

The woeful state of Whistleblower Protection in India

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Abstract.

Whistleblowers are those who disclose perceived misconduct in organisations. Whistleblowing is a crucial part of corporate governance, the objective of which is transparency, accountability and integrity in the corporate sector. Accordingly, the objective of corporate governance is enhanced by a good system to protect whistleblowers.

This paper provides a critical analysis of the present day framework in India for the protection of whistleblowers. This includes the Central Vigilance Commission Act 2003, the Whistleblower Protection Act 2014 and the Whistleblower Protection (Amendment) Bill 2015 (though lapsed). These are found wanting for two reasons. First, they do not extend to the private sector. Second, the powers of the Central Vigilance Commission are inadequate.

The Companies Act 2013 requires a ‘vigil mechanism’ for directors and employees to report concerns. This is found wanting because it applies only to listed companies and lacks details needed for effective implementation of a ‘vigil mechanism’.

The Listing Agreement (2014) mandates that every listed company establish a vigil mechanism to report concerns about unethical behaviour, actual or suspected fraud, or violation of the company’s code of conduct or ethics policy, but it lacks reference to necessary procedures and fails to protect completely the identity of a whistleblower.

This paper also examines major whistleblower cases in India including Satyendra Dubey’s case, Ketan Parekh’s scam, Harshad Mehta’s scam, Manjunath’s case and Prof. Kavita Pandey’s case. These reveal, disturbingly, that some whistleblowers have been killed, victimized, retrenched, sexually harassed or assaulted.

The thesis of this paper is that whistleblower protection laws in India are inadequate and undermine good corporate governance.

Keywords: Protection, whistleblower, corporate governance, Central Vigilance Commission, vigil mechanism.

1. Introduction

Historically, caged canaries were used to warn coal miners about unsafe air conditions in coal mines. Due to their breathing rate, size and metabolism, the birds would succumb before the miners if the air in the mine was toxic. If the miners were able to understand the signs of distress in the canaries, they were able to act in time to save their own lives. The caged canary had no control over its fate and yet the miners fully depended on the birds as ‘whistleblowers’ for their own safety. In the modern globalized world, some individuals now act as whistleblowers, bringing attention to acts which are not in the public interest. In order to curb corrupt activities in both the corporate and government sectors, whistleblowers bring the misconduct or illegal acts carried out by private or public company management to the awareness of authorities.

In India, several laws intend to provide protection to whistleblowers: the Whistleblower Protection Act 2014, the Whistleblower (Amendment) Protection Bill 2015, ss 177(9) and (10) of the Companies Act 2013, and clause 49 of the Listing Agreement. However, clause 49 of the Listing Agreement does not make whistleblower policy mandatory for all listed companies. Further, as per the Companies Act 2013, the vigil mechanism does not talk about the process for implementation of whistleblower policy in companies. The objective of this paper is to critically analyze the legal framework of whistleblower protection in India in the context of company policy.

2. Definitions of Whistleblowing and Whistleblower

Corruption is the root cause of a poor economy in any country; corrupt or illegal activities, wrongdoings, and misconduct all hamper financial growth. When moral and ethical principles are not legally implemented, a nation may have to face political scandals, corporate scams, crimes, white-collar crimes, and so on. To reduce corrupt activities at the national and international level, a good governance system needs to be implemented. Moral and ethical

principles are at the basis of good governance; in particular, ethics are a set of principles or standards of human conduct that govern the behavior of individuals or organizations.

Although there is no uniform definition of whistleblowing at the international level, the International Labour Organization defines it as “the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers”¹. The United Nations Convention Against Corruption (UNCAC) 2006 refers to whistleblowing as “any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”². Many scholarly definitions of whistleblowing can be found in the literature on business ethics. Peter B. Jubb (1999) defines the term whistleblowing as, “a deliberate non-obligatory act of disclosure, which get onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicated and is under the control of that organization, to an external entity having potential to rectify the wrong doing”³. Precisely, a whistleblower is a person who exposes wrongdoing within an organization. This definition clearly covers the traditional use of the term in a business context. One of the first modern uses was by US consumer activist Ralph Nader in 1971 who described whistleblowing as, “an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity”⁴. Taken together, these definitions provide a comprehensive meaning of the term whistleblower as anyone who is an employee, former employee, or member of an organization who reports misconduct to people or entities that have the power to take corrective action.

2.1. Meaning of Corporate Governance

¹ Kehinde, F. H., & I., O. O. U. (2017). Effective Whistle-blowing Mechanism and Audit Committee in Nigerian Banking Sector. *Journal of Business and Management Sciences*, 5(1), 18-26. Available: <http://pubs.sciepub.com/jbms/5/1/3/index.html>

² Study Prepared By The OECD G20 Anti-Corruption Action Plan Protection of Whistleblower (2012), “Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislations” Available: <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

³ Jubb, P. (1999). Whistleblowing: A Restrictive Definition and Interpretation. *Journal of Business Ethics*, 21(1), 77-94. Available: https://www.jstor.org/stable/25074156?seq=3#metadata_info_tab_contents

⁴ Banisar, D. (2011) *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, Publisher: World Bank-Institute for Social Research, Editors: I. Sandoval, pp.64.

The concept of ‘corporate governance’ first emerged in the corporate sector to give strength and legal recognition to principles of morals and ethics. Investors are aware that companies do not solely exist to provide dividends but are interested in filling their own coffers, and, while there are exceptions, many really care for their stakeholders and practice good corporate governance. There is no universal definition of corporate governance. Noble Laureate, Milton Friedman defined corporate governance as, “the conduct of business in accordance with shareholders’ desires, which generally is to make as much money as possible, while conforming to the basic rules of the society embodied in law and local customs”⁵, while Sir James D. Wolfensohn⁶ defines it as being “about promoting corporate fairness, transparency and accountability”⁷. The OECD’s definition of corporate governance is “a system by which business corporations are directed and controlled”⁸.

Corporate governance and whistleblowing are interlinked terms; in order to strengthen the objectives of corporate governance, whistleblowers must be protected. The protection provided to whistleblowers signals a good corporate governance system. Whistleblowing is based on principles of morals and ethics and it is at the basis of corporate governance.

3. The Framework in India for Protection of Whistleblowers

3.1. The Listing Agreement: Clause 49

During the 1900s, industrial licensing was abolished in India and economic reform on a wide scale began. Despite there being no uniform or unique structure for corporate governance in the developed world, Indian companies, banks, and financial institutions could no longer afford to ignore better corporate practice. In 1996, the Confederation of Indian Industry (CII) took a special initiative on corporate governance and for over two decades, the CII has been at the forefront of the corporate governance movement in India. Their objective was to develop and promote a code for corporate governance that could be adopted and followed by Indian companies, including the private sector, public sector, banks and financial institutions. According to the CII’s code, corporate governance refers to, “an economic, legal

⁵ Khanka S. (2014), Business Ethics and Corporate Governance (Principles and Practices) S. Chand Publishing.

⁶ Ninth President World Bank 1995–2005.

⁷ Dangi, V. (2008), Corporate Governance Emerging Issues. Ocean Books Pvt. Ltd.

⁸ Study Prepared By The OECD G20 Anti-Corruption Action Plan Protection of Whistleblower (2012), Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislations. Available: <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

and institutional environment that allows companies to diversify, grow, restructure and exit and do everything necessary to maximize long-term shareholder value”.⁹ In April 1998, the CII released a taskforce report entitled “Desirable Corporate Governance: A Code”, which outlined a series of voluntary recommendations regarding best-in-class practices of corporate governance for listed companies. The CII Code 1998 focused on the role of the audit committee, the efficiency of the board of directors, and annual and quarterly reporting to maintain transparency in the affairs of the company, while also emphasizing the procedures of appointment and re-appointment of the board of directors, compliance certificates and disclosure policy in the company. It is worth mentioning that most of the CII Code was subsequently incorporated in the Securities Exchange Board of India’s (SEBI) Kumar Mangalam Birla Committee Report (2000), and thereafter in clause 49 of the Listing Agreement.

The SEBI’s¹⁰ circulars dated 1st February 2000, 9th March 2000, 12th September 2000, 22nd January 2000, 16th March 2001, and 31st December 2001, formulated clause 49 of the Listing Agreement for the improvement of corporate governance in all listed companies. In 2004, the SEBI directed all listed companies to amend existing clause 49 of the Listing Agreement by issuing revised clause 49 of the Listing Agreement (vide circular no. SEBI/CFD/DIL/CG/1/2004/ 12/10). Revised clause 49 of the Listing Agreement (2005) discusses the important facets of corporate governance with which every listed company needs to comply; it also covers the role of the audit committee, composition of the board of directors, non-executive director’s compensation and disclosures, code of conduct, independent audit committee, and the role and responsibilities of the remuneration committee. The whistleblower mechanism is also introduced by revised clause 49 of the Listing Agreement under a non-mandatory section. Through this mechanism, employees in a company can report to the management concerns about unethical behaviour, actual or suspected fraud, or violation of the company’s code of conduct or ethics policy. This policy could also provide adequate safeguards against victimization of employees who make use of the mechanism; in exceptional cases, it provides direct access to the chairman of the audit committee. Once established, the existence of the mechanism may be appropriately

⁹ Bansal C. (2005), Taxmann’s Corporate Governance Law Practice and Procedures with Case Studies. Taxmann Allied Services Ltd.

¹⁰ Sundaresan V. (2003). Corporate Governance in listed companies - Clause 49 of Listing Agreement, Circular 23 August 2003. Available: https://www.sebi.gov.in/legal/circulars/aug-2003/corporate-governance-in-listed-companies-clause-49-of-the-listing-agreement_15948.html

communicated within the organization. Revised clause 49 of the Listing Agreement endeavors to achieve the objectives of corporate governance. On 17th April 2014, the SEBI amended the corporate governance norms for listed companies and these came into effect from 1st October 2014 with the objectives of aligning the provisions of the Companies Act, 2013, and imposing more stringent conditions on listed companies in consideration of the need to have better governance practices. The new clause 49 of the Listing Agreement¹¹ provides for those significant facets mentioned above: the remuneration committee, audit committee, disclosures in the annual report, code of conduct, role of independent directors, nominee directors, and the vigil mechanism i.e., whistleblower policy in detail. As per the new clause 49 of the Listing Agreement, it is mandatory for all listed companies to establish a vigil mechanism to report concerns about unethical behavior, actual or suspected fraud, or violation of the company's code of conduct or ethics policy. The details of the mechanism shall be disclosed by a company on its website and in the Board's report. Additionally, related party transactions and the stakeholders' relationship committee are also discussed in detail in revised clause 49. In 2003, after Satyendra Dubey's case in India, people put their heads together in an effort to prepare effective whistleblower policy and protection for every sector. Efforts were taken by the Narayan Murthy Committee (2003) to include whistleblower policy, and, in their report, the Committee recommends the implementation of whistleblower policy in the corporate sector. However, this was a non-mandatory recommendation; thereafter, the SEBI framed clause 49 of the Listing Agreement for introducing the concept of corporate governance. In clause 49 of the Listing Agreement, whistleblower policy is mentioned for listed companies as a non-mandatory obligation¹². Although the clause regulates corporate governance in India, it is not sufficient for comprehensive implementation of whistleblower policy in the corporate sector.

3.2. The Companies Act 2013: A vigil mechanism: Is it deficient?

The Companies Act 2013 made whistleblower policy mandatory via ss 177(9) and (10), in which every listed company has to establish a vigil mechanism for directors and employees to report genuine concerns in such a manner as may be prescribed and also establish provision

¹¹ Masood, N. (2014). *Ministry of Corporate Affairs, Monthly Newsletter*, Vol 36, 3-4. Available: http://www.mca.gov.in/Ministry/pdf/Monthly_Newsletter_May_2014.pdf

¹² Taxmann's Corporate Governance (2014), A Comprehensive Analysis of New Clause 49 of Listing Agreement issued by the SEBI on 17-4-2014, April 17, 2014, Taxmann Publications (P.) Ltd.

assuring safeguards against victimization of persons who use such a mechanism¹³. The provision also provides for direct access to the chairperson of the audit committee in appropriate or exceptional cases. However, the Companies Act 2013 fails to define or provide clarity on the term ‘victimization’.

The Companies Act 2013 made mandatory the establishment of a vigil mechanism for listed companies but the procedure for the establishment of such a mechanism is not provided for under the Act. However, the details of the mechanism’s establishment should be disclosed on the company’s website and in the Board’s report. This also means that the execution of the mechanism is at the discretion of the Board of Directors; some companies appoint the Audit Committee to oversee the execution of the mechanism and in other companies it is done by the Board of Directors. Further, the Companies Act 2013 does not make provision for maintaining the confidentiality of the whistleblower. A vigilance officer does not have the power to penalize the person who is at fault; the officer only acts as an advisory body. Companies have the discretion to amend or make changes to this mechanism/policy. This is the biggest loophole in this particular provision of the Companies Act 2013. There is no concrete and effective protective legislation for corporate whistleblowers.

The vigil mechanism is established and executed via an internal mechanism of the company, so it deviates from basic objectives of corporate governance. Internal mechanisms/vigil mechanisms are decided by the Board of Directors and can be changed or modified, meaning there are no checks or balances for this mechanism. The Board of Directors has complete discretion.

3.3. Indispensable aspects of the Whistleblower Protection Act 2014

The Whistleblower Protection Act 2014 established a mechanism to receive complaints relating to the disclosure of any allegation of corruption or willful misuse of power or discretion against any public servant and to inquire or cause an inquiry into such disclosures and to provide adequate safeguards against victimization of the person making such complaint and for matters connected therewith and incidental thereto¹⁴. As per s 4 of the said Act, any public servant or any other person including any non-governmental organization may make a public disclosure before the competent authority despite any provisions of the Official Secrets

¹³ Taxmann’s Companies Act, 2013, Taxmann Publications (P.) Ltd.

¹⁴ The Gazette of India, Published by Authority, New Delhi, May 12, 2014/Vaisakha 22, 1936 (SAKA)

Act 1923. Under section 4, every disclosure shall be made in good faith and it shall be in writing or by electronic mail or electronic message. Section 4 also states that action cannot be taken by the competent authority on public disclosure if the disclosure does not indicate the identity of the complainant and if the identity is found to be incorrect or false.

Chapter III of Whistleblower Protection Act, 2014 talks about the inquiry by the competent authority in relation to public interest disclosure; the competent authority on any public disclosure under s 4 shall confirm from the complainant or public servant whether he was the person who made the disclosure; the competent authority shall conceal the identity of the complainant unless the complainant himself has revealed his identity to any other office or authority¹⁵. The competent authority will also make inquiry to deduce whether there is any basis for proceeding further to investigate the disclosure. Further, if the competent authority on the basis of inquiry or without inquiry is of the opinion that the disclosure needs to be investigated, in that case, it will try to get comments, explanations or reports from the head of the department of the organization or authority, board or corporation concerned within the due period of time. In the process of obtaining comments/ explanations/reports, the competent authority protects the identity of the complainant and also directs the concerned head of department of the organization not to reveal the identity of the complainant. Section 4 also states that if the competent authority is of the opinion that it is necessary to reveal the identity of the complainant to the concerned head of department of the organization in order to avail their comments/explanations/reports, in that case the competent authority with the prior consent of the complainant can reveal the identity of the complainant to the office/head of the department/authority/board/corporation concerned. If consent has not been given by the complainant to reveal his identity to the concerned office, then the burden of proof lies with the complainant; he has to provide all documentary evidence in support of his complaints/arguments to the competent authority.

Further, s 4 states that if the competent authority on the basis of reports/explanations/ comments realizes that there is willful misuse of power or discretion or substantiated allegations of corruption, then the competent authority recommends the matter to the public authority to take certain steps against the alleged person/authority. Under the Act, the competent authority has all the powers of the Civil Court in the matters prescribed in the Act. Every proceeding before the competent authority shall be deemed to be a judicial proceeding

¹⁵ ibid

within the meaning of ss 193 and 228 and for the purposes of s 196 of the Indian Penal Code (45 of 1860). Section 7(4) also mentions that subject to the provisions of s 8, it is not obligatory to maintain the secrecy or other restriction upon the disclosure of information obtained by or furnished to the government or any public servant, whether imposed by the Official Secrets Act 1923 or any other law for the time being in force, provided that the competent authority, while exercising the powers of the Civil Court, shall take necessary steps to ensure that the identity of the complainant has not been revealed or compromised.

As per certain provisions of the Act, certain matters are exempted from disclosure; none of the persons involved will furnish any information or answer any questions or produce any documents or information which is likely to prejudicially affect the interests of the sovereignty or integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. A certificate issued by the Secretary to the Government of India or the Secretary to the State Government or any authority so authorized by the Central or State Government certifies that any information, answer or portion of a document is binding and conclusive.

The Act¹⁶ provides protection to persons who make disclosures by mentioning that no complainant will be victimized by initiation of any proceedings or otherwise merely on the grounds that such person or public servant had made a disclosure or furnished assistance in inquiry. It also states that if any person is being victimized or likely to be victimized on the grounds that he had filed a complaint or made disclosure or provided assistance in inquiry, then he may file an application with the competent authority availing remedy in this matter, and such authority shall take an action, as deemed fit and may give suitable directions to the concerned public servant or the public authority to protect such person from being victimized or to avoid his victimization. These directions are binding upon the public servant or the public authority against whom the allegation of victimization has been proved; the Act also mentions the penalties for the following acts:

- a. non-compliance with the directions of the competent authority
- b. if the organization/office will not provide the report within the specified time or malafidely refuses to submit the report to the competent authority

¹⁶ Whistleblower Protection Act, 2014, The Gazette of India, Published by Authority, New Delhi, May 12, 2014/Vaisakha 22, 1936 (SAKA)

- c. incomplete or incorrect or misleading or false report or destroyed record or information
- d. obstructions in the process of competent authority
- e. revealing the identity of the complainant.

Under the statute, appeal to the High Court is provided to any person who is aggrieved by any order of the competent authority relating to imposition of penalty under ss 14, 15 16 within a period of 60 days from the date of the order appealed against. The Whistleblower Protection Act 2014¹⁷ also provides various definitions: competent authority; the requirement of public interest disclosure; power and functions of the competent authority; certain matters exempted from the disclosures; protection to the persons who make the disclosure subject to certain terms and conditions; offences and penalties for the incorrect report by the concerned organization; and, false complaint by the complainant.

3.3.1. Role of the Central Vigilance Commission (CVC) under the Whistleblower Protection Act 2014

Unfortunately, the Whistleblower Protection Act 2014 has ignored the private sector completely, although the Act establishes a mechanism to receive complaints relating to the disclosure on any allegation of corruption or willful misuse of power or disclosure and to provide safeguards against victimization of the person making such complaint. The Whistleblower Protection Act 2014 talks about complaints against public servants but not about corporate scams, even though India has witnessed many corporate scams, such as the Harshad Mehta scam, the Ketan Parekh case, and the Satyam case, among others. The casualty in all such scams and scandals has been the erosion of faith and wealth of stakeholders in the equity markets¹⁸. This Act is considered to be ‘disarmed law’ as the CVC/competent authority does not have the power of execution of punishment, acting merely as an advisory body. At a time when the Supreme Court is considered to strengthen the CVC¹⁹ by attaching independent investigators to it, the anti-corruption Ombudsman has all but admitted to failing to tackle graft in central and state government offices.

¹⁷ *ibid*

¹⁸ Bansal C. (2005), Taxmann’s Corporate Governance Law Practice and Procedures with Case Studies. Taxmann Allied Services Ltd.

¹⁹ A copy of detailed resolution of Government of India (2004). Available: <http://document.ccis.nic.in/WriteReadData/CircularPortal/D6/D06crd/whistleblow.pdf>

Table 1: Complaints received from Jan. 2007 to Sept. 2014

Complaints received from Jan. 2007 to Sept. 2014	Complaints sent to CVOs (Central Vigilance Officers) after initial screening	Cases in which penalty was prescribed	Cases closed	Cases in which report is pending
3,634	1,063	78 (7.3%)	650 (61.7%)	335

Source: A 130-page affidavit filed in the Apex Court by the CVC on how it dealt with 3,634 complaints brought to it by whistleblowers between January 2007 and September 2014 from all over India, holds some disappointing figures²⁰

Most complaints filed by whistleblowers relate to misuse of official position, irregularities in purchase of equipment and award of tenders, and irregularity in transfers and postings.

Activist and lawyer Prashant Bhushan and Arvind Kejriwal's NGO Parivartan, filed an affidavit following a court direction in a decade-old PIL²¹, demanding better handling of complaints from whistleblowers and protection of their lives. The affidavit states that out of the 15 cases referred to the Central Bureau of Investigation (CBI), First Information Report have been lodged in only one case and administrative action taken in another. Seven cases have been closed and reports are pending in six others. These statistics should hardly be surprising. CVOs (Central Vigilance Officers) hardly act on complaints forwarded by the CVC. The CVOs belong to the same government department as their seniors, against whom they are expected to act.

The CVC's best performances have been in cases in which it conducted direct inquiries. The Commission stated that since 2007, 244 whistleblowers have filed complaints of harassment after lodging complaints against officials in their respective departments. This harassment is not only limited to transfers, suspensions or threats to life. Whistleblowers who exposed corruption in Air India, the CBI, the railways and the State Bank of India, claimed they were being implicated in false cases of sexual harassment. During a hearing on February 12, 2015, the Supreme Court bench headed by Justice T.S. Thakur said that unless the CVC

²⁰ Nair H. (2015). Toothless' CVC leaves India's whistleblowers exposed, report shows. *Mail Online India*. <http://www.dailymail.co.uk/indianews/article-2964289/Toothless-CVC-leaves-India-s-whistleblowers-exposed-report-shows.html>

²¹ Parivartan and Ors. v/s Union of India, W.P. (C) No. 93 of 2004 (Jan 2017)

adopts a satisfactory, transparent and independent procedure, the Commission will remain largely toothless.²²

It is interesting to note that although anonymity of the complainant has to be maintained, even the CVC (designated agency) ascertains the identity of the complainant and if the complainant is anonymous, it does not take any action in the matter. This means that the Commission will not entertain anonymous/pseudonymous complaints and its jurisdiction is restricted to the public sector only. On September 15, 2015 a bench comprising Justices H.L. Dattu and S.A. Bobde made an egregious demand on the Centre for Public Interest Litigation (CPIL)²³ to accept an affidavit filed on the NGO's behalf only if it revealed the source of its information. In response to the Supreme Court's original demand for the name of the whistleblower, the CPIL filed a fresh affidavit informing the court that it was loath to reveal the name of its source. The affidavit states: "Several whistleblowers have unfortunately been killed after their identity was revealed". Along with its new affidavit, the CPIL filed a fresh plea requesting the court to recall its earlier order²⁴.

As the affidavit filed by the CPIL²⁵ informs, whistleblowers whose identities have been revealed, often face the wrath of real offenders: Satyendra Dubey, S.Manjunath, Amit Jethwa and Shehla Masood are but a few informants who were killed after their identities became public.

As per the Whistleblower Protection Act 2014, the complainant either has to disclose his identity by so-called consent, in the process of seeking information from the head of department of the concerned organization (it is requested from the complainant by the competent authority), or, if the complainant is not willing to disclose his identity then he must provide all documentary evidence in support of his complaint to the competent authority. This means that the burden of proof lies on the complainant. Accordingly, it is apparent that existing laws are insufficient to protect whistleblowers in the public sector as well. Unlike in

²² Nair H. (2015). Toothless' CVC leaves India's whistleblowers exposed, report shows. *Mail Online India*. <http://www.dailymail.co.uk/indianews/article-2964289/Toothless-CVC-leaves-India-s-whistleblowers-exposed-report-shows.html>

²³ Chauhan. N. (2017). CBI files corruption case against former Chief Ranjit Sinha. *Times of India*. Available: <http://timesofindia.indiatimes.com/india/cbi-files-corruption-case-against-its-former-director-ranjit-sinha/articleshow/58363666.cms>

²⁴ Chandrachud A. (2004). Protection for Whistleblowers: Analysing the Need for Legislation in India. The Practical Lawyer. (2004) 6 SCC (Jour) 91. Available: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=623

²⁵ Indirect Tax Practitioners Association vs R. K. Jain [(2010) 8 SCC 281]

the US and the UK, s 3 of the Act does not define the term “victimization” in detail. The Act does not give the complainant the right to appeal to higher authorities or the court, if he/she is not satisfied with the decision of the competent authority. The right to appeal to the High Court is provided for in the penalties under ss 14, 15 and 16 of the Whistleblowers Protection Act 2014. Although the Act provides penalties for false or frivolous disclosure, it fails to specify the procedure for filing the complaint with the competent authority/CVC nor does it detail the procedure of appropriate machinery or competent authority.

3.4. Essence of the Whistleblower Protection (Amendment) Bill 2015

The Whistleblower Protection (Amendment) Bill 2015 was passed by Lok Sabha (Lower Chamber of India’s Parliament) on 13th May 2015 and the said Bill was pending in Rajya Sabha (Upper Chamber of India’s Parliament) for approval²⁶. The objective of the Whistleblower Protection (Amendment) Bill 2015 was to strengthen the safeguards against disclosures which may prejudicially affect the sovereignty, integrity of the country, or security of the State. The Bill proposed amendments to ss 4, 5 and 8 of the Whistleblower Protection Act 2014. The amendments in s 4 would prohibit disclosures prejudicially affecting the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relations with foreign states or those leading to incitement of an offence, records of deliberations of the Council of Ministers, information which is forbidden to be published by a court or if it may result in contempt of court, commercial confidence, trade secrets, intellectual property (if it harms a third party), information received from a foreign government, information received in a fiduciary capacity, information that could endanger a person’s safety, or information that would impede an investigation. Further, the amendments mention that if certain information is available under the Right to Information Act 2005, then it can be disclosed under the Bill. It was also proposed that the disclosures cannot be made under the Bill and are prohibited under the Official Secrets Act 1923. Once the disclosure is made, the competent authority will refer it to a government authorized authority, and this government authority will take the final decision on whether the disclosure is prohibited. These amendments were based on the provisions of subs (1) of s 8 of Right to Information Act 2005.

²⁶ Delay in operationalising Whistle Blowers Protection Act (2018). Government of India, Press Information Bureau, Ministry of Personnel, Public Grievances & Pensions. Available: <http://www.pib.nic.in/Pressreleaseshare.aspx?PRID=1541243>

As per the proposed amendment, the competent authority shall not inquire into any public interest disclosure which involves information of the nature specified in the amended s 4 of the Whistleblower Protection Act 2014. It was also proposed in this amendment that no person shall be required to furnish any information or answer any question or produce any document or render any other assistance in an inquiry under the said Act, if the same is likely to result in the disclosure of any information of the nature specified in the amended s 4. By these proposed amendments, the Bill tried to increase the categories of information which cannot be disclosed to the public at large during the inquiry into a whistleblowing complaint and create a mechanism to determine prohibited disclosures. However, the proposed amendment Bill lapsed in the dissolution of 16th Lok Sabha. The researchers tried to explain and analyze the amendment Bill 2015 because the operationalization of the Whistleblower Protection Act 2014 was dependent on it. While the amendment Bill 2015 was introduced by the Government of India, unfortunately, to date there has been no operationalization of the Whistleblower Protection Act 2014 with the lapse of the amendment Bill. To date, there are no efficient laws contributing towards the protection of whistleblowers in India.

4. Conclusion

There is a need to protect the truthfulness, honesty, authenticity and trustability of all individuals by providing the necessary protection to whistleblowers in India. In our country, laws, policy, and rules have been made to protect whistleblowers on the basis of various committees and the Commission's recommendations, but there is a gap between promises and practices. The Whistleblower Protect Act 2014, the Companies Act 2013, and clause 49 of the Listing Agreement are inadequate in providing complete protection to whistleblowers as these laws are not even able to entirely protect the identity of whistleblowers. The CVC has confined powers and no real punitive powers. The procedure to file a complaint to the concerned authorities is mislaid in the provisions of these laws. In reality, many people are not aware of the present laws regarding protection of whistleblowers and, consequently, the public still expects the concerned authorities to entertain anonymous complaints to protect the identity of whistleblowers. The lack of an efficient mechanism has resulted in the annoyance, harassment, retaliation against, and even death of whistleblowers in India.

Whistleblowing is gaining recognition worldwide as an important means of ensuring transparency and integrity of global markets. Unfortunately, in India there is inadequate

protection for whistleblowers; if the concerned organisation submits incorrect reports/information/explanations/answers, punishment by imprisonment is not provided for under the laws concerned. However, complainants can be imprisoned for wrongfully complaining; a stringent punishment is provided to the complainant but not to the alleged organization/department/ authorities. Also, there is no rigorous punishment dispensed for revealing the identity of a complainant under the laws concerned. The fortitude and high moral responsibility of whistleblowers show that they can play a vital role in fighting loose ethics and slack corporate governance. Regrettably, they have to undergo insult and injury in the form of loss, ridicule, retaliation, boycott or even death, due to the absence of adequate laws in India that could better protect them.

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- [1] Banisar, D. (2011) *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, World Bank-Institute for Social Research, Editors: I. Sandoval, pp.64.
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