

WHISTLE BLOWER PROTECTION: CRITICAL ANALYSIS

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ABSTRACT

The corporate world is huge and it is necessary to monitor them to protect the interest of stakeholders, the company and society. The corporate sector forms the backbone of the economy; any fraud in this sector also affects the other sectors. The paper highlights the basic understanding of corporate governance and how whistle-blowing forms an indispensable part of corporate governance. Further, the paper reveals the importance of whistle-blowing law to protect the complainant from victimization and retaliation. The paper then moves on to analyse the various laws which are prevalent in India in relation to protection of whistle blower. For better understanding the laws has been divided into public sector, listed companies and private sector. Moving on, the next part of the article focuses on the various lacunae which are still there and needs to be addressed. The paper concludes by highlighting some suggestions to fill in the lacunae.

KEYWORDS

Corporate governance, whistle-blower, companies, victimization.

INTRODUCTION

Scams are not new to the corporate world. If we turn the pages of history, we can witness that even reputed multinational companies are not innocent as a lamb. As the name suggests, 'whistle blowing' is act to blow the whistle in relation to the illegal activities happening in the enterprise. The person who intimates the appropriate government authority or the superior of the enterprise about the wrong is called the whistle-blower. In simple terms, the whistle-blower is an individual who blows the whistle. Whistle Blowing is of two types:

- a) **Internal** – When the whistle-blower reports the misconduct to another person in the same organization. Such a person could be an employee or his superior.

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- b) **External** – When the misconduct is reported to an outside agency such as law enforcement department or enforcement agencies.

It has been observed that external whistle-blowing is more effective but at the same time it also requires solid proof than internal whistle-blowing. Whistle-blowing is a positive development because it helps corporate entities to follow the right track and ensure transparency.

The philosophy behind whistle-blowing reveals a dichotomous choice between whistle-blowing and silence. When an employee of the organization gets knowledge of the wrongdoings, he or she has to decide whether to blow the whistle and expose the entity or remain silent and be indifferent to it. Whistle-blowing is a two-stage process:

- a) **Intention**- The person has the intention to blow the whistle and he has the knowledge of the wrongful activities.
- b) **Action**- Mere intention is not enough. Whistle is blown only when the person with such knowledge reports the same to the appropriate authorities.

Corporate governance takes a significant position after the series of corporate scandals. According to Organization for Economic Cooperation and Development (OECD) corporate governance is “*the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.*”² It is in the public interest to know if the corporation has followed all the rules and regulations in order to achieve its objectives without jeopardizing stakeholders’ interest. It is essential to keep a check on managers to prevent them from perusing their private interest by overlooking the company’s interest. Owing to these concern, the concept of corporate government has become significant in the business world. In nutshell, corporate governance is ensuring transparency, complying with mandatory disclosures and effective surveillance on the working of company.

There are two types of corporate governance. First is internal corporate governance, which directly monitors my Board of Directors, Shareholders activism, accounts and

² Organization for Economic Cooperation and Development, OECD Principles of Corporate Governance11 (2004)

audit and whistle blowing. Second is external corporate governance which consists of credit rating companies such as Crisil, security analyst and SEC's examination.

Whistle Blowing legislations are the laws which focus on the protection of whistle blowers by prohibiting their wrongful termination, demotion in position, cutting their salaries and benefits, transferring them to a dead-end job or harassing them mentally or physically. The objective of such statutes is to give full immunity and protection to such whistle blowers. In the absence of any protection to such employees they become hesitant to come forward as they may end up digging their own grave by putting their career at stake. In addition to this, the identity of such employees should be kept John Doe so that they don't face retaliation from the corporation. A proper regulatory legislation on whistle blower will enhance corporate governance in the country. The various laws in India to protect whistle blowers are as follows:

a) Public Sector

- *Public Interest Disclosure and Protection of Informers Resolution (PIDPIR)*

Through the office resolution on 13.02.2012, the Government of India authorized the Central Vigilance Commission (CVC) as designated authority to receive written complaints, conduct enquiry and take appropriate actions. The complaint could be related to disclosure of misconduct, corruption, unethical behaviour or illegal activities in the department of government, or any authority established under central government or government companies. The objective of this resolution is to enable transparency in the system and to ensure a proper mechanism for the employees to report improper acts. The resolution ensures to keep the identity of the informer a secret so that he/she is not victimised or retaliated for filing the complaint. However, the resolution provides protection only to the employees of government departments and does not cover private companies. The designated authority does not entertain the complaint which is anonymous. Furthermore, the designated authority can call the police and CBI in order to complete the investigation. The Central Vigilance Officer ensures that no punitive action is taken against the individual because of him/her being a 'whistle Blower'. The order in detail mentions about the manner and form in which the complaint should be filed by the informer.

- *Whistle Blower Protection Act, 2014*

The act is divided into seven chapters spread across thirty-one sections. The preamble of the act states that the objective of the act is to establish a mechanism to file complaint relating to disclosures of wilful miscount or abuse of power, to investigate such disclosures and provide safeguards to the person filing the complaint from victimisation. The act provides protection to public servants who make a public interest disclosure to the competent authority. However, the disclosure must be made in good faith and the complainant has to sign a declaration that he genuinely believes the information is true. Chapter III deals with the powers and functions of the competent authority such as to ascertain the identity of the complainant, to conceal the identity of the informant and to conduct a discreet investigation into the matter. Chapter V of the act exclusively provides for the protection of person making the complaint against victimisation and protection to witnesses. In order to prevent misleading or frivolous complaints, the act mentions punishment under section 17 i.e., imprisonment which can extend up to two years or fine up to thirty thousand. Thus, the act tries to balance the interest of informants by concealing their identity and protects the department from false complaints.

b) Listed Companies

- *Companies Act, 2013 and Companies and (Meetings of Board and its Powers) Rules, 2014*

The company has no explicit provision related to whistle blower protection. However, Sec. 177(9) of the 2013 act provides for establishment of Vigil mechanism by all listed companies for directors and employees to report genuine concerns. Sub section 10 further states that Vigil mechanism shall provide safeguards against victimisation of persons and a procedure to have direct access to chairman of Audit Committee in exceptional circumstances. Rule 7 of the Companies and (Meetings of Board and its Powers) Rules, 2014 provides that every listed company who has accepted deposits from public or borrowed money from banks exceeding fifty crore rupees shall have a vigil mechanism. One key requirement of the whole mechanism is that there should be no conflict of interest between the members of the company and head of audit committee or independent director. Section 149(8) read with schedule IV of the companies act, 2013 deals with the code of conduct of independent directors. This clearly mentions that one of the functions

of the independent director is to ensure the proper functioning of vigil mechanism and monitor that complainants are not discriminated.

- *The Securities Exchange Board of India*

Clause 49 of the Listing Agreements deals with corporate governance and states that company should have a mechanism to report all kinds of unethical behaviour or suspected fraud or fraud in the company. SEBI has made it mandatory for every listed company to have a whistle blower policy and make employees mindful of such policy to empower them to report cases of unpublished sensitive information. With effect from December 2019, the SEBI has also introduced a *reward mechanism* for incentivizing ‘*Informants*’ to report violation of insider trading laws to SEBI³.

- *Companies (Auditor’s Report) Order, 2020*

The Ministry of Corporate Affairs has recently issued, the Companies (Auditor’s Report) Order, 2020, according to which all the companies has to enhance due diligence and ensure greater disclosure on the part of auditors to ensure transparency in the financial working of the company. In addition to this, the company will have to share information about the whistle-blower’s complaints received, the manner in which dealt with it, and the amount involved.

c) **Private Companies**

There is no separate law to mandate the whistle blower policy in private companies. However, some multinational companies have incorporated the whistle blower policy as a part of their global policies. The main aim to incorporate whistle blower policy in an organization is to allow the employees and staff to speak up about any illegitimate activities without the fear of being discriminated or victimised.

LACUNAE IN LAW

Whistle blowing involves a moral dilemma to choose between the loyalties to the corporation and to stand up for the wrong. Whistle blowing involves a great risk as it

³ Chapter IIIA, Securities and Exchange Board of India (Prohibition Of Insider Trading) Regulations, 2015

might affect the individuals' whole future. In spite of there being provisions for protection of whistle blower, there is still some gaps which need to be filled. Some of the lacunae are as follows:

1. There is no compulsory law on whistle blower policy to be incorporated in private or unlisted companies. Some multinational companies have incorporated whistle blower mechanism in their organization but it still on voluntary basis. For efficient corporate governance it is essential to have mandatory whistle blower policy in every corporation.
2. The Whistle Blower Protection bill provides safeguards from victimisation but it does not define victimisation. Hence, it becomes difficult to determine whether the person has been discriminated or not. Further, the bill gives narrow meaning to disclosure.
3. The bill does not specify the procedure of conducting internal enquiry into the complaint that is filed. Though there is vigil mechanism in place according to companies act provisions but how such mechanism shall operate is not yet provided.
4. The vigilance officer shall not look into complaints which are anonymous. This creates a problem because sometimes the person may be reluctant to come forward and reveal their identity. However, the information provided by them may be true. Thus, there are chances that illegal activities go unnoticed because it was an anonymous complaint.

CONCLUSION AND SUGGESTIONS

Today's corporate world is infected with scams, frauds and corruption. In such a scenario whistle blower policy becomes the need of the hour. This will not only help to reveal the scandals earlier but also force the companies to follow all the rules and regulations. Thus, it will increase the transparency and efficiency of the corporation leading to enhanced corporate governance. On one hand, the companies should incorporate a robust mechanism of whistle blower policy and on the other hand ensure that adequate safeguards are available to employees or staffs making such disclosures. We live a globalized world where companies have their branches all over the world. In such cases, the issue arises regarding which country should have the jurisdiction or which law should

govern which blower compliant as the laws in all the countries are not same. Further, the private sector is not immune to scams +hence, it is essential for the parliament to implement a law for proper corporate governance in private sector. The first and the foremost requirement to have an effective whistle blower policy is the guarantee to conceal the identity of the informant and ensure that he is not compromised financially, physically or mentally because of blowing of whistle. The members of the enterprise must feel safe to report an offence. In addition to this, there should be no discrimination in terms of protection given to the whistle blowers and the witnesses. Further, there should be an internal independent committee in the company exclusively to oversee the functioning of whistle blowing policy in the company. This committee shall keep track on the number of complaints filed, the complaints addressed and protection given to the complainants.

Needless to say, the legislature is trying to have a complete law on protection of whistle blowers. From the last one decade the parliament has moved forward in this direction. However, there is still vacuum left which needs to be filled.