundry" by an executive. It was because of the Boisjoly call that the company was held liable. The hot topic of accusation being raised against the Chief Executive Officer and the other senior officials of the Infosys has freshly diverted the area of interest towards the whistleblowers protection. It is evident almost in every sector that the number of whistleblowing has grown, whether it be the Wipro or State Bank of India. Whistleblowing can be understood as the modern alternative to "informers"- people who disclose others' wrongdoings. 6

II. THE HISTORY OF WHISTLEBLOWING

America claims themselves to be the first nation to have laws relating to the whistleblowers as researched out by Stephen M. Kohn, Executive Director of the National Whistleblowers Center, The resolution, enacted on July 30, 1778, can be considered the world's first whistleblower law. But, which if we see with the broader aspect and practical scenario it is certainly not true, there are live instances and direct mentioning of whistleblowers in the Chanakya's Arthashastra, which was compiled somewhere between in the 2nd century BCE

⁴ Boatright, John R.: 2000, Ethics and the Conduct of Business, third edition (Prentice Hall, Upper Saddle River, NI)

⁵ Colin Gran, Saints of Secular Culture, Journal of Business Ethics, Vol. 39, No. 4, Theoretical Foundations (Sep., 2002), pp. 391-399, JSTOR, (February 29,2020, 18:41), https://www.jstor.org/stable/25074853

⁶ Elonnai Hickok, The Privacy Rights of Whistleblowers, the centre for internet and society (March 5, 2020, 20:30),https://cis-india.org/internet-governance/blog/privacy/privacy-wikilileaks-whistleblowers

⁷ Nwc, The Untold Story Of The Whistleblowers of 1777 - The Origins of National Whistleblower Day, (March 5, 2020), https://www.whistleblowers.org/news/the-whistleblowers-of-1777-the-origins-of-national-whistleblower-day/

and 3rd century CE. Where, in its Chapter VIII. Detection of what is embezzled by government servants out of state revenue clearly says, "Any informant (súchaka) who supplies information about embezzlement just under perpetration shall if he succeeds in proving it, get as reward one-sixth of the amount in question; if he happens to be a government servant (bhritaka), he shall get for the same act one-twelfth of the amount." This proves that the laws for whistleblowers are not a new concept and India since its ancient period has concerns regarding the value of information. As mentioned in Arthashastra, modern whistle-blowing resembles it.

III. WHAT IS WHISTLEBLOWING

Whistle-blowing has been defined 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". But the more accepted definition of this can be understood as- Whistleblowing is an act of disclosing information by an insider or an employee or any violation of laws, rules or regulation, gross management, abuse of authority or any other unethical conduct within the organization in the public interest. Whistleblowers are the ones who bring to light any scandal, scam, malpractices or incident of corruption. It can be based and associated with a number of aspects such as bribe, theft, fraud, wastage of resources or instances of safety violations. The definition given by James, 1995 "Whistleblowing may be defined as the attempt by an employee or former employee of an organization to disclose what he or she believes to be wrongdoings in or by the organization". ¹⁰ As a layman we can understand this concept by understanding of blowing of the whistle, like in the game, whether be the basketball or football, the referee blows the whistle to call out to the foul and in that sense, it could be understood as a whistle by a person knowing about that foul. Just the major difference to be understood, there in a game, the referee holds a responsibility to call to the foul whereas, in case of the whistleblowing, the whistleblowers generally don't hold a legal responsibility to do so. It is being based on a somewhat integral factor, where the controversy comes in.

Whistleblowers as on a broader basis, keeping in mind the roots as against inappropriate activity can be classified into two aspects, the insider whistleblower, and the outsider whistleblower. The insider whistleblower takes into consideration the matter and react onto it

⁸ Kautilya. Arthashastra. Translated by R. Shamasastry. Bangalore: Government Press, 1915, 515-520.

⁹ Near, J. P., & Miceli, M. P. 1985. Organizational dissidence: The case of whistle-blowing. Journal of Business Ethics. 4: 1-16.

¹⁰ James, Gene G.: 1995, 'In Defense of Whistle Blowing', in William H. Shaw and Vincent Barry (ed.), Moral Issues in Business, sixth edition (Wadsworth, Belmont, CA).

by moving and informing to the concerned authority, whereas outsider whistleblower when got to know about the facts, takes that into the consideration and generally inform to the media or public, and the both directly leading to as whistleblowing, forming a circle, starting from whistleblower to whistleblowing.

IV. WHY DO WE EVEN NEED WHISTLEBLOWER PROTECTION?

Thomas M. Devine, University of California rightly said that "Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private."

An RTI activist from Krishna district in Andhra Pradesh, Sola Ranga Rao, who had filed a number of RTI applications seeking information with regard to the sanctioned funds and being utilized for the drainage system of the village from the Mandal Parishad Development Office, on April 6, 2010, was brutally murdered. The reason for murdering was evident as he was a proactive user of Right to Information, and also, one of the prominent whistleblowers with reference to the misrepresentation of these funds. On the orders of Andhra Pradesh Information Commission, an inquiry commission was established, it was found there was a direct connection of public information officer in Ranga's murder¹¹.

And we cannot forget the famous case of NHAI, in which an Indian Engineer Services officer posted in National highway authority of India, Satyendra Dubey was murdered, which got a huge public rage, as due to his exposure many serious irregularities were taken into consideration, as a result to which even the roads were rebuilt, destroying the names or various politicians and Affluent people. On which Satyendra Dubey was even referred to as "The Brave Whistleblower who was betrayed by Government." With parallel to this case, one more famous murder case of Shanmughan Manjunath where Manjunath, Sales executive of Indian oil corporation made into notice about the oil adulteration racket and which he tried to expose but as a response to which, he was brutally murdered on the night of November 19, 2005, by a petrol pump owner and his seven accomplice.

The constant support from his fellow-alumni from IIM, the tepid response of his employers and the point making scenarios and coverage by the media outraged the authorities and the culprits were convicted by the district court in Lakhimpur Kheri, Uttar Pradesh and the whole of the matter was flashed into.¹³ One of the other famous case of Karnataka official which

¹¹ Members of the Working Committee, NCPRI and UFRTI, Death of RTI Activist, Economic and Political Weekly, Vol. 45, No. 17 (APRIL 24-30, 2010), p. 5, JSTOR, (March 1, 2020, 18:52), https://www.jstor.org/stable/25664370

Prachi Sharma, What is the story of Satyendra Dubey, Quora, (March 7, 2020, 10:30), https://www.quora.com/What-is-the-story-of-Satyendra-Dubey

¹³ Economic and Political Weekly, Urgent Need for Legislation, Economic and Political Weekly, Vol. 42, No.

took place in 2012, where S.P Mahantesh, deputy director of the audit wing in the state cooperative department who reported some lacunas and inappropriate activities by some officials and also bringing out the name of various political leaders, being termed as whistleblowers in the land allotment controversies by the society was murder in May 2012. This is a classical case where a person stood up for the truth and was done in and there is no protection for him, what happened to his family?

A severe allegation in the state of Uttar Pradesh that the Mayavati's government is corrupt and is involved in money laundering and has embezzled a large amount of money was being made by a senior police officer, as a result, to which that officer was declared insane and was sent to a psychiatric hospital.

V. THE PATHWAY AND DEVELOPMENTS IN LEGISLATION WITH RESPECT TO WHISTLEBLOWERS.

Public Interest Disclosure (Protection of Information) bill, 2002 was firstly proposed in 2003, as a result of recommendation by the law commission of India in its 179th, with respect to the protection of whistleblowers. A number of events of threatening, harassment, and even of murder have been recorded of various whistleblowers, discussed above in the paper. The Government of India was asked by the Supreme court of India, being in the rage of same and forced by the circumstances made by such instances to issue a public order, the public interest disclosures and protection of informers resolution, 2004 which directly by its provisions directed and designated CVC as the nodal agency. The second administrative reforms commission took into consideration in January 2007, the fact about whistleblowers legislation 2007. The Public interest disclosure bill, 2010 was introduced into the Lok Sabha in August 2010 and in June 2011, the bill was approved by the cabinet. The name of the same bill was further changed as the whistleblower protection bill, 2011. The whistleblower protection bill, 2011 was passed by the Lok Sabha on December 28, 2011. The bill was introduced in Rajya Sabha on March 29, 2012, by V. Narayanswamy, minister of state for parliamentary affairs. The Whistleblowers protection act has been notified in the official gazette on 9th May 2014.

VI. WHISTLEBLOWERS PROTECTION ACT, 2014

Whistleblowers protection act, 2014, is an Act of parliament of India which provides a mechanism to receive complaints relating to the disclosure on any allegation of corruption or

^{13,} Money, Banking and Finance (Mar. 31 - Apr. 6, 2007), pp. 1068-1069, (February 29, 2020, 18:45), https://www.jstor.org/stable/4419396

¹⁴ One hundred and seventy ninth report of Law Commission of India, Government of India, (March 10, 2020, 18:30), http://lawcommissionofindia.nic.in/reports/179rptp1.pdf

wilful misuse of power or, wilful misuse of discretion against any public servant and to inquire or, cause an inquiry into such disclosure and to provide adequate safeguards against victimization of the person making such complaint. The new whistleblower protection law gives the Central Vigilance Commission (CVC) the task of receiving complaints, assessing public disclosure requests and safeguarding complaints. The law further strengthens protection for whistle-blowers through stronger anti-retaliation provisions. The CVC has the power to order that, whistleblowers who suffered employment retaliation be stored in their prior positions. The new law puts the burden of proof on the public official to show that any adverse action taken against a whistleblower was not retaliatory. It ensures confidentiality and penalizes any public official that reveals a complainant's identity, without proper approval, with up to three years imprisonment and a fine of up to Rs. 50,000. Additional penalties apply o organizations and individuals that fail to comply with CVC requests for information, or that knowingly provide incomplete, incorrect or misleading information. The law also places various limitations on complainants. There is a penalty up to 2 years imprisonment and a fine of up to Rs. 20,000 for individuals that bring false or frivolous complaints. There is also a 7-year time limit to bring complaints, dating from the alleged corrupt practices that occurred.

In addition to all this and as a broad perspective, the whistleblower legislation tries to make a balance between the two conflicting interests – the need to protect the individuals raising complaints against the need to prevent unnecessary harassment of public officials and minimize frivolous claims. Whistleblowers protection act, 2014 increases the scope of the term to include anyone (or any organization) that raises on alarm or files a complaint against any public servant. The act creates a safety net for individuals who may have information about illegal or unethical conduct by public servants using processes laid down in legislation such as the Rights to Information Act, 2005. For that to happen however it was particularly important to have a clear articulation of rules and mechanisms, as well as guidelines for such complainants that would make the protection in the Whistleblowers Protection Act more effective, accountable and easily accessible.

As above told about the pros and provisions of the whistleblower protection act, there also lies a number of issues with it, the central government has failed to frame any rules which pertain to important procedural and substantive issues not covered by the provisions of the Act itself.

The Whistleblower Protection Act has the over-riding effect over the colonial period law, Official Secrets Act, 1923 and gives the complainant power to make the disclosure in the public interest to the competent authorities, with keeping mind and not destroying the integrity and sovereignty of the nation. But a suppressive legislation was proposed with respect to this scenario. Where in the amendment bill of 2015, it was proposed that the whistleblowers must not be given the information or should not be allowed to disclose any information covered by the Official Secrets Act, 1923 even if it is related to any acts of corruption, misuse of power or criminal activity. Which was certainly not passed, and if we take into consideration this, directly dilutes the primary aspect of the legislation of the Whistleblowers Protection Act of 2014. If we have another look towards this with a more of democratic and liberal aspect, the Official Secret Act, 1923 was a suppressive legislation made by Britishers in order to refrain Indians to interfere in the administration, which is certainly against the very initial agenda of the Constitution of India, where the government and all the three organs of the government are accountable.

VII. MENTALITY OF THESES WARRIORS AND MENTALITY OF OTHERS TOWARDS THEM.

One of the eminent persons criticizing the concept of whistleblowers, James M. Roche, former president of General Motors – "Some critics are now busily eroding another support of free enterprise - the loyalty of a management team, with its unifying values of cooperative work. Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony and pry into the proprietary interests of the business. However, this is labelled - industrial espionage, whistleblowing, or professional responsibility - it is another tactic for spreading disunity and creating the conflict". ¹⁶

One of the mentalities of the people towards whistleblower is that it is due to their less efficiency and frustration towards their work which makes them criticize the work of others, it is the fault in them that they impose and use on others and the one of the other mentality being that- the person who is not able to achieve the fame and success in their fields and one who wants to have the impact and works on attention criteria do enrol in the whistleblowing and with the motive of came into the big picture of company market, act just in order to come into consideration or by the people who find themselves being victimized by their employers. But that is certainly not true, Sissela bok in her work 'Whistleblowing and Professional

¹⁵ Mint, Whistleblowers protection act, Drishti (March 5, 2020, 22:24), https://www.drishtiias.com/daily-updates/daily-news-analysis/whistleblowers-protection-act

¹⁶ Roche, James M.: 1971, 'The Competitive System, to Work, to Preserve, and to Protect', in Vital Speeches of the Day (May), p. 445, in Norman Bowie: 1982, Business Ethics (Prentice-Hall, Englewood Cliffs, NJ).

Responsibility' observed that the act of whistleblowing is related to the factor and mindset of an individual is generally gets the boost from the broader factor about the protection. It is the concern of that individual with respect to the damage which that act of that particular company would be causing to the general population, employee, consumers and the wider community, not some kind of vendetta or personal rage. In the realities this dissent, disloyalty, and accusation have more of a broader aspect and not just being involved and indulged frivolously. It can be said that the whistleblowers kind of become disloyal to the institution which is based on and because of the circumstances being created by the corporation and not due to the personal actions of a whistleblower, it is with respect to keeping in mind the humanity and loyalty to one's self which is beyond the corporation.

Now let's have a look towards the actual mentality which instigates a person to blow the whistle over the act, if we see in the Boisjoly's story after the act his words were "I have been asked by some if I would testify again if I knew in advance of the potential consequences to me and my career. My answer is always an immediate 'Yes.' I couldn't live with any self-respect if I tailored my actions based upon the personal consequences" No what we get to know about from this, it is not something which a person is being made to by some forces, laws or some kind of regulation here which is controlling the individual's will, rather it is something which is being inherited into an individual since his birth, it is something which he has learned that not to tolerate the injustice and to take a stance against the wrong. This thing an individual learns from his upbringing, the circumstances and the values with which he has grown. These traits in practicality cannot be enforced or asked by anyone, they come within the personality and character of an individual, that is the trait of a warrior.

VIII. JUDICIAL DEVELOPMENT AND INTERPRETATION

In the recent case of Parivartan and Ors. Vs. Union of India (UOI) and Ors. ¹⁸, the supreme court disposed off the petition by arguing that, once the legislation would be passed then the petitioner may bring the concerning matter to the court. So, here, in this case, the petitioner approached the supreme court seeking the directions to the Government of India to ensure that there is an independent authority that should receive the complaints of whistleblowers and protect them. The petitioner contended that in spite of legislation being passed by the parliament and enacted, the matter of the protection is still not in force. The solicitor general informed the court that the provisions of the whistleblower legislation have certain

¹⁷ Boisjoly, Russell P., Ellen Foster Curtis, and Eugene Mellican: 1989, 'Roger Boisjoly and the Challenger Disaster: The Ethical Dimensions', in Deborah C. Poff and Wilfrid J. Waluchow (eds.), 1999, Business Ethics in Canada, third edition (Prentice Hall Allyn Bacon Canada, Upper Saddle River, NJ

¹⁸ Parivartan and Ors. vs. Union of India (UOI) and Ors. (12.01.2017 - SC): MANU/SC/0120/2017

deficiencies with respect to Right to Information, 2005 and furthermore the amendments are being proposed. The court here contented and agreed to the dissatisfaction by the petitioner regarding the amendments of whistleblowers legislation, on which the court held that it would not be possible for the court to engage at this juncture where the legislation is not in force and concluded that the petitioner can approach the court once the legislation in force.

Here we can see the perfect ration used by the apex court, the court is aware of the fact that the amendment would certainly not be in favour as per the provisions of the constitution, but it is giving the parliament to reconsider it, as it is still not enforced and there is no need as such to stop the debate regarding it.

IX. WHAT SHOULD BE THE OUTLOOK NOW – THE ANALYSIS

Whistleblowers being the warriors against the inappropriate activities, corruption, malpractices, misuse of powers and other evil practices, should be protected and given certain powers that will directly enhance the integrity of democracy. Keeping a strong mechanism for whistleblowers protection will ensure a cherished and accountable atmosphere.

As per several scholars, the measures given for whistleblowers is to reward them, but in practicality, if we see that is certainly not the solution as that directly leads not only to the increase of malpractice and malice whistleblowing, but also will act as an interference to the employers way of handling and will gradually invite the abuse from malcontents and incompetents. So, the ultimate motive and aim should be the protection of whistleblowers by the retaliation from employers and not rewards. As if we see the reward measure in itself is against the spirit of the whistleblowing, where the actual motivation for whistleblowers is far beyond the rewards, that is to protect the mankind or to stand against the wrong. As rightly elaborated by martin "There is such a thing as voluntarily assuming responsibility and doing so because of commitments to (valid) ideals, to a degree beyond what is required for everyone" 19

Few of the researchers believe that the whistleblowing should be enhanced, but if we see from a more rational point of view whistleblowing would not even be needed if there are appropriate authorities within, to have a check and also the adequate listening of the internals concerning the happening within the organizations. One of the measure for this can be, there would be internal grievance authorities with proper and accountable measures and procedures, who encourages and rewards the disclosing of the matters internally and also

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¹⁹ Martin, Mike W: 1999, 'WHISTLEBLOWING, Personal Life and Shared Responsibility for Safety in Engineering', in Deborah C. Poff and Wilfrid J. Waluchow (eds.), Business Ethics in Canada, third edition (Prentice Hall Allyn Bacon Canada, Scarborough, ON).

there should be special persons or the head of the departments to be made responsible for investigating of wrongdoings, and also having check and balances by having hierarchical authorities, where even about and against the heads and the executive, the matter could be reported. There should also be certain punitive measures where the person not following within the procedures or found guilty should be liable for the fine.

When there would be proper internal mechanisms for these whistleblowers to be heard, or in elaborate understanding when there would be a hierarchical mechanism without having flaws, and being accountable having sense of integrity in itself is a measure or step forward for whistleblowers against the malpractices, these warriors waging the war. There can be an argument that this is illusionary and ideal, but with the help of proper planning if we see as prudent man this is practically possible.

And with respect to the outer whistleblowing, the authorities such as CVC must be enhanced and should be made competent enough to carry out their matters effectively without having any unreasonable bar over their powers of disclosure and security given by them to the whistleblowers.

Whereas to conclude, the most effective and realistic measure would be having proper changes in the legislation to protect whistleblowers. There should be appropriate and suitable laws concerning the protection of innocent whistleblowers that must be enacted and also the weakening resolution proposed in the whistleblower amendment act of 2015 should be abandoned.
