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# Redeveloping Whistleblowing Policy in India: A Fight for Better Corporate Governance

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## ABSTRACT

*In recent years, corporate industry in India has undergone certain radical changes that require huge amounts of capital investments. The company's uncertainty augmented with the Public Private Partnership model implemented in India, where stakeholders' as well as equity holders' interests need to be addressed. The growing uncertainty has also resulted from the chain of corporate failures such as Satyam, Sahara, King Fisher, Enron, Xerox, etc. that have rattled economies around the world, causing stockholders to lose trust in their funds' managers as well as among overseas investors. India, as an increasing economy, needs enormous foreign investment to finance big projects, as the Indian government looks at MNCs to provide resources and technological know-how. This calls for a Corporate Governance review with specific regard to the whistle blowing process in order to keep a check on such widespread fraudulent activities. It is therefore important that companies should ensure that their policies and procedures on human resources ensure that whistleblowing conduct is viewed in a favorable light and that the whistleblower is considered a savior rather than a traitor. The present study aims to highlight the value of the principles of corporate governance concerning whistle blowing process and other legislation for the company's successful functioning as well as systemic changes in the contemporary law to create conditions conducive to its existence in companies.*

## I. INTRODUCTION

*“The purpose of whistleblowing is to expose secret and wrongful acts by those in power in order to enable reform.”*

- **Glenn Greenwald<sup>3</sup>**

The term Whistle blowing simply means raising an alarm about the wrongdoing inside or outside the company where other people's interests are at stake. It is a concept of recent origin

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<sup>3</sup> Glenn Greenwald, *Edward Snowden's worst fear has not been realised – thankfully*, THE GUARDIAN (Fri 14 June 2013 19:00 BST), <https://www.theguardian.com/commentisfree/2013/jun/14/edward-snowden-worst-fear-not-realised>

that has become common in many corporate scandals around the world, such as the Enron, WorldCom, Bear Stearns, Lehman Bros, Countrywide, AIG, Washington Mutual, Fortis, ING, Satyam Computers and more. The word is believed to come from the procedure, where referees raise an alarm by blowing a whistle for their orderly continuation to avoid foul play or wrongdoing in a match.<sup>4</sup> Another theory is that it derives from the English policeman's idea of blowing the whistle to warn witnesses and officials of crimes or hazards.<sup>5</sup> It basically means revealing the wrong done in an agency or in a society in simple terms. The concept includes four elements "the whistle-blower, the whistle blowing act, the individual against whom the complaint is made and the entity against which the complaint is lodged," according to Janet Near and Marcia Miceli.<sup>6</sup> Usually, whistleblowing is undertaken in relation to severe moral faults i.e. matters including those connected to public safety, public money and environment where the whistleblower feels he has a moral and ethical duty to report it.<sup>7</sup>

The rules and regulations on whistleblowing were developed to enable potential whistleblowers to come forward with their suspicion by providing opportunities for workers to raise complaints and identify a way of coping with unethical practice. This involves the duty of a whistle blower to make sure that the information he or she has is pure facts and not any sort of speculation. Otherwise it may generate needless rigidity among stakeholders and weigh the personal risks faced when choosing to become a whistle blower.<sup>8</sup> Sometimes, staff members are the first to learn about any immoral or simply illegal activity that takes place inside an organization. However, they also appear to be the last to speak out, fearing the loss of their job, friends or potential advancement. For this reason, most companies will penalize whistleblowers by firing, suspending, or charging them for violating laws or employment agreements, even if they are acting in good faith. The whistle blowing rules and regulations are therefore critical for protecting workers who blow the whistle on those engaged in dishonest and illegal actions against retaliation by public corporations.

However, in India, there is no proper statute which deals with protection of whistle blowers in public listed companies. The Whistle Blowers Protection Act, passed in 2011, includes general provisions relating to whistle blowing.<sup>9</sup> However, it does not resolve the plight of private-sector whistle blowers because the law applies only to government companies, non-governmental

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<sup>4</sup>Jubb & P.B., *Whistleblowing: A Restrictive Definition and Interpretation*, J. BUS. ETHICS 21, 77–94 (1999).

<sup>5</sup>DANA. L. GOLD, RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 254 (Stephan Tully ed. 2005)

<sup>6</sup>Janet Near & Marcia Miceli, *Organisational Dissidence: The case of Whistle Blowing*, J. BUS. ETHICS 1, 2-4 (1985).

<sup>7</sup>*Id.*

<sup>8</sup>Ernika Hernik, *Understanding Whistle Blowing: A set theoretic approach*, 68 (2) J. BUS.RES. 442, 450 (2015)

<sup>9</sup>Whistle Blowing Protection Act, Act No. 17, Acts of Parliament, 2014 (India).

organisations and public employees and does not apply to the private sector. The Law Commission's proposal to apply the Act to the private sector in its 179th report and the 2nd Administrative Reforms Commission in its 4th Report has been ignored. This being the critical problem, the fear amongst staff members as well as various employees prevails due to which most of the corporate fiascos stay underreported leading to serious economic breakdown.

This paper is going to delve into the principles of corporate governance with in respect of whistle blowing mechanism in India. Further, it is going to address the drawbacks of Indian legislations related to the whistleblowing process as well as the need to establish a systematic mechanism to prevent the outbreak of such corporate fiascos highlighting the international legal framework. Subsequently, it provides the recommendations and suggestions regarding changes in the contemporary laws to ensure successful functioning of the companies in India.

## **II. INDIAN LEGAL FRAMEWORK OF WHISTLEBLOWING POLICY**

- **The Indian Companies (Amendment) Act 2017<sup>10</sup>**

Under The Companies (Amendment) Act 2017, there is no such term as whistle blowing but all the provisions laid in it have a concept of whistle blowing policy. There is a separate chapter in the companies act named “Inspection, Inquiry and Investigation” which deals with the concept of the whistle blowing. Sec 210 to 229 of the Act provides for a new system for investigating corporate matters.<sup>11</sup> Section 211(1) of the Act provides for the creation of an Office for Serious Fraud Investigation (SFIO).<sup>12</sup> As per the Companies (Amendment) Act 2017, whistle blowing is not merely a voluntary act of the individual willing to do so, but in fact it is the person's duty, right and obligation to assist in business relations and corporate affairs. This act motivates and encourages to raise voice fearlessly against unethical business acts and promotes through its provisions, investigation and inquiry. Under section 218 of this act protection has been provided to the employees during investigation.<sup>13</sup> Sec 229 of the Companies (Amendment) Act, 2017 states the provision of penalty in case of providing false statements or damage or destruction of any document.<sup>14</sup> Under section 177(9) of the Companies (Amendment) Act, 2017<sup>15</sup> and Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014, all the listed companies are required to set up a vigil mechanism for the employees and the director of the company so that they can report complaints of any

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<sup>10</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

<sup>11</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

<sup>12</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

<sup>13</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

<sup>14</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

<sup>15</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

unethical behaviour, violation of code of conduct, actual or suspended frauds or any misconducts in the company, complaints are not limited to only the given topics, any genuine complaint affecting the company can be reported. Later there was an amendment in the section according to which the Board has all the rights reserved to amend the mechanism but any change must not be varying with the provision of listing agreement, Companies (Amendment) Act, 2013 and any law for the time being in force.

- **SEBI guidelines**

In an amendment to Clause 49 of the listing agreement in August 2003, SEBI incorporated guidelines for companies. According to the agreement, it is mandatory for the companies to have a vigilant system and a whistleblowing policy of its own and it is the duty of the employees to be vigilant and if they believe that there is any malpractice or fraud going on in the company then they have the right to access to the company's audit committee. The agreement also mentions that it is company's responsibility towards those employees to provide them protection from any kind of harassment or termination. It also proposed that companies should come up with an annual declaration that they did not refuse or restrict any personal access to audit committees and that they offered immunity to the whistleblowers from unfair dismissal or other prejudicial workplace practices. But unfortunately, this mandatory recommendation was never implemented and also got diluted in a non- mandatory provision letting companies to get off the hook.

- **Whistle Blower Protection Act 2014<sup>16</sup>**

This act was created to establish a mechanism where the complaints related to any willful use of power against any public servant, allegations of corruption or any complaint related to the disclosure of any document can be addressed. This act also includes inquiry on the organization or the person for such disclosure and also have adequate safeguards to protect the complainant against victimization for whistleblowing.

The act deals with the requirement of public interest disclosure. According to it, In spite of the provisions contained in the Official Secrets Act, 1923 (19 of 1923), any public servant or any non-governmental authority can make a public interest disclosure before the competent authority. Any disclosure made under this act will be treated as a public interest disclosure. Also, every disclosure must be made in good faith and the person making it must give a personal declaration stating that he reasonably believes the information disclosed by him and the allegations contained in there are considerably true. The disclosure must be made in

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<sup>16</sup>Whistle Blowing Protection Act, Act No. 17, Acts of Parliament, 2014. (India)

accordance with the procedure mentioned with all the supporting documents and if the competent authority feels fit, it can also call the person making the disclosure in case they need any other information. The most important thing is that it is important for the person making the disclosure to reveal his identity, in case the identity is incorrect, no action will be taken. Under section 4 of this act, the competent authority shall ascertain that the complainant himself has made the disclosure or not. The competent authority must upon receiving the receipt of complaint and after ascertaining the identity of the complainant or the public servant shall decide that whether more investigation is required from the complainant within the prescribed time. The authority shall investigate discreetly. And if, after the discreet investigation the competent authority feels that the disclosure needs more investigation, they shall seek comments and explanations from the head of the department of the organization concerned without revealing the identity of the complainant. Provided, if the competent authority believes that it is important to reveal the name of the complainant before the head of the department while seeking comments and explanation, it can reveal the name only if it has prior consent of the complainant to do so, if the complainant agrees to it then the name can be revealed, but, if the complainant denies to reveal his identity, he shall provide the authority all the documentary information and evidences to support his complaint. After investigating all the documents and evidences if the authority believes that the complaint is frivolous, vexatious, or there is no ground for the case, the matter shall be closed. Or, if the discreet inquiry and investigation shows that there was willful misuse of power and complaint is true, it shall recommend the public authority to choose the measures as prescribed in the act. The public authority shall take the decisions within 3 months of the recommendation and also must inform the complainant about the same.

Under this act, the competent authority investigating the case must have the powers of the civil court by the reason of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974) and every proceeding before the Competent Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860).

Under section 8 of the whistleblower protection act 2014 there is no obligation on the competent authority to not to disclose the complainant's name whether it is imposed under Official Secrets Act, 1923 (19 of 1923) or any other law which shall be in force at that time, the competent authority can do what they believe is fit for the time. But, while exercising the powers of the civil court, the competent authority must exercise all the possible steps to keep the identity of the complainant safe. Also, for the discreet inquiry the competent authority

can take assistance from the police authorities to complete the enquiry within the prescribed time.

The act deals with the provisions to safeguard the whistleblower against victimization. If the competent authority believes that there is a need to give protection to the person making the disclosure, or any witness, or any other person giving assistance in the inquiry, through any application sent by the complainant or by any other means, then they give appropriate directions to the government authorities or the police to give the respective people the appropriate protection.

### III. INCIDENTS OF CORPORATE FRAUDS IN INDIA

- **The Infosys Episode:**

On October 21, a whistle was blown by a group of employees in an Indian multinational corporation Infosys limited where the whistleblowers alleged that the company is using ‘unethical’ steps to increase the profits and the short-term revenues. The whistleblowers also assured that they have call recordings and copy of the emails as evidence to prove the same. The complaint was sent to the board of directors of Infosys and the US Securities And Exchange Commission (SEC) because Infosys is also classified in the US and the regulator allows for the filing of confidential complaints with it. The whistleblowers did not reveal their identity and referred to themselves as “*ethical employees*” in the complaint letter. This was the third whistleblower complaint in Infosys. The group in the letter alleges that CEO of the company Salil Parekh directed them to manipulate the documents and to make wrong assumptions in order to show margins and that the chief financial officer prevented the Infosys employees from presenting and showing all the large deal issues.<sup>17</sup>

Infosys did not make the disclosure earlier under *Regulation 30* of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (*SEBI LODR Regulations*).<sup>18</sup> Under SEBI, LODR it is mandatory to make disclosure within 24 hours from the occurrence of event or information.<sup>19</sup>

The audit committee gave a clean chit to the CEO as they did not find any evidence. "The audit

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<sup>17</sup>Jochelle Mendonca & AyanPramanik, *Whistleblower accuses Infosys of ‘unethical’ practices to boost numbers*, THE ECONOMIC TIMES, (Oct 21, 2019) <https://economictimes.indiatimes.com/tech/ites/whistleblower-accuses-infosys-of-unethical-practices-to-boost-nos/articleshow/71679710.cms>.

<sup>18</sup>Abhyuday Agarwal, *whistleblowing norms in India, Everything you need to know about whistleblowing in India beyond Infosys*, SCC (October 29, 2019), <https://www.sconline.com/blog/post/2019/11/04/sebi-disclosure-of-divergence-in-the-asset-classification-and-provisioning-by-banks/>

<sup>19</sup>Devika, *SBI- disclosure of divergence in the asset classification and provisioning by banks*, SCC (November 4, 2019), <https://www.sconline.com/blog/post/2019/11/04/sebi-disclosure-of-divergence-in-the-asset-classification-and-provisioning-by-banks/>.

committee determined that the allegations are substantially without merit," the company said.<sup>20</sup> Later SEC also gave the company a clean chit. A statement was released by the company which said "*The Company received notification from the SEC that the SEC has concluded its investigation and the Company does not anticipate any further action by the SEC on this matter.*"<sup>21</sup>

- **The Satyam scam:**

Satyam computers was one of the companies which had their whistleblowing policy since 2005 but still it was never implemented or followed in a correct way which led to such a big scam. It can be said that the metro man E. Sreedharan was the first and the original whistleblower in the scam.<sup>22</sup> He suspected a big mischief and being a Delhi Metro Rail Corporation's (DMRC) chief, he alerted the then Planning Commission deputy Montek Singh Ahluwalia and raised a red flag. After writing the letter to the planning commission that how the Andhra Pradesh government is selling the family silver and this could lead to a very big political scandal. After Sreedharan wrote the letter he was charged with defamation by the Andhra Pradesh government. Later, after a huge loss, Ramalinga Raju, owner of the company surrendered himself.

- **The Ranbaxy company fraud:**

The condition of whistleblowers is pathetic whether it is a corporate company or any government company. A whistleblower Dinesh Thakur blew the whistle in Ranbaxy and also highlighted the issues fraudulent in the company like drug development, manufacturing and testing data. After blowing the whistle in 2005 Dinesh was forced to resign from his post after exposing the fraud internally. After leaving the company Dinesh started working closely with the US Food and Drug Administration and he soon exposed the Ranbaxy Company.<sup>23</sup> All this happened because he took the protection of the US whistleblowers' program. But not everyone is so fortunate and privileged.

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<sup>20</sup> Amit Mudgil, *Will clean chit to CEO in whistleblower case reverse Infosys stock's underperformance?* THE ECONOMIC TIMES, (Jan 11, 2020, 02:49 PM IST), <https://economictimes.indiatimes.com/markets/stocks/news/will-clean-chit-to-ceo-in-whistleblower-case-reverse-infosys-stocksunderperformance/articleshow/73201497.cm>

<sup>21</sup> Anonymous, *Infosys gets clean chit from SEC on whistleblower complaint; stock rallies 10%*, CNBC TV (18 March 24, 2020, 01:12 PM IST), <https://www.cnbcv18.com/market/stocks/infosys-gets-clean-chit-from-sec-on-whistleblower-complaint-stock-rallies-10-5544031.htm>.

<sup>22</sup> Narendra Shah, *Metro-man E. Sridharan was original whistle-blower of Satyam Scam*, METRO RAIL NEWS, (12 April, 2015), <https://www.metrorailnews.in/metro-man-e-sridharan-was-original-whistle-blower-of-satyam-scam/>.

<sup>23</sup> Rahul Singh, *A tribute to the whistleblower, risking job and even life*, THE TRIBUNE, Jan 05, 2020 07:28 AM (IST), <https://www.tribuneindia.com/news/comment/a-tribute-to-the-whistleblower-risking-job-and-even-life-21765>



- **The Satyendra Dubey and S. Manjunath Murder case<sup>24</sup>:**

Shanmugan Manjunath, a manager at Indian oil-corporation was murdered after he sealed a corrupt petrol station when he came to know they were selling adulterated petrol. Similarly, Satyendra Dubey, an IES, and the project director in the National Highways Authority of India (NHAI) at Koderma was murdered when he blew a whistle and exposed corruption in the Golden Quadrilateral Project.

#### IV. INTERNATIONAL LEGAL FRAMEWORK FOR WHISTLEBLOWING POLICY

Most of the International mechanisms for combating corruption have accepted whistleblowing as an important weapon.<sup>25</sup> Legislations such as Whistleblower protection have been implemented in the United Nations Convention Against Corruption,<sup>26</sup> the 2009 OECD Anti-Bribery recommendation<sup>27</sup>, the OECD Recommendation which was proposed in 1998 on Improving Ethical Conduct in Public Service, the Council of Europe Civil and Criminal Law Conventions on Corruption<sup>28</sup>, the Inter-American Convention against Corruption<sup>29</sup> and the African Union Convention on Preventing and Combating Corruption etc.<sup>30</sup> All these legislations work internationally to give whistleblowing protection against the prevalence of corrupt practices all across the world.

##### UNITED STATES: WHISTLEBLOWING LEGISLATIONS

Whistleblowers in the United States may request immunity from three sources: federal laws, state laws, and tort of wrongful discharge based on common law exceptions to the doctrine of “Employment at will”.<sup>31</sup> At present, forty-seven of the fifty States offer workers with general whistleblower protection.<sup>32</sup> State statutory protection includes general whistleblower protections and subject-specific legislation.<sup>33</sup> These subject-specific protections provide protection in the fields of occupational health and safety, elderly care, healthcare, medical aid

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<sup>24</sup>Rohit Gandhi, *Tough road for whistle-blowers in India*, DNA INDIA (Oct 24, 2016), 08:00 AM IST, <https://www.dnaindia.com/india/column-tough-road-for-whistle-blowers-2266884>.

<sup>25</sup>OECD, *Recommendation On Improving Ethical Conduct In The Public Service, Principles for Managing Ethics in the Public Service* 4, (Aug.17, 2016) <https://legalinstruments.oecd.org/public/doc/129/129.en.pdf>

<sup>26</sup>OECD Convention on *Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, S. Treaty Doc. No. 105-43.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup>Inter-American Convention against Corruption, Article III (8), March 29, 1996 O.A.S.T.S, S. Treaty Doc. No. 105-39, 35 I.L.M 724.

<sup>30</sup>African Union Convention on Preventing and Combating Corruption, Article 5(6), July 11, 2003, 43 I.L.M. 5.

<sup>31</sup>Gerard Sinzdek, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL.L.REV.1633 (2008)

<sup>32</sup>Elletta Sangrey et al., *The State of State Whistleblower Protection*, 38 AM.BUS L.J. 99,108 (2000).

<sup>33</sup> *Id.*

abuse, minimum wage, employment and the environment.<sup>34</sup> Most of such laws are sectoral or Industrial specific. For example, the *Occupational Safety and Health Act 1970* safeguards people who report or inform about the issues regarding safety and health at workplace, the *Corporate and Criminal Fraud Accountability Act 2002* (Sarbanes-Oxley), as extended by the *Wall Street Reform and Consumer Protection Act 2010* (Dodd-Frank), safeguards whistleblowers related to securities law and the *Affordable Care Act* safeguards people blowing the whistle on issues regarding healthcare reform. Also, provisions included in *Securities Exchange Commission regulations* promoting full public disclosure, defending investors against deceptive and misleading business practices, and controlling takeover actions by companies. Most of these laws are made in force/directed by the Department of Labor (DOL) or the Occupational Safety and Health Agency (OSHA).

- **The Sarbanes Oxley Act, (SOX) 2002<sup>35</sup>:** More than 40 million US publicly traded company workers are protected by this Act.<sup>36</sup> The SOX Act provides for civil, criminal, anti-retaliation measures, administrative remedies and controls the entire publicly traded jobs market.<sup>37</sup> However, it also applies through the Securities and Exchange Commission (SEC) to businesses with other reporting provisions, as well as to their vendors, subcontractors, and agents, including employees of privately owned firms who do work for public companies. The Act includes provisions that include specific safeguards in favor of whistleblowing and other employment-based safeguards such as:

1. The definition of the word “Employee” is broader, including present and former workers (if the protected activity occurs during their employment), supervisors, managers, officers and independent contractors as well.<sup>38</sup>
2. Section 301 of the Act requires the establishment of internal and independent 'audit committees' by publicly traded companies, requiring the audit committee to create protocols for workers to submit complaints from whistleblowers and protecting the identity of these whistleblowers.<sup>39</sup>

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<sup>34</sup>Robert G Vaughn, *State whistleblower Statutes and the future of whistleblower protection*, 51 ADMIN L. REV.581, 582 (1999).

<sup>35</sup>The Sarbanes–Oxley Act, 2002.

<sup>36</sup>Hesch, Joel D, *Whistleblower Rights and Protections: Critiquing Federal whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U.L. Rev 51, 98 (2011).

<sup>37</sup>*Supra* note 28.

<sup>38</sup>Steven Hymowitz et. al., *Managing Employees Who Have Made Complaints of Unlawful Conduct*, 37 AM. BAR ASSOC. 881, 922 (1951).

<sup>39</sup>The Sarbanes–Oxley Act, 15 U.S.C. §301(2002).

3. Another provision urges professionals to become internal whistleblowers against their employers or customers before the stock exchange commission and to carry the wrongdoing to the audit committee's notice.<sup>40</sup> Under the whistleblower rules all these attorneys' or professional workers' actions should be considered as 'safe operation.'<sup>41</sup>
4. The amended clause criminalizes retaliation against every informant who offers truthful information about the commission or potential prosecution of a federal crime to a law enforcement officer and makes it applicable to any employer.<sup>42</sup>
5. Another clause requires an employee to report directly to the Labor Department within 90 days of retaliation on the employer's fair belief in retaliation.<sup>43</sup> The Labor Department must investigate the complaint and send it to OSHA for review, then OSHA must issue a finding and compliance order.<sup>44</sup>
6. There are also statutory provisions for retaliation against a whistleblower who made a complaint to a law enforcement agency about the execution of any federal crime, including a fine or 10 years' imprisonment (or both).<sup>45</sup>

With the advent of these laws, various court verdicts of whistleblowing cases also added to the efficiency of such laws. For example, in the case of *Van Asdale v. International Game Technology*<sup>46</sup>, the Ninth Circuit Court overturned the summary judgment and ruled that even if the internal counsel exposed 'privileged details to the counsel-client' they would be covered from retaliation<sup>47</sup>. The amended clause criminalizes retaliation against every informant who offers truthful information about the commission or potential prosecution of a federal crime to a law enforcement officer and makes it applicable to any employer.<sup>48</sup> Further, regarding the question that whether the said act covers private companies under its ambit or not was addressed in *Kalkuntev. DVI Financial Services, Inc*<sup>49</sup> where it was held that the public company's subsidiaries are also responsible for retaliation against employees if they are parent company agents and share the same management.<sup>50</sup> It is important for the employee to prima

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<sup>40</sup>The Sarbanes–Oxley Act, 15 U.S.C. §7245(2002).

<sup>41</sup>The Sarbanes–Oxley Act, 18 U.S.C. §1514 (a) (1) (2002).

<sup>42</sup>The Sarbanes–Oxley Act, 18U.S.C. §1513 (e) (2002).

<sup>43</sup>The Sarbanes–Oxley Act, 18 U.S.C. §1513(e) (2002).

<sup>44</sup>*Supra* note 17 at 104.

<sup>45</sup>The Sarbanes–Oxley Act, 15 U.S.C. §802 (2002).

<sup>46</sup>*Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009).

<sup>47</sup>*Id*

<sup>48</sup>The Sarbanes–Oxley Act, 18 U.S.C. §1513 (e) (2002).

<sup>49</sup>*Kalkunte v. DVI Financial Services, Inc*, ARB Nos. 05-139, 05-140.

<sup>50</sup> *Id.*

facie establish that the employer knew of this activity, he suffered an unfavorable personal action and circumstances suggest that the protected activity was a contributing factor to the unfavorable action in order to claim retaliation. In *Collins v Beazer Homes, USA, Inc.*,<sup>51</sup> the plaintiff after having complained at their office about the suspected 'corruption' and 'cover-ups', was fired within 14 days. The court held that the complaint revealed wrongdoing that counts as a protected practice, and the employer's immediate firing constituted retaliation.<sup>52</sup> Whistleblowers will have recourse to both monetary and non-monetary redress if they are subjected to an adverse employment action.

- **The Dodd-Frank Wall Street Reform and Customer Protection Act (Dodd-Frank Act) 2010:** The Act expanded the position of whistleblowers by offering incentives to whistleblowers who provided confidential information to the Stock Exchange Commission or the Commodities Future Trade Commission.<sup>53</sup> A whistleblower who provided information contributing to an effective compliance action resulting in more than \$1 million is qualified for a reward of not less than 10% and not more than 30%.<sup>54</sup> Another provision implemented by the Act expanded immunity to the employees of subsidiaries of publicly traded companies and parent companies.<sup>55</sup> It also expanded the time period for lodging a retaliation complaint from 90 days to 180 days.

Subsequently, several amendments were made which also allowed the new United States legal system to function more effectively. For example, amending the SOX clause to guarantee jury trials and forbid forced arbitration agreements,<sup>56</sup> new and strengthened protection for whistleblowers reporting to the newly formed consumer protection board,<sup>57</sup> amending the False Claims Act to extend the time period for filing retaliation claims and unfair discharge claims to three years.<sup>58</sup> Provisions against retaliation could also be located in Federal Discrimination (Equal Employment Opportunities) laws, protection to Government employees in Whistle Blower Protection Act of 1989, the employees of Defence Contractors under the Department of the Defence Authorization Act of 1987,<sup>59</sup> Occupational Safety and Health Act of 1970 etc.<sup>60</sup>

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<sup>51</sup>*Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004)

<sup>52</sup>*Id* at 1370-71.

<sup>53</sup>Dodd-Frank Act, 15 U.S.C. §922 (a) (2010).

<sup>54</sup>Dodd-Frank Act, 15 U.S.C §922 (b) (1) (2010).

<sup>55</sup>Dodd-Frank Act, 15 U.S.C. §922 (2010).

<sup>56</sup>Dodd-Frank Act, 15 U.S.C. §922 (c) (2010).

<sup>57</sup>Dodd-Frank Act, 15 U.S.C. §1057 (2010).

<sup>58</sup>Dodd-Frank Act, 15 U.S.C. §1079B (c) (2010).

<sup>59</sup>Department of the Defence Authorization Act, 10 U.S.C § 2409 (a) (1987).

<sup>60</sup>Occupational Safety and Health Act, 29 U.S.C. § 660 (c) (1970).

## V. PITFALLS OF THE INDIAN WHISTLEBLOWING LAWS

*“Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private”*  
– Thomas M. Devine<sup>61</sup>

Laws have been implemented in line with the welfare of the general public but they are inadequate in line with the growth rate. While the Center informed the 2014 Whistle Blowers Protection Act, it subsequently requested some amendments to the Whistleblowers Protection Act that were passed in the Lok Sabha to protect against leaks that may have repercussions for national security.<sup>62</sup> To that end, Center introduced the Whistle Blowers Protection (Amendment) Bill, 2015, passed in May 2015 by Lok Sabha. But Bill's amendment did not clear Rajya Sabha and lapsed before the 2019 dissolution of the 16th Lok Sabha.<sup>63</sup> Even after the Whistleblowers Protection Act 2014 was passed after the Infosys Whistleblowers reported suspected corporate malpractice of the Indian IT giant, accusing executives of violating norms and falsifying numbers in their top ranks, the act is still to be operationalized.<sup>64</sup> An amendment introduced to the Act was further criticized on the grounds that it dilutes whistleblowers' protections. The whistle-blower will not be able to disclose protected information under the Official Secrets Act and any information that the government is exempt from disclosure under the Right to Information Act if the amendments come into being. Any disclosure which would have an adverse impact on India's sovereignty and independence, the State's stability, political, scientific or economic interests, friendly ties with foreign states or incitement to an offence would be exempted. It also covered intellectual property and trade secrets. This ensures the whistleblower won't be allowed to complain about corruption, rule breaches, misuse of power, and excessive government spending if the allegation falls foul of these specific categories of exemptions.<sup>65</sup> The original legislation was highly problematic and the new one is also not close to solving the problem. India wants to get stricter punishments. In addition, the Act only included public corporations within its scope and was entirely silent on applying the policy in private corporations. Meanwhile, if we compare India's laws with an international perspective, in the U.S., the laws protect all employees reporting economic abuse or misconduct as well as

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<sup>61</sup>Thomas M Devine, *The Whistleblowers Protection Act, 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 533 (1999).

<sup>62</sup>Whistle Blowing Protection Act, 2014.

<sup>63</sup>TNN, *Where the law stands on Whistle blowers in India*, THE ECONOMIC TIMES, 26 Oct 2019, 10:48 AM IST, <https://economictimes.indiatimes.com/news/company/corporate-trends/a-look-back-at-how-the-open-plan-offices-evolved/its-german/slideshow/71463183.cms>

<sup>64</sup>*Id.*

<sup>65</sup>*Supra* Note 16.

actions that affect individuals' health and safety and the environment.<sup>66</sup> Many laws in India cover only the public sector, or are not enforced according to whistle blowers' particular needs. The laws only offer specific security to those listed in the statute, and those not falling under the purview remain outside.

The very popular Satyam scam case has opened authorities' eyes and drafted Companies Bill 2009 to prevent further corporate fraud.<sup>67</sup> Satyendra Dubey's murder of an engineer who has served with India's National Highway Authority and Manjunath Shanmugham's case induces the need for a stringent legislation that can protect the whistleblower.<sup>68</sup> Had strong laws existed then such murders could have been avoided. The implementation of the 2010 Public Interest Disclosure and Safety for Individuals Making the Disclosure Bill will make the situation healthier, but at the same time, it cannot be overlooked the need for an independent competent authority. Indian laws do not make strict criminal proceedings against those who prevent whistleblowers from working against a corporation. Just like the U.S. SOX Act of 2002 effectively provides for the safety of whistleblowers by enforcing criminal penalties, and this should also be adopted by our country.<sup>69</sup> A simple modification to SEBI cl.49 won't serve the purpose.

On the other hand, pursuant to section 177(9)(10) of the Indian Companies Act 2017<sup>70</sup>, which requires each listed company or class or class of companies to establish a vigilance mechanism for directors and employees to report genuine concerns in the manner prescribed. It nowhere in the act, specifically mentions about "whistleblowing policy". Also, the vigil mechanism under sub-section (9) is required to provide for adequate safeguards against victimization of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. There is no proper definition of a "whistleblower". The provision shows no clarity as well as no proper guidelines regarding any sort of compensation to the employees who encounter retaliation because of disclosing information. Furthermore, there are no confidentiality clauses in the act which makes the Act less credible in securing the rights of Indian whistleblowers.

## VI. CONCLUSION AND SUGGESTIONS

*"A common self-deception is the belief that the injustice that one perceives is the most*

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<sup>66</sup>DAVID BANISAR, CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY, 64 (I. Sandova ed. 2011)

<sup>67</sup>*Supra* Note 16.

<sup>68</sup>*Id.*

<sup>69</sup>The Sarbanes–Oxley Act, 15 U.S.C. §802 (2002).

<sup>70</sup>The Indian Companies (Amendment) Act, Act No. 1, Acts of Parliament, 2017.

*important one and that fixing it will make a major difference.”*

- **Bill Corcoran**<sup>71</sup>

Even after enacting various legislations, whistleblowers in India are not safe or protected because the corrupt systems and companies do not let them raise their voice and if anyhow they manage to blow the whistle they are executed or victimized. It is not easy to be a whistleblower, it takes guts to be one. They risk their job and even their life. They deserve to get protection in return but unfortunately India has become a home to victimization of whistleblowers whether it is a government company or private company. In an affidavit signed by the Supreme Court “The conviction rate of central vigilance office was only 7.3%”<sup>72</sup> and the recommended punishments were also very minor. To create fear in the minds of the corrupt peoples, the punishment must be strict and stringent. Corruption is a very big challenge in India, the second most populous country in the world and stands at the 80th position in the corruption perception index.<sup>73</sup> Now, there is a need to show a much higher degree of progress, honesty and transparency in India so that it could change the corrupt perception of it and to move towards the path of nationhood. This will help the whistleblowers’ to raise their voice whenever there is a need. For instance, just as the U.S. whistleblowing laws provide effective protection against retaliation, confidentiality clauses as well as heavy penalties in order to safeguard the interests of those who blow the whistle against such unethical practices, it’s high time India should adopt such laws too.

Whistle-blower has already been described as one of the very important and primary principles of corporate governance. The non - mandatory provision of the listing company was formed through this policy and if the economic and legal suggestion of providing protection are not followed then ultimately it is the loss of the company because if the director of the company is committing any fraud it will directly affect the company’s market value and goodwill, for which Satyam fraud is a good instance. Secondly, in the absence of the a mandatory provision of whistleblower, the company should make their own provision for not just the protection of the whistleblowers’ but also keeping in mind all the dimensions from making a healthy working environment to inculcating a commitment and loyalty in the employee towards their work and fearlessness in their conduct while exposing the employees or officers of higher post. And only

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<sup>71</sup>Bill Corcoran, *Some Great Quotes for Whistleblowers or others who care about ethics* WHISTLE BLOWERS SUPPORT BLOG (December 3, 2008), <https://gflorescote.wordpress.com/2008/12/03/some-great-quotes-for-whistleblowers-or-others-who-care-about-ethics/>.

<sup>72</sup>*Supra* Note 22.

<sup>73</sup>PTI, *India ranked 80th in Corruption Perception Index*, THE ECONOMIC TIMES (Jan 23, 2020, 10.14 PM IST), <https://economictimes.indiatimes.com/news/politics-and-nation/india-ranked-80th-in-corruption-perception-index/articleshow/73560064.cms>

making of any policy is of no use until and unless it is not implemented. Hence, some suggestions that can be adopted to prevent such fraudulent activities are as follows:

1. All the norms of Corporate Governance must be adopted regularly in day-to-day life in the workplace and to attain this goal proper definitions of whistleblowers', non-retaliation clauses, confidentiality and due process should be made clear.
2. Introduction of more welcoming clauses in businesses such as immunity from harassment, victim protection services, a third party's twenty-four hotline service.
3. Implementing successful communication strategies to establish awareness of the presence of a hotline system on employees, increasing the desire of employees to use it by building confidence and improving the capacity of employees to recognize possible wrongdoings.
4. Increasing employees' confidence that their identity will remain confidential, communicating how a whistleblower report will lead to an investigation and necessary disciplinary action, and stressing the role of each employee in preventing and detecting fraud and using the hotline for these purposes without any kind of fear.
5. Whistleblowing procedures can be enforced successfully in Indian corporations with sufficient help from the organization's government, regulators and senior management. Simply making legislations will not do any good. There is a need for implementation of such laws as well.
6. Also, there is a need to keep a check on frivolous complaints and should be taken care of by imposing heavy penalties.

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