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PROTECTION OF CORPORATEWHISTLEBLOWERS IN INDIA: A STUDY

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ABSTRACT: Whistleblowing policy is one of the tools of corporate governance. For an organization to fulfill its aims and objectives it is very important that the organization is governed by good corporate Governance. The Whistleblowing mechanism is an effective tool to eradicate illegal activities and to provide utmost safeguards to the Whistleblower against any retaliation. The paper aims to discuss the lacunae in the Protection of Whistleblowers Act, 2014 and to analyze the reasons for the private sectors to be covered under the ambit of the act. It aims to bring to the notice of legislators/drafters to make necessary amendments to the present law and to stress the need of inclusion of private sectors under the act. The article concludes by stressing on the factor of implementation of comprehensive legislation for the protection of employees in the private sectors as well as making the act more effective and efficient.

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I INTRODUCTION

Whistleblowing policy is one of the tools of corporate governance. It is very significant for a company to adopt a whistleblowing mechanism for the betterment of the company. Every company, whether public, private, or an NGO should adopt a strong whistleblower system to encourage its employees to report illegal and fraudulent activities to its management or the competent authority. Whistleblowing also plays a vital role in implementing Corporate Governance practices.

A whistle-blower is a person who discloses and brings to the notice of the competent authority or the management about the information relating to the company's illegal or unethical practices, which are against the public interests. Whistleblower can be an employee of the organization or an outsider who has a stake in the company. By encouraging whistleblowing mechanism in an organization, it paves a way for the better transparency and accountability towards the society.

On 21 February 2014, the Bill was passed by Rajya Sabha and received the President's assent on 9 May 2014. In India, the 'Protection of Whistleblowers Act, 2014' provides safeguard for the protection of the whistleblowers and also penalties have been prescribed. The Act aims to establish a mechanism to receive complaints with regard to the disclosure of any allegation of corruption, fraudulent activities or willful misuse of power or discretion against any public servant.

The Act only applies to the public companies and does not cover Private companies under the ambit of the said Act. Clause 49 of the listing agreements of the Securities Exchange Board of India (SEBI) prescribes the mandatory clause and the non-mandatory clause to the listed companies. One such non-mandatory clause of Clause 49 of the listing agreements of SEBI is Whistleblower Policy.

In India, corporate crimes or scams are steadily rising. In the past, we have witnessed many such scams which have taken away the lives of the whistleblowers due to the insufficient protection given to them. As discussed above, the Private Companies are not covered under the Act. There is a need to bring private companies under the Act because, majority of the private companies are bankrolled by substantial public money or interests.

II CORPORATE GOVERNANCE

In this Twenty first century, Corporate governance has become one of the hot topics to be discussed on. Corporate governance is the system of rules, practices, and processes by which a firm is directed and controlled. Corporate governance essentially involves balancing the interests of a company's many stakeholders, such as shareholders, senior management executives, customers, suppliers, financiers, the government, and the community.¹ In an organization corporate governance plays a vital role to accomplish and fulfill the goals and the objectives. Corporations have great responsibilities towards society and are answerable to them.

¹<https://www.investopedia.com/terms/c/corporategovernance.asp>

A successful company should always focus on both economic and social aspects. Whistleblowers Protection policy would be an efficacious tool for corporate governance, as it will make the corporate accountable to the common mass, which would certainly help the society to nurture.²

III CORPORATE GOVERNANCE IN INDIA

The code prescribed by Confederation of Indian Industry was subsequently incorporated in Securities and Exchange Board of India's ('SEBI') Kumar Mangalam Birla Committee Report and then vide its circular dated August 26, 2003 has amended the Principles of Corporate Governance i.e., made amendment to clause 49 of the listing agreement.³

The principles incorporated in the Birla Committee Report emphasizes the companies to prepare a policy called Whistleblower Policy which would safeguard the victims who voice on the malpractices and fraudulent activities. The aim of the policy is to encourage the employees of the organization to report any illegal or unethical practices to the management.

Adoption of whistleblower's protection policy was made mandatory for the listed companies through the amendments made to the clause 49 of the listing agreements. According to the directions of the Securities and exchange Board of India(SEBI), a vigilance commission is introduced to report malpractices and fraudulent activities by the employees and directors who work for the organization.

The Auditor is bound to report the instances of fraud and illegal activities taking place in the organization to the Central Government within the prescribed time frame. However, the act does not cover unlisted companies which is a major drawback. Whistleblowing Mechanism paves the pathway for the Auditors (internal or external) to resolve the issues which are in violation to the fundamental principles of the business to the management.

IV WHISTLEBLOWING MECHANISM

Whistle-blowing is commonly 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.⁴ For Timely detection of frauds it is very essential that a good internal whistleblowing system must prevail in an organization.

To improve the scope of Whistleblowing it is essential to improve the safeguards provided to the Whistleblowers. However, if the organization lacks to take measures for providing the safeguards to the Whistleblowers, the employees will take a step back in reporting the malpractices and fraudulent activities.

Employees being the first ones to observe the wrong happenings in the organizations, they take a step back when it comes to the reporting because of the fear of retaliation against the

²KarnMarwaha ,*Corporate governance and whistleblowing in India: promises or reality?* , 59 INTERNATIONAL JOURNAL OF LAW AND MANAGEMENT (2007).

³<https://www.cii.in/PolicyAdvocacyDetails.aspx?enc=tY9RauqVx47h7V4G1rU6/jmCHSML2OwpVJtbLaE2vPFukhx566abX9jYjSpP+zUObymFCsRSpFalMSkgUR0vKQ==>

⁴Gladys Lee and Neil Fargher, *Companies' Use of Whistle-Blowing to Detect Fraud: An Examination of Corporate Whistle-Blowing Policies*, 114 JOURNAL OF BUSINESS ETHICS, MAY 2013, 283-295 (2013)

Whistleblowers. There arises a comprehensive need for the protection of the Whistleblowers in the Organization. In India, there is massive evidence to show the retaliation against the Whistleblowers. Retaliation against whistleblowers can also be much more severe than loss of money and career opportunities, it includes retaliation in the form of jailing, torturing and killing whistleblowers.⁵ The retaliation against Whistleblowers includes death, career related problems, income fluctuation even though the complaints were made confidentially to its regulators. The complaints which are made to the regulators or the officials of the department are supposed to maintain it confidentially, yet the information are leaked to the media or the information reach the hands of the goons who then retaliate against the Whistleblowers.

V WHISTLEBLOWING MECHANISM IN INDIA

In India the Whistleblowing mechanism is governed under the Protection of Whistleblower's Act, 2014 (Whistleblowers Act). The said Act is applicable only to the Public servants and the public listed companies. One of the notified and discussed drawbacks of the Act is ,it does not bring private sectors within the ambit of the Act. The intention of the legislature to introduce the act was to receive complaints relating to disclosure of any allegation of corruption, willful misuse of power/discretion against any public servant, to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimization of the person making such complain.⁶

All the disclosure of the public interest can be made by utilizing the Whistleblower Act. Whistleblower (Amendment) Bill, 2015 was proposed before the parliament. The bill aimed to secure disclosures against the disclosed information which prejudicially affect the sovereignty of the country, security of the state.⁷ The bill was not passed by the Rajya Sabha and it lapsed.

The Whistleblower's protection Act, 2014 has many discrepancies in it. The protection given to the Whistleblower is very limited and very narrow. Further the Act does not bring the Private sectors/companies within its ambit. The act imposes punishment and penalties for the victimization; however, the term Victimization is not defined under the act which brings in a lot of doubts which acts to be considered as the Victimization.

The Indian legislation regarding the Whistleblower encourages a Confidential system of reporting the complaints rather than anonymously reporting. The confidential reporting has caused deleterious consequences to the Whistleblowers due to the retaliation against them. In the United States of America, the Confidential and the Anonymous methods of reporting the complaints are severely encouraged⁸. Unlike in the USA, in India the complaints from the Whistleblowers are received only if the identity is revealed to the Central Vigilance Commission and the anonymous complaints are not entertained. If the complaints are frivolous or false the person making the complaint attracts the punishment as mentioned under section 16 of the

⁵Richard P. Nielsen, Lakshmi Balachandra and Anna L. Nielsen, *Whistle-Blowing Methods for Navigating Within and Helping Reform Regulatory Institutions*, 112 JOURNAL OF BUSINESS ETHICS, 385-395 (2013).

⁶http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/whistleblowing-in-india-are-we-there-yet.html?no_cache=1&cHash=b5747c0cd8db654635cb5ee27689acaa

⁷Statement of Objects and Reasons, The Whistleblowers Protection (Amendment) Bill, 2015.

⁸Terry Morehead Dworkin, SOX and Whistleblowing, 105 MICHIGAN LAW REVIEW, 1757 (2007).

Protection of the Whistleblowers Act, 2014. This factor leads to the major discouragement to the Whistleblower as it brings fear within him to be held liable for the punishment because of which he may tend not to report the complaint at all. Anonymous complaints encourage the informant to report without any fear of retaliation which could be a threat to his life, his job, low incomes etc.

VI EXCLUSION OF PRIVATE SECTOR UNDER THE PROTECTION OF WHISTLEBLOWERS ACT, 2014

In the present times the fraudulent and illegal activities take place not just in the public sector but in the private sector as well. The law should mandate to bring the private sector of any size including non-profit organization, so that illegal activities could be identified and major risk could be avoided.⁹ Due to privatization even the private companies are indulging into entering the public domain there is a great scope for the private companies also to be secured under the act.

Excluding the private sectors would be perilous. The exemption of private sectors does not only affect the companies or the organizations but it affects the society as a whole. Whistleblowers can be termed as the guardian of the Organization, it is necessary for the organization to create a subtle environment and work space, instead of retaliation and causing harm to them.

Like the public companies, even the private companies contribute to the growth and development of Indian economy. Therefore, the country cannot take any chance for the misconduct to occur in the system which in turn would affect the people at large. This being said, private companies are not free from unethical practices. There are many cases which evolve bribery, cash embezzlement etc. In many countries, in order to protect the whistleblowers, organizations have framed policies and guidelines. Even Indian companies do have certain policies to safeguard the whistleblowers.

To increase the scope and efficiency of the Act the Administrative Reform Commission made recommendations to increase the safeguards provided to the Whistleblowers along with the recommendation to include the private sectors in the ambit of the act in the year 2007. Unfortunately, these recommendations were not taken into consideration by the commission which has limited the act only to the public sectors.¹⁰

The recommendation to include private sectors within the ambit of the Whistleblowers act has also been expressed by the international authorities as well. The 2009 OECD Anti-bribery Recommendation calls on Parties to ensure that whistleblower protections are in place for both public and private sector employees.¹¹

⁹KarnMarwaha ,*Corporate governance and whistleblowing in India: promises or reality?*,59 INTERNATIONAL JOURNAL OF LAW AND MANAGEMENT (2007).

¹⁰ Fourth Report on Ethics in Governance' (Second Administrative Reforms Commission 2007) <https://darpg.gov.in/sites/default/files/ethics4.pdf>

¹¹ OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, (2009)

After the great Enron scam (2001), the US Supreme court in the case of *Lawson v FMC LLC*¹² held that, section 1514A of the Sarbanes Oxley Act of 2002 extend to the private companies and not just to the public companies.¹³ The private companies include the contractors who provided services to the public companies. Thus, the Sarbanes Oxley Act extended the protection to the company which were bankrolled by the public substantial money and not just to the public companies all together.¹⁴

As per Companies Act 2013, every listed companies or such classes of companies should establish a mechanism that would encourage the directors and employees to report frauds in the manner prescribed.¹⁵ This is given in the sub-section 9 shall provide safeguards against the victimization of persons and can directly report to the chairperson of the Audit Committee in exceptional cases, provided that the details of the mechanism should be posted on the company's official website and in the board's report.¹⁶

Clause 49 of the listing companies has made it mandatory to adopt a policy for the employees to report to the management about the unethical or fraudulent activities that are happening in the organization. The policy should also provide adequate safeguard for the whistleblowers. Where a senior manager is involved in the fraud, the whistleblower has direct access to chairman of the audit committee as per the benefit under the Act.¹⁷

The article covers a few reasons why the private sectors have to be brought within the purview of the Protection of Whistleblowers Act, 2014.

1. The fraudulent or the Illegal activities take place even in the private sectors just like the public sectors. The employees in the private sectors need required protection to report the Whistleblower complaints and not to face any retaliation against them. The scope and impact of the Act would extensively increase if the private sectors are included under the act.
2. Private sectors contribute at large to the economy of the country. Only if the private sectors are immune from unethical practices and procedures it will continue to contribute better to the economy of the country. If the fraudulent or the illegal activities are not reported at the right time, it will affect the country's economy and also the society at large.
3. At times, the company may manipulate the books of accounts and there could be the chances of under reporting of income. When this happens, the profit of the company will be shown less in the financial statements. The tax is calculated and paid to the government on the basis of the profit shown in the financial statements. Because of the under reporting of the income the company may pay a lower amount of taxes to the government. This may impact the economy of the companies. Because there aren't any laws which are applicable to the private companies regarding the whistleblowing policy, the employees may not report such fraud even if they are aware of such frauds, because of the fear of getting retaliated.

¹² 571 U.S. 429 (2014)

¹³ <https://supreme.justia.com/cases/federal/us/571/429/>

¹⁴ Kevin Rubinstein, *Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer*, 52 NYLS LAW REVIEW, 638-657

¹⁵ The Companies Act, 2013 s 177(9)

¹⁶ The Companies Act, 2013 s 177 (10)

¹⁷ Clause 49 of the Listing Agreement.

4. When the company is caught in such an act, the employees would refrain from joining the company. Due to this there won't be any skilled human resource available in the company. Because of the unskilled personnel in the management of the company, the management cannot make any right decisions which would benefit the company.

VII CONCLUSION

The main purpose and object of the Whistleblower Protection Act, 2014 is to safeguard the Whistleblowers and to wipe out the fraudulent, illegal activities and corruption in the organization. However, excluding private sectors from the ambit of the Whistleblowing policies will not help in attainment of the Act's objectives. These policies aim to enable people in organizations, to raise concern about organizational wrongdoing so that such wrongdoing is rectified and protect whistleblowers when they raise such concerns.¹⁸

A National legislation should be drafted to include the private sectors under the act, which in turn increases the organizational value by laying down the extensive guidelines those which have to be adopted by the private companies.

The Companies Act 2013, should be amended so as to cover even the Private companies within the purview of the Act. Private Companies also play a vital role in the economy of India. Therefore, steps have to be taken to curb the happenings in those sectors. The Companies Act should introduce guidelines and policies that would create an ambience for the employees a sense of security and belief in oneself. As a whistleblower is one of the tools of corporate governance, essential steps have to be taken to raise its standards and make it beneficial to both employees and the organization.



¹⁸Eva E. Tsahuridu and Wim Vandekerckhove, *Organisational Whistleblowing Policies: Making Employees Responsible or Liable?*, 82 JOURNAL OF BUSINESS ETHICS, 107-118 (2008).

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