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THE WHISTLE BLOWERS PROTECTION ACT, 2011: SAFEGUARDING WHISTLEBLOWERS AND PROTECTING THE FABRIC OF CORPORATE GOVERNANCE

AUTHORED BY - SPRIHA JHA

CONCEPT OF CORPORATE GOVERNANCE

The concept of corporate governance has been extracted from the correlation between the governments of cities or nations and the governance of corporations.¹ While there is no comprehensive, universally agreed upon definition of corporate governance, it has been construed in different ways by different authors and has unique characteristics accorded to it in different cultural circumstances. However the Cadbury committee² defined corporate governance in words that have been popularised since, “Corporate governance is the system by which companies are directed and controlled”.

The definition of corporate governance can be viewed with a lens of definitions concerned with the substantive behaviour and behavioural patterns of corporations in terms of performance, efficiency, growth and financial structure. This however, is not the only angle with which we approach the definition of corporate governance. Alternatively, corporate governance can be seen from the angle of normative framework ie. the rules under which a corporation functions, the source of such being, legal and judicial systems and financial and labour markets.³

In lucid words, corporate governance is the collective system of rules and practices through which a company discerns its functions. It is the way in which a company is governed, directed and controlled. It allows the objectives of a company to be set and to be practised and pursued. Corporate governance is the ethical code upon which any company rests.

The reason why corporate governance has been accorded such a paramount position in company law, company governance and society is due to the understanding that corporate governance lays

¹ Becht, M., Bolton, P., & Röell, A. (2003). *Corporate Governance and Control. Corporate Finance*, 1–109.

² Cadbury Committee 1992

³ Stijn Claessens, Corporate Governance and Development, *The World Bank Research Observer*, Volume 21, Issue 1, Spring 2006, Pages 91–122,

down doctrines for how company functions may be conducted in order to assist companies in accomplishing its primary and essential objectives and goals. Corporate governance conceptualises certain regulations that help in increasing the overall value of the company in the long run by bringing about increased advantages to stakeholders.⁴ International standards set the standard that good corporate governance is directly proportional to accountability and improved performance. It also acts as a source of competitive advantage.⁵ Moreover, favourable and acceptable standards of corporate governance are testimony to the integrity of corporations and financial institutions and are advantageous in bringing about stability and increased growth.⁶

BACKGROUND AND NEED FOR THE WHISTLE BLOWER PROTECTION ACT 2011

While the concept of corporate governance exists, there are aspersions on the able implementation and effectiveness of it. In order to increase faith in corporate governance and corporations, the concept of whistleblower was introduced as a medium to keep checks on companies and to increase truth in them. Whistleblowing is an endeavour through which any incidents of misconduct or corruption can be brought to light in cases where there is active concealment of the same by organisations.

It remains an undisputed belief that whistleblowing has a dominant effect on the parties involved and even with the risks associated with whistleblowing and the threats and vulnerabilities it brings with it, it remains a successful initiative at its core due to the supportive measures accorded to it.⁷

The ILO⁸ defines whistleblowing as "Reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers". It is thus established that whistleblowing is the process or activity through which any unethical activity within an organisation may be reported, whether it is the company which takes part in the same, any employee or any member of the administration.

⁴ Mary Thomson, 'What Is Corporate Governance?' (The Economic Times 18 January 2009) accessed 11 April 2015

⁵ Ho, C.-K. (2005). *Corporate Governance and Corporate Competitiveness: an international analysis*. *Corporate Governance*, 13(2), 211–253.

⁶ 'Corporate Governance in India: Developments And Policies' (nseindia 2013) accessed 23 April 2015.

⁷ JACKSON D., PETERS K., ANDREW S., EDENBOROUGH M., HALCOMB E., JACKSON D., PETERS K., ANDREW S., EDENBOROUGH M., HALCOMB E., LUCK L., SALAMONSON Y. & WILKES L. (2010) Understanding whistleblowing: qualitative insights from nurse whistleblowers. *Journal of Advanced Nursing* 66(10), 2194–2201

⁸ International Labour Organisation

It is pertinent to be noted that whistleblower hasn't been explicitly defined in any statute in India, not even the Whistle Blower Protection Act. This makes the scope of the term wide but also ambiguous and uncertain. In general parlance, a whistleblower may be understood as any person, usually a stakeholder in the organisation, who discloses information regarding illegal and unlawful and detrimental activities taking place in a company.

The need for a specific whistleblower act to accord protection and specify duties was realised after the horrific death of Satyendra Dubey. Over the years, various cases emerged which shed light on the need of the hour, however, it didn't end there. In the recent few years, the conversation around the requirement for increased protection and elaboration with respect to certain provisions has emerged.

The Law Commission of India in 2001 put emphasis on the requirement for a whistleblower protection being necessary to curb unlawful practices and corruption in the corporate sector. The supreme court of India in 2004 directed the central government to put an administrative machinery in place until the law was to be enacted. As a response, the government notified a resolution that gave the CVC⁹ the power to act on complaints from whistleblowers. The said resolution was named 'Public Interest Disclosure and Protection of Informers Resolution.' The Second Administrative Reforms Commission in 2007 recommended a specialised whistleblower legislation be enacted. Finally, in 2011, the Whistleblower Protection Bill received assent in the Lok Sabha and in 2014, it was approved by the Rajya Sabha. The Companies Act¹⁰ and SEBI¹¹ regulations have made it mandatory for the corporate sector to deal with whistleblower complaints promptly and sincerely.

DRAWBACKS IN THE WHISTLE BLOWER PROTECTION ACT

It is impeccable that the need of the hour was not just recognised in India by judicial, quasi judicial and governmental authorities, but also acted upon. However, just because it was acted upon doesn't mean the act is exhaustive and not without its flaws. There are gaps in the legislation and it is silent on certain matters. As has been previously mentioned in this article, it is also ambiguous

⁹ Central Vigilance Committee

¹⁰ The Companies Act 2013

¹¹ Securities and Exchange Board of India.

in places and thus has an unspecified ambit. Moreover, it can't be said with certainty that the protections provided under the act are self sufficient in nature and leave the whistleblower with absolute protection.

The act primarily covers public sector companies which leaves a large segment of private companies to fall outside its ambit. This also implies that private companies aren't bound by the provisions of Clause 49 of the Listing Agreement¹². Private companies aren't bound by the act keeping in mind the autonomy that they enjoy, and are rather encouraged to voluntarily put provisions in place to ensure protection of whistleblowers, but this leaves whistleblowers in these companies exposed to threats and makes it difficult to regulate unethical practices and corruption within the company. While certain companies such as TATA, Wipro and Infosys have implemented measures to ensure a vigil and safe whistleblowing practice, these companies are far and few in between and do not represent the market practice. This, nevertheless, is a step in the right direction.

Undoubtedly, the primary purpose of the act was to ensure protection of honest employees and this purpose holds true to this date, but how effective are the protection provisions is arguable. Chapter V of the Act mentions protections provided to the persons making disclosure. Section 11 provides immunity against victimisation but there is only a monetary penalty of a nominal amount and no other repercussions. Section 13 calls for the protection of the identity of the persons who made the complaint in order to protect them from victimisation and to safeguard their identity. Section 16 punishes for the violation by means of imprisonment of 3 years and fine upto 50,000 rupees. The legislation however remains silent on how to ensure that those who experience loss of jobs or demotion due to their act of informing are not stigmatised against. It also continually remains silent on how to compensate for the same in monetary terms. The act also makes it a mandatory requirement to disclose one's identity when filing a complaint. There is no provision for making anonymous complaints. It is due to these reasons that often, whistleblowers do not inform about the malpractices within the company because the risk often isn't proportional to the reward.

¹² SEBI Equity Listing Agreement

THE INTERCONNECTEDNESS OF CORPORATE GOVERNANCE AND WHISTLEBLOWER PROTECTION

The essence of corporate governance can be captured by the whistleblower protection policy. This policy becomes a tool which holds the corporate world accountable to the common masses. This in turn, allows the society to grow and develop and get nurtured.¹³

Corporate governance has been regarded as the basic ethic and value system of a company and this virtue comes into play in protection of those people who aim to expose malpractices, aware of the fact that the same may put their own lives and livelihoods in danger. The Manjunath Case is another example of the threat that a whistleblower is constantly exposed to. When an organisation fails to protect a whistleblower, it is not only the failure of the organisation but the failure of the corporate fabric of the nation. It puts a question mark on the corporate governance policies in place and shakes the faith that employees and stakeholders have in the organisation which destroys the very foundation these companies are built on.

While corporate governance is about getting finance suppliers a fair return on their investment¹⁴, it isn't limited to this. It is about governing the functioning of a company and ensuring that this functioning is done in a fair, transparent and accountable manner. When the functioning of a company is questioned by an employee in good faith and not with any ulterior motive, the protection of the employee is proof of its fair governance structure.

It is imperative that private companies be given the autonomy to function in a truly independent manner, however every right comes with a corresponding duty. While the law doesn't mandate companies to compulsorily follow whistleblowing protection guidelines, it would be a rightful duty of a company to provide protection to its most important stakeholder. Companies these days are voluntarily putting protection guidelines in place. This is corporate governance in its purest and truest form.

¹³ Marwaha, Karn (2017). *Corporate governance and whistle blowing in India: promises or reality? International Journal of Law and Management*, 59(3), 430–441.

¹⁴ Shleifer, A., & Vishny, R. W. (1997). *A Survey of Corporate Governance. The Journal of Finance*, 52(2), 737–783.

CONCLUSION

The world today is a capitalist world, globally, and the impact and influence of private companies is ever increasing. It is indisputable that they are becoming increasingly important and various policy making is done keeping in mind the hold that these companies have over the nations they operate in. This is both good and bad. While the increasing importance of companies has brought about advancement, improvement and expansion, it has also made the world fall slave to the corporate sector. This has been truly detrimental for human beings. More and more impotence is given to work, rather than wellbeing.

The Whistleblower Protection Act has been a milestone in achieving corporate governance through protection of whistleblowers. However, the provisions of the act can't bring about true change till every company operating within the nation is required to comply with it. Voluntary provisions have not ensured true protection to all employees, in fact, it has provided protection to only a small section of corporate employees. Moreover, certain segments have been removed from the purview of whistleblowing, in order to put the safety, security and growth of the nation above all else. This further narrows down the scope of protection. The Act isn't exhaustive in nature and has to be read along with clause 49 of the Listing Agreement.

The risk of being a whistleblower is immense. Whistleblowers and their families face a risk to their lives in extreme cases, but more often than not face passive risk such as that of transfer, holdbacks, demotions etc. There is an urgent requirement for provisions of compensation to whistleblowers, in case of any loss, monetary or otherwise, suffered by them. Another pertinent point to be mentioned is that there need to be the addition of a provision for filing of anonymous complaints. This will help protect the identity of whistleblowers and will also be beneficial for companies since it will reduce cases wherein complaints are made by individuals for the purpose of publicity or rewards. In addition, it will help in taking effective action and disregarding complaints made with *mala fide* intention. Moreover, it is also pertinent to note at this point that since its inception, the act hasn't been modified. Amendments are an essential aspect of any legislation and help in keeping it alive in order to cater to the need of the hour. If amendments aren't done at the correct time, when a requirement is seen, it often makes the act obsolete. An act which protects honest employees deserves better.