

**PROTECTION OF WHISTLE BLOWERS IN CORPORATE INDIA: A COMPARATIVE ANALYSIS****PRIYA R, LECTURER (GUEST),****GOVT. LAW COLLEGE, ERNAKULAM*****Abstract***

*Corruption has become the norm of the day. New mechanisms have to be strengthened so as to curb this evil. One such mechanism in Indian corporate field is the whistle blowing system. But the recent incidents in India show that whistle blowers are at risks. Some of them have lost their life for reporting the corrupt practices. So it's high time to give more teeth to the laws in India to protect those who serves the interest of Justice.*

**Key words Used – Corruption, Company, Whistle, Punishment and Protection.**

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Transparency and accountability are the norms of good governance. The system of Corporate Governance acts as a means to good governance in corporate world. Corporate Governance can be defined as “the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company” It is a process by which the companies are directed and controlled. Whistle blowing is one of the top mechanisms to better corporate governance. Whistle blowers are considered as ‘corporate conscience keepers’.

The term whistle blowing is derived from the terms “blow” and “whistle”, slang meaning of the word blow is to describe ‘the act of informing’ and the word whistle can be interpreted as ‘to give secret information or to turn informer’. The blowing of whistle would alert both law enforcement officers and general public of danger. The practice of whistle blowing can be traced from the practice followed by English Bobbies to alert law enforcement officers and general public of danger. Whistle blowing is defined as “the disclosure by organization members (former or current) of illegal, immoral, illegitimate practices under the control of their employers, to persons or organizations that may be able to affect action”. Whistleblower is a person who informs on another or makes public disclosure of corruption or wrong doing. In the context of corporation, whistleblowers are those who expose malpractices, unethical and corrupt practices of their co-workers and seniors for the benefit of the company, stake holders and society at large.

Whistle blowing may be three types-Internal to Internal, Internal to External and Extrinsic to External. In Internal to Internal, Internal people such as staff who report misconduct or non-compliance to internal people such as supervisors, managers, service and supply, procurement and purchasing, human resources, executives, directors, CEOs, CFOs, board of shareholders, investors and business owners. In Internal to External, Internal people (staff) who report misconduct or non-compliance to external people such as the clients, the suppliers and sub-suppliers (companies contractors, consultants, lawyers) the competitors, government departments and agents and police. In Extrinsic to External, Extrinsic people (those who have intimate knowledge of the business) who report misconduct or non-compliance to external people such as the clients, the suppliers, the consultants and government departments and agencies. Characteristics of whistle blowing are:-

- 1) It shall be made voluntary
- 2) It shall be made in public interest (public good),
- 3) It must be unauthorized reporting or disclosure of information in good faith.

Whistle blowing has many benefits like it fosters good governance by encouraging employees to report up deceitful actions by colleagues, seniors and third parties to appropriate authority; promote organizational transparency, alert that severe action will be taken against unethical and fraudulent acts; to discourage employees from committing fraud by instilling fear of unfavorable consequences when caught; helps to reduce mismanagement and maintenance of good will, protect the interest of society as a whole. Whistle-blowing can be extremely beneficial to the organization, its employees, shareholders and society and the general public at large. Violations, misconduct and malpractices which would affect the stakeholders can be mitigated and the transgressors be punished. Demerits are the issues like disclosing information for any personal gains like profit making, getting job promotion, transfers etc. whistleblowers are at great risk as they have to face retaliations from senior officers and other colleagues such as harassment, suspension, threat, salary cut, termination, demotion, any other discrimination etc.

### **Legislative Attempts in India**

The first step with regard to whistle blower protection in corporate field was stated in 1996, when the confederation of Indian Industries took a special initiative to develop a Code of Corporate Governance. The Code focused mainly on listed companies as these are financed largely by public money and hence, need to follow policies that make them more accountable to their investing public. The code has no material provision as regards the Whistleblowers Policy. The Code deals with reporting of internal audit reports, including cases of theft and dishonesty of a material nature to the Board and an independent audit committee consisting of non-executive directors. The major committee recommendations that dealt with the protection of whistle blowers are given below:-

#### **The 179<sup>th</sup> Law commission report 2001**

The one hundred and seventy ninth report of the law commission deals with 'Eradication of Corruption and Whistle blowing'. The Law Commission has proposed a Public Interest Disclosure (Protection of Informers) Bill to provide protection to whistleblowers. The Bill provides safeguards to the whistleblowers against victimization in the organization. It is provided that the whistleblower can himself seek transfer in case he apprehends any victimization.

#### **The N.R Narayana Murthi Committee Report 2003**

The Securities and Exchange Board of India constituted the N.R Narayana Murthi Committee on corporate governance in 2003. The committee made mandatory recommendations with regard to

whistle blower protection such as Personnel who observe an unethical or improper practice should be able to approach the audit committee without informing their supervisors. Companies shall take measures to ensure that the right of access is communicated to all employees. The employment and other personnel policies of the company shall contain provisions protecting whistle blowers from unfair termination and other unfair practices. The committee suggests that Companies shall affirm that they have not denied any personnel access to the audit committee of the company and that they have provided protection to whistleblowers. Such affirmation shall form part of the Board report on corporate governance.

#### **Clause 49 of Securities Exchange Board of India**

The recommendation of the N.R Narayana Murthi Committee led to the insertion of Clause 49 of the Listing agreement of stock exchange. It came into force on 1<sup>st</sup> January 2006. It places a non-mandatory requirement for listed companies to adopt whistle blower policy. The Listing agreement states that 'The Company may establish a mechanism for employees to report to the management concerns about unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy. This mechanism could also provide for adequate safeguards against victimization of employees who avail of the mechanism. The mechanism must provide, where senior management is involved, direct access to the Chairman of the Audit committee in exceptional cases. Once established, the existence of the mechanism may be appropriately communicated within the organization.' The Listing Agreement also provides that the Audit Committee must periodically review the existence and functioning of the mechanism.

#### **The Fourth Report of the 2<sup>nd</sup> Administrative Reforms Commission 2007**

The second administrative reforms commission constituted in January 2007 deals with Ethics in Governance. Chapter III of the report deals with "Protection of Whistle blowers". The report made some suggestions like Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment. It provides that the legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by willful acts of omission or commission. Acts of harassment or victimization of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence.

#### **The Naresh Chandra Committee Report 2009**

The Naresh Chandra Committee was constituted on November 2009 with Mr Naresh Chandra as the chairman. The committee deals with corporate governance – need for voluntary adoption. Recommendation 17 of the report deals with institution of a mechanism for whistle blowing to report concerns about unethical behavior, actual or suspected fraud, or violation of the company's

code of conduct or ethics policy. The committee also recommends that the mechanism shall also provide for adequate safeguards against victimization of employees who avail of the mechanism, and also allows direct access to the Chairperson of the audit committee in exceptional cases.

### **The Corporate Governance voluntary guidelines 2009**

Based on the recommendations of the Naresh committee report, the ministry of corporate affairs has issued a voluntary Code of corporate governance. Chapter VI of the Code mentions about institution of mechanism for whistle blowing. It suggests that the companies should ensure the institution of a mechanism for employees to report concerns about unethical behavior, actual or suspected fraud, or violation of the company's code of conduct or ethics policy and the companies should also provide for adequate safeguards against victimization of employees who avail of the mechanism, and also allow direct access to the Chairperson of the Audit Committee in exceptional cases.

### **The Whistle Blowers Protection Act, 2011**

The death of whistleblower Satyendra Dubey, an engineer working with the National Highway Authority of India led to the initial attempt to protect whistleblowers. Dubey was killed after he wrote letter to the then Prime Minister, A.B Vajpayee about the corrupt practices in the construction of highways. The government issued notification laying down certain guidelines for whistle blowing and protection of whistleblowers. The Public Interest Disclosure and Protection of Persons Making the Disclosure Bill, 2010 was introduced in the Parliament. The Bill is now replaced by the Whistle Blowers Protection Act, 2013. The main purpose of the Act is to establish disclosure on any establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power of discretion against any public servant; to inquire into such disclosure and to provide adequate safeguards against victimization of the person making such complaint and for matters connected with it.

### **Disclosures and its exceptions**

The Act excludes armed forces of the union from its purview. The central vigilance commission is the competent authority to address complaints. The Act defines disclosure as “( i) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988; (ii) willful misuse of power or willful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party; (iii)

attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosures. The Act excludes matters such as which affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the state, relations with foreign state or lead to incitement of an offence; or (b) involves the disclosure of cabinet papers including records of deliberations of the council of Ministers, secretaries and other officers except that provided under right to information act, 2005 from disclosure. Any public servant or any other person including a non-governmental organization may make a public interest disclosure. The Act specifies the requirements of Public Interest Disclosure such as it shall be made in good faith with a reasonable belief that the information is true, in writing or in electronic mail or electronic message and also protects the identity of the complainant

### **Protection to the persons making disclosures**

The Act imposes an obligation on central government to ensure that no person or public servant who has made a disclosure is victimized by initiation of any proceedings. If any person is been victimized on the ground that he has filed a complaint or a disclosure, he may file an application before the competent authority for redress. The competent authority shall give an opportunity of hearing to the complaint and the public authority or public servant. Any person who willfully does not comply with the direction of the competent shall be liable to a penalty which may extend up to thirty thousand rupees. If the witnesses and other persons need protection, the competent authority shall issue appropriate directions to the concerned government. The Act ensures the protection of identity of complainant and the document and information furnished by him. False or frivolous disclosure shall be punished with imprisonment for a term of two years and also fine up to thirty thousand rupees. Penalty of imprisonment for a term which may extend up to three years and also fine up to fifty thousand rupees is fixed for revealing the identity of complainant

### **Role of CVC**

The central vigilance commission will act as the competent authority in case of Government Company or company controlled by the state government. The central vigilance commission is given powers of a civil court. Any person aggrieved by the order of the central vigilance commission can make an appeal to the high court within sixty days from the order

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**The Companies Act, 2013**

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The companies Act 2013 makes its mandatory for every listed company and the companies which accepts deposits from the public and companies which have borrowed money from banks and public financial institutions in excess of Rs.5 crores to establish a vigil mechanism for their directors and employees to report genuine concerns. The company will operate vigil mechanism through the audit committee. Vigil mechanism will provide for adequate safeguards against victimization of employees who use it but the Act is silent on whistle blowers protection or not even uses the term.

**Whistle Blowers Protection in Different Jurisdictions**

Legal protection for Whistle blowers has two major aspects (1) a proactive part which attempts to change the culture of organizations by making it acceptable to come forward, facilitating the disclosure of information on negative activities in the organization such as corrupt practices and mismanagement, and (2) a second aspect consisting of a series of protections and incentives for people to come forward without fear of being sanctioned for their disclosures. Balance between the employers interest to not to have business interest hampered by malicious allegations or by risk of confidential information being disclosed unnecessarily to competitors or press shall be the aim of all whistle blowers protection laws. As retaliations by employers stops whistle blowers from reporting the corrupt practices, effective laws are needed to boost up their confidence. Countries like US, UK, Australia, Canada, South Africa and Japan have express provisions to protect whistle blowers in corporations or companies.

**Protection of whistle blowers in United States of America**

In United States, the Sarbanes Oxley Act 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 deals with whistleblowers protection in companies or corporations. The Sarbanes Oxley Act, 2002 protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. The Sarbanes-Oxley Act requires that all publicly traded corporations shall create internal and independent audit committees. Each audit committee must establish procedures for employees to file internal whistleblower complaints, and procedures to protect the confidentiality of employees who file complaints. The Act prohibits any discrimination such as threat, suspension, etc by the company or any officer of such company against the employees who provide evidence of fraud. The Act also penalizes retaliations of persons who give information regarding federal criminal offences. Retaliated employees can file enforcement action and claim compensatory damages. The Dodd- Frank Act, 2010 provides for the payment of awards to whistleblowers who voluntarily provides original information to the Securities

and Exchange Commission. The Act also mentions about denial of awards to whistle blowers in cases he acquired the original information in violation of grounds mention under the Act. The Act protects whistleblowers from retaliations. Retaliated employees have remedies such enforcement actions from the district courts of United States and compensatory reliefs such as pay back with interests, compensation such as litigation costs and attorney fees etc.

### **Protection in United Kingdom**

The Employment Rights Act, 1996 provided protection to whistle blowers in the workplace. The Act explains disclosure as any disclosure of information which the worker makes to show that a criminal offence has been committed, is being committed or is likely to be committed, that a person has failed or is likely to fail to comply with any legal obligation to which he is subject, that a miscarriage of justice has occurred, is occurring or is likely to occur, that the health or safety of any individual has been, is being or is likely to be endangered, that the environment has been, is being or is likely to be damaged. Disclosers can be made to an employer or other responsible person, to legal adviser, Minister of the crown or to some prescribed persons. This Act has been amended by the Enterprise and Regulatory Reform Act 2013. The new Act replaced the scope of disclosures in the old Act from good faith requirement to public interest. Under the new Act, the employment tribunal has the power to reduce any compensatory award it makes to the employee by 25% if it found that disclosures are not made in good faith. Thus this Act requires disclosures to be in public interest and in good faith. The Act imposes personal liability on employees and vicarious liability on employer for reprisals.

### **Protection to whistle blowers in Canada**

The Public Servants Disclosure Protection Act 2007 deals with protection of persons who disclose wrongdoings in the public sector. The Act defines protected disclosure as a disclosure by a public servant in good faith in accordance with this Act or in the course of a parliamentary proceeding or as per procedure established under any other Act of Parliament or when lawfully required to do so. Any person can blow the whistle about wrongdoings either to their own departments or to **the Public Sector Integrity Commissioner** or to **the Public under limited circumstances**. The Act requires all chief executives to establish an internal procedure to manage disclosures under the Act. The Act protects whistle blowers from reprisals and also takes care of their identity. Retaliated employees can file complaints to Public Sector Integrity Commissioner and the commissioner can refer the matter to the Public Servants Disclosure Protection Tribunal for its decision.



**Protection of Whistle blowers in Australia**

The Corporations Act 2001 and the Common Wealth Public Interest Disclosure Act 2013

deal with protection to whistle blowers. The Corporations Act 2001 is the most frequently used legislation in private sector. The Act protects company officers or employees and contractors who make good faith disclosures about breach of corporation's legislations. Disclosures can be made either to the Australian Securities and Investments Commission or to company's auditor or a member of an audit team conducting an audit of the company; or to a director, secretary or senior manager of the company; or to a person authorized by the company to receive disclosures of that kind. Whistle blowers enjoy privileges such as immunity from civil, criminal and contractual liability for disclosures made. They are protected against victimizations and are liable to be compensated. The Common Wealth Public Interest Disclosure Act, 2013 deals with disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector. The Act also ensures that the public officials who make public interest disclosures are protected from reprisals and that the disclosures are properly investigated into. The Act protects persons who disclosure information from for civil, criminal or administrative liability including disciplinary action for making the disclosure. Reprisals against persons disclosing information in public interest are prohibited by the Act. Act also provides for civil remedies including reinstatement in case reprisals are taken against whistleblowers. The Act also protects the identity of disclosures.

**Protection provided under South Africa**

The Protected Disclosures Act, 2000 deals affords protection to the employees in both public and private sector who makes protected disclosures regarding the unlawful or irregular conduct by their employer or other employee. The Act protects employees who make disclosures from occupational detriment. Employees can claim relief any court including the Labor Court, if they are subjected to occupational detriment. The Act defines Protected Disclosures as disclosure made to a legal adviser, to an employer, to a member of Cabinet or the Executive Council of province or to certain persons or bodies.

**Protection in Japan**

The Whistle bower Protection Act, 2004 extends its protection to the life, body, assets and other interests of the general public by ensuring corporate and government compliance with laws and regulations. The Act defines whistle blowing as disclosure of relevant disclosure information by a worker to either an employer or to a government agency or officer with relevant jurisdiction or to

any other person deemed necessary to prevent the matter from occurring or worsening and not for an illegitimate purpose. The Act invalidates dismissals or other disadvantageous treatments to those who disclose public interest information about companies or government agencies wrongs.

### **Suggestions and conclusion**

India's new Act on protected disclosure is a welcome step. But the recent incidents of Victimization of Whistleblowers like Satyendra Dubey, Manjunath Shanmugham, S Saseendran in Malabar Cements Limited case, etc points out to the need for an effective mechanism to protect whistleblowers. Some of the suggestions includes - whistle blowing program shall be made mandatory for all public and private companies; whistleblowers shall be protected from retaliations. Provisions shall be including to make retaliations a criminal offence and more punishment shall be imposed on those who practice it; Corporate whistle blowers shall be also included in the Act; time bound procedures should be retained and a provision for incentives to the whistleblowers should be incorporated in the Act and awareness programmes on whistleblowers protection shall be provided in companies.

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