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THE MISSING SHIELD: EXAMINING THE ABSENCE OF ANTI-RETALIATION LAWS IN INDIA'S WHISTLEBLOWER PROTECTION FRAMEWORK

~ *A B Joshma*

ABSTRACT

The increasing cases exposing fraud, corruption, and other forms of misconduct are highlighting a need for a person who plays crucial role in promoting transparency, accountability and ethical conduct within corporate organizations by reporting such cases. And such individuals are called as whistleblowers. For sound corporate governance whistle blowers are important and hence those are to be protected. In India, the legal framework governing whistle blower protection are Whistle Blowers Protection Act, 2014, the Companies Act, 2013, and various regulatory mechanisms established by the Securities and Exchange Board of India (SEBI). These frameworks mainly gives protection of whistleblowers and punishment of person disclosing the identity of whistle blower and, hence it does not provide punishment against individuals, who retaliate whistleblowers through acts such as harassment, demotion, transfer, discrimination, or wrongful termination. This paper seeks to critically assess particularly emphasizing on the absence of direct penalties for retaliators under Indian law. And also analyses the limitations of the current legal framework and compares it with international legal frameworks of various jurisdictions such as the United States, the United Kingdom, and the European Union, where stringent anti-retaliation measures and enforcement mechanisms exist. It concludes by recommending legislative and policy reforms for strengthening the whistle blower protection and enhance the effectiveness of corporate governance in India.

KEYWORDS: Whistle blowing, Confidentiality, Retaliation, Victimization, Corporate governance, Vigil Mechanism, Corporate accountability, Corporate fraud

INTRODUCTION

Corporate governance refers to system of principles, rules and regulations which promotes transparency, accountability, fairness, and ethical conduct in business operations. And in recent days there are more incidents of corporate fraud, corruption and financial irregularities and there comes a need of individuals who discloses to prevent professional misconduct, and those individuals called whistle blowers.

The term whistle blower is originated from United Kingdom, through *winters v. Houston* chronicle case and which is later brought back to practice with the connection of concept of police officials who blow their whistle whenever they identify any crime being committed. And the intention was identified to be for the welfare of the public. And later different people defined the term whistle blower and whistle blowing with different definitions. ¹Whistle blowing includes Misconduct, Conflict of interest, illegal activity, immoral activity, etc. Whistle blowing is classified into Internal whistle blowing and External whistle blowing, where internal whistle blowers report the complaint of professional misconduct within the company to their superior authority while external whistle blowers report to any other law enforcement authorities. And those are to be protected and safeguarded without disclosing the details of whistle blowers by maintaining the confidentiality of their personal details. If an organisation or any individual discloses the information then the chance of retaliation such as harassment, demotion, transfer, discrimination, or wrongful termination or any other kind of victimisation such as death threats by the person against whom the whistle blower raised complaint is very high.

In addition to their role as informants, the value of whistleblowers lies in the fact that they act as a mechanism by which corporate governance can be improved, and corporate accountability can be achieved. Through their disclosure of cases of fraud, corruption, misuse of power, financial manipulation, and violations of regulation, the whistleblowers help organizations in recognizing the weaknesses in their operations, thereby preventing any potential economic and reputational damages. Besides serving the purpose of protecting the shareholders and investors' interest in the corporation, such disclosures also ensure that public confidence in corporate

¹ Legal Services India, *Whistleblowers and Their Protection in India*, Legal Servs. India, <https://www.legalservicesindia.com/article/1693/Whistleblowers-and-their-Protection-in-India.html>

bodies is maintained. Hence, the implementation of whistleblower mechanisms has now become a vital element of contemporary corporate governance systems.

In order to encourage the whistleblowers to disclose information related to any wrongdoing in an organization, many nations have introduced various legal mechanisms that protect whistleblowers from being adversely affected due to such disclosures. This includes international laws such as UNCAC and laws of other countries like the United States, the United Kingdom, Australia, and European Union, where there exists strict protection from any retaliation, along with protection of whistle blowers with provision of monetary rewards. In India, whistleblower laws include the Whistleblowers Protection Act, 2014, the Companies Act, 2013, and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, and it seek to promote transparency and ethical conduct within both public and corporate sectors.

RESEARCH OBJECTIVE

This paper mainly aims to analyse the legal inadequacy of Whistle bower protection law in India. It evaluates the requirement for a stronger legal mechanism with better recommendations and solutions for protection of whistle blowers not only from person breaching confidentiality but also from retaliators. In addition to exploring the whistle bower protection law against retaliator, this paper analyses in comparison with international frameworks.

RESEARCH PROBLEM

Indian legislative frameworks protects the interest of the whistle bower and punishes the individual who disclosed the identity of whistleblower but unlike countries like the United States, the United Kingdom, Australia, and the European Union, the Indian laws does not have penalties for those who retaliate against whistleblowers and there is no strict anti-retaliation laws and the Indian legal system offers limited protection with punishment only for person disclosed identity and there is a lack of a stringent punishment system for retaliators and also no mandatory enforcement of existing laws too. Weak remedies and enforcement measures would discourage employees from reporting corporate fraud and misconduct. This legal gap weakens whistleblower confidence, makes whistleblower policies less effective, and leaves actual wrongdoer from being punished.

LITERATURE REVIEW

1. "Whistle Blowing Mechanism in India: An Analytical Study," authored by Shah Samrudhee

Author explains how whistleblowers are critical in bringing corruption, unethical behaviour, fraudulent practices, and other forms of wrongdoing into light for purposes of taking corrective measures to improve accountability. Additionally, the research discusses problems facing whistleblowers, such as harassment, victimization, dismissal from work, exclusion from social groups, and insecurity. Such issues make it difficult for people to come out to report on wrongdoings because they risk their reputation and welfare in the process. The author emphasizes the importance of having protective legal frameworks, such as the "Whistle Blowers Protection Act, 2014". Moreover, the study reviews factors limiting the effectiveness of whistleblowing in India, such as lack of awareness, fear, and ineffective enforcement of existing laws protecting whistleblowers.²

2. "Retaliation for Whistleblowing: What to Do if You Face Retaliation after Reporting Illegal Activities" authored by James S. Brewer Attorney at Law

This paper talks about the problems faced by whistleblowers as far as the issue of retaliation by employers after the act of whistleblowing. Whistleblowing can be seen as a method of encouraging transparency, accountability, and ethics in organizations, although the process exposes the employee to acts such as demotion, harassment, discrimination, pay cuts, unfavorable assignments, and firing. According to the article, there are laws at both federal and state levels which offer legal protection to whistleblowers against such forms of retribution or retaliation. In other words, one can see retaliation as one of the problems that prevent individuals from becoming whistleblowers even where there are legal means that protect them. The writer insists on keeping records in order to prove any allegations of retaliation. In addition, it provides guidance on what steps should be taken by the employee once faced with retaliation. This includes the use of the organization's internal reporting system or involving regulatory bodies. Some of the remedies available to the victim include being reinstated and/or receiving back-pay among others.³

² Samrudhee Shah, *Whistle Blowing Mechanism in India: An Analytical Study*, D.Y. Patil L. Rev., <https://law.dypvp.edu.in/plr/Publication/all-publication/Research-Paper-Samrudhee-Shah>

³ James S. Brewer, *Retaliation for Whistleblowing: What to Do if You Face Punishment for Reporting Illegal Activities*, Brewer L. Firm, <https://brewerlawct.com/blog/retaliation-for-whistleblowing-what-to-do-if-you-face-punishment-for-reporting-illegal-activities/>

LEGISLATIVE FRAMEWORKS IN INDIA FOR PROTECTION OF WHISTLEBLOWER

- REASON OF PROTECTION: PROTECTION UNDER INDIAN CONSTITUTION, 1950⁴

Constitution of India offers a legal basis for ensuring protection of the rights of whistleblowers by protecting their fundamental rights. Article 14 provides equality before law and safeguards whistleblowers against any form of discrimination, arbitrariness or any other unfair treatment at the hands of employers or any public authority following whistleblowing. In addition to this, Article 19(1)(a) protects the fundamental right of people to freely express themselves or speak out, thus allowing whistleblowers to reveal cases of corruption or other such malpractices committed within the government. While protecting the freedom of expression and speech, the Constitution also protects the right of life and personal liberty provided under Article 21, which according to the courts includes the protection of one's personal dignity, reputation, livelihood, as well as personal safety.

1. WHISTLEBLOWERS PROTECTION ACT, 2014⁵

Whistleblowers Protection Act, 2014 was passed with an aim to motivate citizens in making disclosures regarding any corruption or abuse of authority and other criminal acts committed by public servants. This act provides a channel to receive and investigate such disclosures. This act ensures transparency, accountability, and integrity in public service. The entire act is applicable mandatorily for public sector and private companies does not have any comprehensive policy equivalent to that of Whistleblowers Protection Act, 2014.

And this act mainly focuses on protecting whistleblowers from being disclosed by any individual. Such disclosure may lead to severe retaliation such as job loss, workplace harassment, blacklisting, defamatory suits and other physical violence. If whistleblower faces harassment, transfer, suspension, demotion, discrimination, or other retaliation, they have right to seek protection under Competent Authority under Section 11 of this act. And if someone breaches confidentiality then the person who disclosed is punishable under Section 16

⁴ *The Constitution of India*, India Code,

https://www.indiacode.nic.in/bitstream/123456789/19150/1/constitution_of_india.pdf

⁵ *The Whistle Blowers Protection Act, 2014*, No. 17 of 2014, India Code,

<https://www.indiacode.nic.in/bitstream/123456789/2114/5/A2013-18.pdf>

Whistleblowers Protection Act, 2014 for upto three years and also fine which may extend upto fifty thousand rupees.

This act gives protection for whistleblowers and punishment for person who breached confidentiality. And lacks giving punishments for retaliators. This is a major problem which is to be considered serious because due to disclosure the whistleblower faces problem from retaliators. Hence there is a need of serious concern towards this problem. Under Section 11 of this act relief for offences such as demotion, discrimination and suspension will be reversed, prevent demotions and stops victimization. But the retaliator is left unpunished freely for such act because there is no stringent law to punish retaliator and also there is no guaranteed financial compensation.

2. COMPANIES ACT, 2013⁶

Introduction of Whistle Blower Policy in Companies Act, 2013 is a significant move in the direction of effective corporate governance through introduction of whistleblower protection policies in the Act. Section 177(9) of the Companies Act makes it mandatory for some classes of companies to adopt a Vigil Mechanism Policy or what is also called a Whistleblower Policy to allow directors and employees to raise their genuine concerns regarding any matter relating to fraud, misconduct, unethical behavior or violation of company policy. This shows the significance of Whistle Blowers in detecting corporate malpractice in the beginning itself.

Section 177(10) of the Companies Act also states that there should be sufficient assurance about the safety of Whistle Blowers and ensures that there would be direct access to the Chairperson of the Audit Committee where needed. This section aims at creating a safe reporting environment to protect the persons reporting malpractice from victimization by the management or other employees. Furthermore, according to Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014, various types of companies are required to establish these mechanisms along with protection against victimization.

However, despite these statutory protections, the legal framework remains inadequate in addressing the issue of retaliation against whistleblowers. While the law requires companies to provide safeguards against victimization, it does not prescribe any specific punishment or

⁶ *The Whistle Blowers Protection Act*, No. 17 of 2014, India Code, <https://www.indiacode.nic.in/bitstream/123456789/2114/5/A2013-18.pdf>

stringent penalties for individuals who retaliate against whistleblowers through harassment, demotion, transfer, discrimination, denial of promotion, or wrongful termination. Consequently, these provisions largely operate as preventive measures rather than effective deterrents. In contrast, jurisdictions such as the United States, the United Kingdom, Australia, and the European Union impose direct legal consequences on retaliators, thereby offering stronger protection. The absence of a comprehensive anti-retaliation punishment framework in India weakens the practical effectiveness of vigil mechanisms, discourages employees from reporting misconduct, and ultimately undermines transparency, accountability, and corporate governance objectives.

3. SECURITIES EXCHANGE BOARD OF INDIA (SEBI)⁷

The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 have been designed to enhance corporate governance and instil ethical business practices among listed companies. Regulation 22 prescribes the need for the creation of a vigil mechanism where employees, directors, and other stakeholders can report any instances of fraud, corruption, unethical behaviour, and illegal activity. It is also required that sufficient safeguards be provided against victimization, along with providing direct access to the Chairperson of the Audit Committee in case it is required. This would help provide individuals with a safe platform to make reports of any unethical or illegal acts committed within the organization.

Furthermore, regulation 4 of the SEBI (LODR) Regulations states the values of transparency, accountability, fairness, and safeguarding the interests of stakeholders, which forms the bedrock of corporate governance. Schedule II also assigns the Audit Committee with the duty of addressing whistleblowing complaints.

Despite these safety precautions, there is an essential drawback within this system that makes whistleblower regulation less effective. In particular, Regulation 22 provides protection from victimization but fails to impose certain sanctions or punishments for those who persecute whistleblowers by means of harassment, discrimination, demotion, relocation, refusal of promotion, and unjust dismissal. Hence, the protection provided becomes primarily procedural

⁷ Securities and Exchange Board of India, *SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015*, SEBI, <https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListing=yes&sid=1&ssid=3&smid=0>

and does not have a deterrent effect. In other words, contrary to the practice adopted by such countries as the US, the UK, Australia, and the EU, where legislation against retaliation creates legal sanctions directly for the perpetrators, in India, this problem remains unaddressed by the law. Consequently, the inefficiency of this aspect of the regulation system undermines the trust of potential whistleblowers in the process, which prevents them from filing reports and ensures the ineffectiveness of the policy overall.

4. CENTRAL VIGILANCE COMMISSION ACT, 2003 (CVC)⁸

The PIDPI Resolution, 2004, was formulated as a measure that would provide an incentive for citizens to come forward and lodge complaints regarding corruption, misuses of authority, and misconduct on the part of public officials. Complaints filed under the above scheme could be forwarded to the CVC, which would serve as the nodal agency for receiving and scrutinizing the complaint. The major goal of the PIDPI Resolution includes the provision of protection to the informer throughout the inquiry process by ensuring confidentiality. The Central Vigilance Commission Act, 2003 gives statutory powers to the CVC as an agency for the supervision of vigilance administration and investigation of corruption cases in the public offices.

It needs to be noted that though there exist provisions that offer anonymity and protection to the informer in the above framework, its effectiveness in tackling retaliatory behavior of the person against whom the complaint is made is weak. In this respect, it can be argued that the focus of the above framework is confidentiality rather than imposing any severe punishment on the person responsible for harassing, discriminating, and threatening the informer in any other form of retaliation including transfer.

5. OTHER ACTS

Several acts of Indian law, such as the Industrial Disputes Act, 1947, Industrial Relations Code, 2020, Service Rules Applicable to Government Employees, the Lokpal and Lokayuktas Act, 2013, and the Prevention of Corruption Act, 1988, make indirect provisions for the protection of whistleblowers. The Acts help deal with wrongful dismissal, victimization, unfair disciplinary action, as well as investigating and dealing with issues related to bribery, corruption, and other malpractice within organizations. Such Acts have punitive provisions in

⁸ *The Central Vigilance Commission Act, 2003*, No. 45 of 2003, India Code, <https://www.indiacode.nic.in/bitstream/123456789/2067/1/A2003-45.pdf>

respect of offenders, but there is no specific provision for punishing people who victimize or retaliate against whistleblowers.

EFFECTIVENESS

Whistleblower laws have been passed in India in the form of Whistle Blowers Protection Act, 2014; the Companies Act, 2013; and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. The primary purpose of the laws is to foster transparency and accountability in corporate activities by creating channels whereby employees and stakeholders can disclose information about any fraudulent, corrupt, financial, and unethical activities being undertaken. The creation of the mandatory vigil mechanism and the provisions of protection against identity disclosure provided by the Whistle Blowers Protection Act show how much the legislature is trying to encourage disclosures for the benefit of the public.

However, statistics indicate that the above mentioned laws lack effectiveness when implemented. According to the Ethics at Work Survey 2024 by the Institute of Business Ethics, whereas 88% of Indian workers who became aware of misconduct reported it, almost 65% of those who did so suffered some kind of retaliation or disadvantages personally for having spoken out. Moreover, whistleblower reports by companies in India grew by 8%, amounting to 1,074 complaints in FY 2023–24. This shows that more use is being made of the whistleblowing process, but it still does not compare to the global benchmark.

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As can be seen from the above statistics, even though certain legal protections have been put in place, fears regarding retaliations continue to act as a deterrent for whistleblowers. Since there are no strict punishments for those who indulge in retaliatory behavior and since there are not enough compensation procedures in place to help whistleblowers financially, they do not really trust the laws. As such, while Indian laws do set the basis of whistleblower protections, much more needs to be done in this regard.

⁹ *Whistleblower Complaints at Indian Companies Up 8% to 1,074 in FY24*, Bus. Standard (Sept. 8, 2024), <https://www.business-standard.com/companies/news/whistleblower-complaints-at-indian-companies-up-8-to-1-074-in-fy24-124090800459>

THE WHISTLE BLOWERS (PROTECTION IN PUBLIC INTEREST DISCLOSURES) BILL, 2010¹⁰

An aspect that is mentioned when it comes to the issue of whistleblower protection in India is that while the Whistle Blowers Protection Bill, 2010 had a more robust method to deal with the retaliation against whistleblowers, the present Whistle Blowers Protection Act, 2014 does not have such a mechanism. In the Whistle Blowers Protection Bill, 2010, it was recognized that people who blow the whistle on corruption, misuse of power or any misconduct are likely to face victimization; therefore, there were strict measures suggested for dealing with the act of retaliation against them. For example, the Whistle Blowers Protection Bill, 2010 included provisions according to which the act of victimization or retaliatory behavior against the whistleblower was to be punishable by imprisonment up to five years and it was given under Section 7 of this bill. This was done to deter the people from committing acts such as harassing, discriminating against, transferring or terminating employment of, or demoting whistleblowers for filing complaints. But unfortunately, there is no such provision in the Whistle Blowers Protection Act, 2014.

INTERNATIONAL PROTECTION AGAINST RETAILATION OF WHISTLEBLOWERS

Countries around the world have developed strong legal regimes to offer protection to whistleblowers and penalize any form of retaliation. These laws take cognizance of the fact that it is highly improbable that employees would ever come forward to report cases of fraud and misconduct unless offered protection from reprisals.

- The international regime offers protection to whistleblowers through the United Nations Convention against Corruption (UNCAC). However, while encouraging the member countries to offer protection to whistleblowers, the UNCAC leaves out specifics on punishments and leaves it to individual countries to frame such laws.
- The United States' Sarbanes-Oxley Act, 2002 ensures robust protection for whistleblowers employed by publicly held companies. It not only prohibits retaliation against

¹⁰ *Whistleblower Complaints at Indian Companies Up 8% to 1,074 in FY24*, Bus. Standard (Sept. 8, 2024), <https://www.business-standard.com/companies/news/whistleblower-complaints-at-indian-companies-up-8-to-1-074-in-fy24-124090800459>

whistleblowers but also prescribes severe punishment for retaliatory acts. In the same vein, the Dodd-Frank Act, 2010 also offers extensive anti-retaliation measures.

- Under the United Kingdom's Public Interest Disclosure Act (PIDA), 1998, workers are protected against dismissal, harassment, or discrimination in case of any kind of protected disclosure. The employer, in such cases, can be made to compensate the affected worker.
- According to the EU Whistleblower Protection Directive, 2019, member states are mandated to create safe reporting mechanisms as well as penalties that are effective, proportionate, and dissuasive for those who retaliate against whistleblowers.
- Similarly, according to the Corporations Act of 2001 in Australia, as well as the Public Servants Disclosure Protection Act of Canada, there are civil and criminal sanctions for retaliators.

These international frameworks indicate that there is an evident trend towards imposing legal implications for retaliation, And thus enhancing the whistleblowers' confidence and encouraging transparency, accountability, and corporate governance.

CASE LAWS

1. Lawson v. FMR LLC (2014, United States)¹¹

In the case of Lawson v. FMR LLC, the scope of the Sarbanes-Oxley Act of 2002 was interpreted broadly in favour of the protection of workers of private companies serving public firms. The ruling enhanced the existing provisions to ensure legal action against employers dismissing or harassing whistleblowers.

2. Digital Realty Trust, Inc. v. Somers (2018, United States)¹²

The landmark Digital Realty Trust, Inc. v. Somers judgment outlined the criteria of protections for employees under the Dodd-Frank Act. Though protection was not granted to the complainant due to procedural aspects, the judgment highlighted employer responsibilities concerning potential liabilities arising out of retaliatory acts against qualified whistle-blowers.

3. Chesterton Global Ltd v. Nurmohamed (2017, United Kingdom)¹³

¹¹ *Lawson v. FMR LLC*, 571 U.S. 429 (2014)

¹² *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149 (2018)

¹³ *Chesterton Glob. Ltd v. Nurmohamed*, [2017] EWCA Civ 979 (Eng.)

In *Chesterton Global Ltd v. Nurmohamed*, a worker was subjected to retaliation because of a disclosure about his firm's financial matters. The judgment was given in favour of the complainant, thus emphasizing the liability of employers in cases of victimization.

4. *Baranya v. Rosderra Irish Meats Group Ltd (2020, Ireland)*¹⁴

In *Baranya v. Rosderra Irish Meats Group Ltd*, an employee was punished after complaining about issues at the workplace. The employee received hefty damages showing that those who retaliate against whistleblowers can suffer serious financial repercussions from their behaviour. The case laws of United States, United Kingdom, and Europe shows evidence of how actively they enforce anti-retaliation laws by imposing legal and financial consequences on employers who punish whistleblowers.

RECOMMENDATIONS

In absence of punishment for retaliators and weak anti-retaliation protection in India, these below recommendations would help to sort the problems:

Recommendations

1. Introduce a Specific Anti-Retaliation Provision which should Explicitly prohibit retaliation against whistleblowers.
2. Impose Criminal Penalties on Retaliators with imprisonment and fines.
3. Revive the 2010 Bill Provision and Reintroduce punishment up to five years for victimization.
4. Create a Compensation Mechanism and Provide financial compensation to affected whistleblowers.
5. Extend Protection to the Private Sector and Make whistleblower protection mandatory for all companies.
6. Establish an Independent Authority and Create a dedicated body for whistleblower protection.
7. Conduct Awareness and Training Programs and should Educate employees about whistleblower rights.

CONCLUSION

¹⁴ *Baranya v. Rosderra Irish Meats Grp. Ltd.*, ADJ-00028293 (Workplace Relations Comm'n, Ir. 2020)

Whistleblowers play a vital role in strengthening corporate governance as they help in identifying any fraud, corruption, financial mismanagement, and unethical behaviour in organizations and the act of whistleblowing promotes transparency, accountability, and ethics. The Indian laws provide a robust legal regime for the same through various laws like the Whistle Blowers Protection Act, 2014, the Companies Act, 2013, SEBI regulations, and more. Despite this, the findings show that such protections have been inadequate in dealing with any retaliation that may arise against whistleblowers. Unlike many countries such as the United States, the United Kingdom, Australia, and the EU, there are no stringent penalties and compensation structures for people retaliating against whistleblowers in India. Such loopholes in the law are bound to make people refrain from whistleblowing. Hence, there is a need for legislative reform in order to introduce such anti-retaliation provisions and compensation structures.