

CORPORATE GOVERNANCE THROUGH WHISTLEBLOWING—A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO INDIA *

INTRODUCTION:

‘Whistle Blowing’ is a term of recent origin which became popular as a result of many corporate scandals that occurred all over the world like the Enron, WorldCom, Bear Stearns, Countrywide, Washington Mutual, Lehman Bros, AIG, Fortis, ING, Satyam Computers and many more. In simple terms it means to expose the wrong done in an organisation or in a society.

THE CONCEPT OF WHISTLEBLOWING:

The term ‘Whistleblower’ was first publicised by Ralph Nader, an American political activist.¹ The term is believed to be originated from the practise, where referees blow whistle to stop foul play or misconduct in a match for their orderly continuation.² Another belief is that it originated from the concept of English policeman blowing the whistle to alert bystanders and authorities about crimes or dangers.³ According to Janet Near and Marcia Miceli it involves four elements “the whistle-blower, the whistle blowing act, the party to whom the complaint is made and the organization against which the complaint is lodged.”⁴ Janet and Miceli’s definition that “it is the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action” is commonly used in discussions on whistle blowing.⁵ Generally whistle blowing is done with respect to serious moral faults;⁶ other matters include those related to environment, public health and public money where the whistle blower believes that he has a moral and ethical responsibility to reveal it.⁷

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¹ RALPH NADER, WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY, (Grossman Publishers, 1972).

² Jubb, Peter B , *Whistle blowing: A Restrictive Definition and Interpretation*, (1999), JOURNAL OF BUSINESS ETHICS, 77, Vol21(1), August

³ Dana. L .Gold ‘Whistleblowers: The Critical Link In Corporate Accountability’ RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY, 254 (Stephan Tully ed;)

⁴ Janet Near and Marcia Miceli, *Organisational Dissidence: The case of Whistle Blowing*, JOURNAL OF BUSINESS ETHICS, 2-4 (1985).

⁵ *Id.* at 2.

⁶ NORMA E.BOWIE AND RONALD F DUSKA, BUSINESS ETHICS, 74, (Englewood Cliffs, NJ: Prentice-Hall, 2nd ed.rev 1990)

⁷ *Id.* at 74.

THEORIES OF WHISTLE BLOWING:

According to Brenkert, the common theories that have evolved during the past that justifies whistle blowing are the Harm theory, the Complicity theory, the Good Reasons theory and the Integrity theory.⁸ Another theory popular among Business Ethicists is the Universal Dignity theory of Whistle blowing.⁹

- ✓ **The Harm Theory:** According to Brenkert¹⁰, the Business Ethicists who popularised the Harm theory were De George, Boatright, Bowie, Duska and James. De George classifies whistle blowing in organisations as morally prohibited, morally permissible and morally obligatory. The moral permissibility of internal whistle blowing by an employee depends on factors like the serious harm the firm can cause to its employees or public, the moral obligation of the employee to report the matter to his immediate superior and lack of action from the immediate superior leading him to explore all the other available channels of reporting within the organisation.¹¹ The employee is justified to proceed with external whistle blowing if he has access to convincing documented evidence and the strong belief with reasons that external whistle blowing will bring out the desired changes he wished for.¹² The importance of employee loyalty towards the organisation and the need to gather evidence before proceeding with whistle blowing¹³ are important attributes of the theory as it avoids unnecessary conflicts in companies.
- ✓ **The Complicity Theory:** Micheal Davis, who propounded Complicity theory, justifies whistle blowing in organisations by arguing that, an employee's desire not to be a part of the wrong doing committed in the organisation is the reason that prompts him to resort to whistle blowing in the organisation he works with.¹⁴ According to him it is the moral wrong and not the harm caused that is important and the information to reveal would have been got as a part of the work done by the employee in the organisation.¹⁵
- ✓ **The Good Reasons theory:** Sissela Bok, who propounded this theory, identifies three major reasons for justifying whistle blowing in organisations namely dissent, breach of loyalty and accusation.¹⁶ *Firstly*, the whistle blower must ensure that what he or she reveals through whistle blowing is in public interest, by evaluating the benefits and the harm that may be caused by such revealing.¹⁷ *Secondly*, the whistle blower must see that there is no breach of loyalty to the organisation through his act of whistle blowing and should use it as a last resort when all other remedies are exhausted.¹⁸ He needs to

⁸ George G. Brenkert 'Whistleblowing, Moral Integrity and Organisational Ethics', THE OXFORD HANDBOOK OF BUSINESS ETHICS, 563, (George G. Brenkert et al. eds. Oxford University Press, 2010)

⁹ W. Micheal Hoffman and Robert E. McNulty, *A Business Ethics Theory of Whistleblowing: Responding to the \$1 Trillion Question*, Centre For Business Ethics, Bentley University.

¹⁰ Brenkert, *supra* note 8 at 566.

¹¹ RICHARD DE GEORGE, BUSINESS ETHICS, 308-314 (Upper Saddle River, N.J: Pearson Prentice-Hall, 6ed. rev. 2006)

¹² *Id.* at 313

¹³ Gene G James, Whistle Blowing: It's Moral Justification, BUSINESS ETHICS: READING AND CASES IN CORPORATE MORALITY, (W. Micheal Hoffman and Jennifer Mills Moore, et al. eds, New York: McGraw-Hill Publishing Company, 1990.)

¹⁴ Micheal Davis, *Some Paradoxes of Whistleblowing*, BUSINESS & PROFESSIONAL ETHICS JOURNAL 15 (1996): 9

¹⁵ *Id.* at 9.

¹⁶ Sissela Bok, *Whistle blowing and Professional Responsibility*, N.Y University Education Quarterly 11 (1980): 2

¹⁷ *Id.* at 5

¹⁸ *Id.*

look at internal mechanisms for whistle blowing before going external.¹⁹ *Thirdly*, the accusation must be something which does not violate the elements of privacy or trust and the information must be fair and accurate and not guided by personal vengeance.²⁰

- ✓ **The Integrity Theory:** George Brenkert the advocate of this theory believed that an individual's morality in blowing whistle in an organisation is based on the principle of positional responsibility.²¹ This duty to report is due to the urge to rectify or prevent the wrong that is not corrected by others, the individual's knowledge of the wrong doing that is not available to others, individual's position he holds in the organisation and the fiduciary relationship he holds in the organisation.²² According to him it's also a question of an individual's personal integrity, the views and values he holds and the norms and character traits that is present in him.²³
- ✓ **The Universal Dignity Theory of Whistle Blowing:** This theory developed by Hoffman and McNulty stresses that whistle blowing is permissible and is a duty on the employees as it protects the dignity of all stake holders.²⁴ According to them it is permissible if there is compelling evidence of the wrong doing that would violate the dignity of stake holders, the knowledge of it does not prompt the organisation to take up corrective measures and would be exempted only if the employee have credible ground to believe that by revealing it he is exposing himself and other employees to serious retaliation from the organisation.²⁵

INTERNATIONAL LEGAL FRAMEWORK FOR WHISTLEBLOWER PROTECTION:

International instruments aimed at corruption have also recognised whistleblowing as an effective tool to combat corruption.²⁶ Whistleblower protection have been introduced in the United Nations Convention Against Corruption²⁷, the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service,²⁸ the 2009 OECD Anti-Bribery recommendation²⁹, the Council of Europe Civil and Criminal Law Conventions on

¹⁹ *Id.*

²⁰ *Id.*

²¹ BRENKERT, *supra* note 8 at 575.

²² *Id.* at 582

²³ *Id.* at 590

²⁴ HOFFMAN, *supra* note 9 at 51.

²⁵ *Id.* at 51

²⁶ OECD RECOMMENDATION ON IMPROVING ETHICAL CONDUCT IN THE PUBLIC SERVICE, Principle 4, (Aug.17, 2016) <https://www.oecd.org/gov/ethics/Principles-on-Improving-Ethical-Conduct-in-the-Public-Service.pdf>.

²⁷ OECD ANTI-BRIBERY CONVENTION, 2009 RECOMMENDATION FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, Section IX.iii. and Section X. C.v., and Annex II to the Recommendation, Good Practice Guidance on Internal Controls, Ethics and Compliance, Section A.11.ii.,(Aug.3,2016)<https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

²⁸ COUNCIL OF EUROPE CIVIL LAW CONVENTION ON CORRUPTION, ARTICLE 9; COUNCIL OF EUROPE CRIMINAL LAW CONVENTION ON CORRUPTION,Article22,(Aug.3,2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f3f6>

²⁹ OECD ANTI-BRIBERY CONVENTION, 2009 RECOMMENDATION FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, Section IX.iii. and Section X.C.v., and Annex II to the Recommendation, Good Practice Guidance on Internal Controls, Ethics and Compliance, Section A.11.ii.(Aug.3,2016) <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

Corruption,³⁰ the Inter-American Convention against Corruption³¹ and the African Union Convention on Preventing and Combating Corruption.³²

Whistleblower Protection in USA:

The origin of Whistle Blower protection laws can be traced back to United States of America. In USA whistleblowers can seek protection from three sources: federal statutes, state statutes and Tort of wrongful discharge claim based on Common Law exceptions to the Employment-at-will doctrine.³³ Forty seven of the fifty states currently offer general whistleblower protection to employees.³⁴ State statutory protection includes general whistleblower statutes and topic specific statutes.³⁵ These topic specific statutes extend protection in occupational safety and health, elder care, child care, medical aid fraud, minimum wage, education and environment.³⁶ According to Hesch, 'The more than thirty federal statutes found in US domain can be brought under six categories -statutes that protect-reporting (1) fraud against the government, (2) violation of laws, waste or management, (3) discrimination, (4) violations of environmental laws, (5) violations of health standards and (6) violations of securities law.'³⁷

The Sarbanes Oxley Act, (SOX) 2002: The Sarbanes Oxley Act passed in 2002 is the most promising Federal Statute that protects whistleblowers who report security violations. More than 40 million employees of publicly traded corporation in US come under this protection.³⁸ The Act provides civil, criminal, anti-retaliation provisions, administrative remedies and regulates the entire publicly-traded sector of employment.³⁹ The definition of employee is wider, which includes present and former workers (if the protected activity occurs during the course of their employment), supervisors, managers, officers and independent contractors.⁴⁰ In *Morefield v. Exelon Services, Inc.*⁴¹, it was held that Whistleblower protection of the Act extends to private companies also that serve as agents or contractors to publicly traded corporations and their subsidiaries⁴² in *Kalkunte v. DVI Financial Services, Inc.*⁴³, it was

³⁰ Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22, (Aug. 3, 2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f6>.

³¹ Inter-American Convention against Corruption, Article III (8), (Aug. 17, 2016) <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/iacac.pdf>.

³² African Union Convention on Combating Corruption, Article 5(6), (Aug. 17, 2016) <http://www.peaceau.org/uploads/convention-combating-corruption.pdf>.

³³ Gerard Sinzduk, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633 (2008)

³⁴ Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 108 (2000) at Appendix A, (listing the states that allow a public policy claim.)

³⁵ *Id.*

³⁶ Robert G. Vaughn, *State whistleblower Statutes and the future of whistleblower protection*, 51 ADMIN. L. REV. 581, 582 n3 (1999)

³⁷ Hesch, Joel D, *Whistleblower Rights and Protections: Critiquing Federal whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, LIBERTY UNIVERSITY, L.R. Vol. 6:ISS. 1, (2011), Feb 22, 2016) Article 4. http://digitalcommons.liberty.edu/lu_law_review/vol6/iss1/4.

³⁸ *Id.*

³⁹ STEPHAN MARTIN KOHN, MICHEAL D KOHN & DAVID K. COLAPINTO, *WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTION FOR CORPORATE EMPLOYEES* 119-21, 122 (2004)

⁴⁰ Steven Hymowitz, R. Bradley Mokros, Eileen Kuo, 'Managing Employees Who Have Made Complaints of Unlawful Conduct', ABA Section of Labor & Employment Law, 3RD ANNUAL CLE CONFERENCE, Washington, D.C., Nov 4-7, 2009, http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/042.authcheckdam.pdf.

⁴¹ 2004-SOX-2 (DOL ALJ Jan. 28, 2004)

⁴² *Id.*

⁴³ ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-056

held that the subsidiaries of the public company will also be held liable for retaliations against employees, if they are agents of the parent company and share the same management.⁴⁴

SOX also contain other employment based protections⁴⁵ like requiring publicly traded corporations to constitute internal and independent 'audit committees', compelling the audit committee to establish procedures for employees to bring whistleblower complaints, and protecting the identity of such whistleblowers.⁴⁶ Another provision urges the attorneys who practice before securities exchange commission to become internal whistleblowers against their employers or clients and bring the misconduct to the notice of the audit committee.⁴⁷ Under the whistleblower provisions all such activities of the attorneys would be regarded as 'protected activity'.⁴⁸ In *Van Asdale v. International Game Technology*⁴⁹, the Ninth Circuit court reversed a summary judgement and held that even if the internal attorney's disclosed 'attorney-client privileged information' they would be protected against retaliation⁵⁰. The amended provision criminalizes retaliation against any whistleblower who provide true information to a law enforcement officer against the commission or possible commission of a federal offense and making it applicable to every employer⁵¹.

Another provision allows an employee to complain directly to the Department of Labour within 90 days of retaliation, on a reasonable belief of retaliation from the employer.⁵² The Department of Labour will look into the complaint and send it to OSHA for investigation and then a conclusion and an enforcement order would be issued by OSHA.⁵³ Both parties can move an appeal to the Administrative Law Judge against the order and from there an appeal will again lie to the United States Court of Appeal. If within 180 days the order is not issued by OSHA the whistleblower have an option to remove his complaint and file a suit in the United States District Court.⁵⁴ Whistleblowers who face retaliation also has an option to forgo the administrative process and opt for a jury trial in a federal court.⁵⁵

To claim retaliation an employee need to prima facie establish that he engaged in a protected activity, the employer knew of this activity, he suffered an unfavourable personal action and circumstances suggest that the protected activity was a contributing factor for the unfavourable action.⁵⁶ In *Collins v Beazer Homes, USA, Inc*⁵⁷, the plaintiff complained that she suspected 'kickbacks', 'corruption' and 'cover-ups' at her office and was terminated within fourteen days. The court held that the complaint pointed misconduct that qualifies as a protected activity and the immediate termination by the employer constituted retaliation.⁵⁸ Both monetary and non-monetary remedies are also available to whistleblowers, if they suffer an adverse employment action.

⁴⁴ Id.

⁴⁵ Stephan. M. Kohn, *Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers*. NATIONAL WHISTLEBLOWERS CENTRE, (March 3,2016), http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27.

⁴⁶ §301 of SOX, 15 U.S.C. 78j-1(m)(4).

⁴⁷ §15 U.S.C. 7245

⁴⁸ 18 U.S.C. 1514 A(a)(1).

⁴⁹ 2009 U.S. App. LEXIS 18037 (9th Cir. Aug. 13, 2009)

⁵⁰ Id.

⁵¹ 18U.S.C. §1513 (e).

⁵² 18 U.S.C §1513(e)(2006)

⁵³ Hetch, *supra* note 37 at 104.

⁵⁴ 18 U.S.C. §1514A(b)(1)(B)(2006)

⁵⁵ 18 U.S.C §1514A(b)(2)(E)(2011)

⁵⁶ 42U.S.C §7622(2006)

⁵⁷ 334 F Supp.2d 1365, 1375 (N.D. Ga. 2004)

⁵⁸ Id at 1370-71.

Under non-monetary remedies reinstating an employee to his former position is the most common if he has been discharged, demoted or transferred⁵⁹. Non-monetary remedies also include expunging of personal files⁶⁰ and restoration of parking privileges.⁶¹ Common monetary remedies include back pay with interest, injunctive relief, compensation for special damages suffered due to discrimination, litigation costs, expert witness fees and reasonable attorney fees.⁶² Additional monetary remedies also include restoration of health and welfare benefits⁶³, lost vacation pay⁶⁴ and stock options⁶⁵. In *Smith v Atlas Off-shore Boat Service Inc*⁶⁶ even damages for intentional torts like infliction of emotional distress was awarded followed by damages for depression and loss of professional reputation in *Neal v Honeywell, Inc.*⁶⁷

The Dodd-Frank Wall Street Reform and Customer Protection Act (Dodd-Frank Act) 2010. The Act extended the role of whistleblowers by providing rewards to whistleblowers who gave relevant information to Securities Exchange Commission or the commodities Future Trade Commission.⁶⁸ Under this, a whistleblower who gave information leading to a successful enforcement action resulting in more than \$1million is eligible for a reward amount of not less than 10 % and not more than 30 %.⁶⁹ Another change brought by the Act was extending protection to employees of subsidiaries of publicly traded corporations and parent corporations.⁷⁰ It also extended the limitation period to file a complaint against retaliation from 90 days to 180 days.⁷¹ Other provisions include changes in Securities Exchange Commission regulations to establish special whistleblower offices and regulations to protect the interest of whistleblowers⁷², amendment of SOX provisions to guarantee jury trials and prohibit mandatory arbitration agreements⁷³, new and enhanced protection to whistleblowers who make disclosure to the newly created consumer protection board,⁷⁴ amendment of False Claims Act to extend limitation time for filing retaliation claims and wrongful discharge claims to three years.⁷⁵

Provisions against retaliation can also be found in Federal Discrimination (Equal Employment Opportunities) laws,⁷⁶ 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 1987⁷⁷, Occupational Safety and Health Act of 1970,⁷⁸ False Claims

⁵⁹ *Reeves v Caliborne County*, 828 F.2d 1096, 1101 (5th Cir.1987)

⁶⁰ STEPHAN MARTIN KOHN, MICHEAL D. KOHN & DAVID K. COLAPINTO, WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTION FOR CORPORATE EMPLOYEES 119-21, 122 (2004).

⁶¹ *Id.*

⁶² 18 U.S.C § 1514(c)(2)(C)

⁶³ *Blum v Witco Chemical Corporation*, 829 F.2d 367, 383 (3rd Cir.1987) an award of lost pension benefit was given to the employee.

⁶⁴ Kohn, Kohn & Colapinto, *supra* note 61 at 107.

⁶⁵ *Id.*

⁶⁶ *Smith*, 653 F.2d 1057, 1064 (5th Cir.1981)

⁶⁷ *Neal*, 994 F.Supp.889, 895 (E.D.III.1998)

⁶⁸ Dodd-Frank Act, P.L.111-203, § 922, 124 Stat. 1376 (2010) (to be codified at 15 U.S.C. § 78U-6), H.R.4173, 111th Cong. § 922(a) (2010).

⁶⁹ P.L.111-203 § 922(b)(1).

⁷⁰ P.L.111-203.

⁷¹ Dodd-Frank Act, § 922-21F(C)-The Act added that 180 days can alternatively be from when the employee becomes aware of the violation.

⁷² P.L. 111-203 § 924.

⁷³ P.L.111-203 § 922(c)

⁷⁴ *Id.* at § 1057

⁷⁵ *Id.* at § 1079B (c). *Dodd-Frank Wall Street Reform & Consumer Protection Act-conference report*- NWC, www.whistleblowers.org.

⁷⁶ Title 10 Armed Forces, S 2409

⁷⁷ 10 U.S.C § 2409(a)

Reform Act of 1986⁷⁹ and the Whistle Blowers Protection Enhancement Act 2012. Complaints can also be made to Office of special Counsel or Office of Inspector General and there are different authorities and multiple agencies like 24hr hotlines and websites that provide guidelines and protection to whistle blowers.

Whistleblower Protection in United Kingdom:

A whistle bower is very well protected in United Kingdom also through various legislations like- The Employment Rights Act 1996, The Public Interest Disclosure Act 1998 and The Enterprise and Regulatory Reform Act 2013.

The Employment Rights Act of 1996: This was the first statute passed in UK that recognised many employee rights like protection from unfair dismissal, anti-retaliation and remedies for unfair dismissal and discrimination. Provision of providing protection from detriment in employment often protected the employee from taking part in an act or a failure to act for preventing risks to safety or health, individually or as a member of a safety committee.⁸⁰ Another employee protection can be seen in S.46 that protects an employee against detriment from an employer for being a trustee of occupational pension scheme⁸¹ and provision under S.47 that protects employee against detriment from employer because he acted as a representative of a trade union or acted as a candidate at an election of an employee union⁸². S.48 entitles an employee to approach the Industrial Tribunal if he is subjected to a detriment under S.44, 45, 46 or 47.⁸³ If the Tribunal finds merit in the complaint it will pass appropriate order and the employee will be entitled to monetary compensation after mitigating the loss.⁸⁴

Another provision is the remedies available for an employee for unfair dismissal by an employer.⁸⁵ Any aggrieved employee can file a complaint with the industrial tribunal within a period of three months from the date of the termination and the tribunal may pass appropriate orders⁸⁶ (which includes an order for reinstatement or an order for re-engagement) or award compensation for such unfair dismissal as it deems fit.⁸⁷ Under an order for reinstatement the employee will be reinstated to the same position before his dismissal and will be eligible for any arrears of pay, rights and privileges he would have enjoyed but for the dismissal.⁸⁸ Under an order for re-engagement the employee will be engaged by the employer or his associate or by a successor in the same type of employment from which he was dismissed or from a suitable employment.⁸⁹ Compensation for unfair dismissal includes basic award of compensation⁹⁰, compensatory award⁹¹ or special award⁹² as decided by the tribunal in appropriate cases.

⁷⁸ The Occupational Safety and Health Act, 1970, S11(c).

⁷⁹ Passed to increase detection and prosecution of false claims submitted to the federal government-ACM council 'ACM code of ethics and Professional conduct'-<http://www.acm.org/constitution/code-html>

⁸⁰ Part V of The Employment Rights Act of 1996, S. 44(1)(a) to (d).

⁸¹ The Employment Rights Act, S. 46(1)(2)(3).

⁸² The Employment Rights Act, S 47(1)(a)(b)&(2).

⁸³ The Employment Rights Act, S.48(1)(2)(3).

⁸⁴ The Employment Rights Act, S.49(1) 2)(3)(4)(5)

⁸⁵ The Employment Rights Act, Part X, Chapter 11, S 111.

⁸⁶ The Employment Rights Act, S.113 (a)(b).

⁸⁷ The Employment Rights Act, S.112 (1) to (4).

⁸⁸ The Employment Rights Act, S.114 (1) to (5).

⁸⁹ The Employment Rights Act, S 115(1)(2).

⁹⁰ The Employment Rights Act, S.118.

⁹¹ The Employment Rights Act, S123.

⁹² The Employment rights Act, S124.

The Public Interest Disclosure Act, 1998: Under this Act definition of disclosure is wider and it covers crimes, failure to comply with legal obligation, miscarriage of justice, danger to health and safety of employees, damage to environment or hiding of information.⁹³ It also encourages the whistle blower by ensuring that later if the disclosure turns to be wrong the whistle blower still will be protected if he believes that the disclosure is made in good faith and is reasonably true.⁹⁴ It also makes clear that the disclosure can be of acts already occurred, is occurring or may occur in future, inside the territory of united kingdom or even outside where any other country's law may have application.⁹⁵ Another protection is the provision that allow anonymous complaints and compensation for victimisation by complaining to Employment Tribunal for unfair dismissal or denial of promotion for a disclosure.⁹⁶

The Enterprise and Regulatory Reform Act 2013: Changes introduced by this Act included abolishment of 'good faith' requirement by the employee who intends to blow the whistle (from 25 June 2013) as it was criticised earlier as more in favour of the employer who could prove easily that the disclosure was made by the employee in bad faith to discredit the employer.⁹⁷

INDIAN POSITION:

India does not have a statute dealing with whistle blower protection in public listed companies. General provisions regarding whistle blowing are contained in the Whistle Blowers Protection Act framed in 2011.⁹⁸ However; it does not address the predicament of whistle blowers in private sector as the legislation is applicable only to public servants, government companies and non-governmental organisations and does not extend to the private sector. The recommendation of the Law Commission in its 179th report and the 2nd Administrative Reforms Commission in its 4th Report to extend the Act to the corporate sector has been ignored.

The Indian Companies Act 2013: There is a real effort made in the new Companies Act 2013 to ensure better corporate governance in companies but just namesake provisions regarding whistleblowing. Whistle Blowing in public listed companies are discussed under S 177 (9) (10) of the Indian Companies Act 2013, where it is made mandatory for organizations to establish a vigil mechanism that has to be disclosed on the company websites.⁹⁹ It further mentions protection against victimisation and direct access to the Chairperson of the Audit Committee in exceptional cases. But there is no clarity in these provisions and no proper guidelines.

⁹³ The Public Interest Disclosure Act 1998, S43 Bc11.

⁹⁴ The Public Interest Disclosure Act 1998, S43G cl1.

⁹⁵ The Public Interest Disclosure Act of 1998, S43 B cl2.

⁹⁶ The Public Interest Disclosure Act of 1998, S43 B cl2.

⁹⁷ The Enterprise and Regulatory Reform Act 2013, S3 47 B.

⁹⁸ Whistle Blower Protection Act 2011 got the assent of the President of India in May 9, 2014 which was enacted by the Parliament in 2014, and notified in the official gazette by government of India on May 12 2014.

⁹⁹ The Indian Companies Act, 2013, S177 (9)- Every listed company or such class of company as may be prescribed, shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed.(10)The vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make direct access to chairman of Audit committee in appropriate or exceptional cases. The details of establishment of such mechanism have to be disclosed by the company on its website and in the Board's report.

SEBI: Under Cl. 49 of the listing agreement by SEBI, setting up of internal whistle blowing structures in companies is made non-mandatory.¹⁰⁰ Currently public listed companies are allowed to draft their own whistle blower policies. It is pertinent to note that the Narayanamoorthy committee on Corporate Governance in 2003 had made a mandatory recommendation (under Clause-D) regarding the need for an internal policy in listed companies with direct access to audit committees.¹⁰¹ Companies also had to ensure that this right of access is clearly communicated to all employees through internal circulars and provisions were to be included in their personnel policies for protecting whistle blowers from unfair termination and other prejudicial employment practises.¹⁰² It further recommended an annual affirmation from companies that they have not denied any personal access to audit committees and that they have provided protection to whistle blowers from unfair termination and other prejudicial employment practises.¹⁰³ It is unfortunate that this mandatory recommendation was not implemented and got diluted into a non-mandatory provision allowing companies to wiggle away.

Serious Fraud Investigation Office (SFIO): Giving statutory recognition and more powers to Serious Fraud Investigation Office (SFIO) in the new Companies Act may not make a difference as it does not have Suo motto powers but have to wait for the recommendations of the central government before they can take up action against officers guilty of fraud.¹⁰⁴

Effective corporate governance casts a duty on board of directors and the auditors to be responsible towards the stakeholders of the company and to provide them with a true report of the financial affairs of the company. Unfortunately due to unethical alliances between them frauds, violations in accounts and audits does not get reflected in financial documents of companies and stake holders are kept in dark until a scandal or a downfall of the company brings out everything in open. According to Certified Fraud Examiner's 2014 Report to the Nations on Occupational Fraud and Abuse more frauds are detected by 'tips' received from employees and third parties than by any other methods¹⁰⁵ and companies that have a whistleblower hotline detected 50% more quickly. The report also recommends that in order to prevent fraud in organisations passive detection methods like confession, detecting fraud by accident, notification by law enforcement etc will not be effective as they are slow but adopting proactive detection strategies like hotlines, management review methods, internal audits and employee monitoring mechanisms will be much more effective as frauds can be caught early.¹⁰⁶

CONCLUSION & SUGGESTIONS:

Earlier research suggests that active whistle blowing can considerably reduce corporate frauds and illegal practices happening in companies than external regulating.¹⁰⁷ Studies have shown that the extent of whistle blowing in companies is closely related to provisions for anonymous

¹⁰⁰ Cl 49 of the listing agreement, Annexure 1D7. Discussion Paper Corporate Governance in India: Theory and practice, NFCG India, India <http://www.nfcgindia.org/library/cgitp.pdf>.

¹⁰¹ Report of the SEBI Committee on corporate governance, Feb 8, 2003, 3.11, <http://www.sebi.gov.in/commreport/corpgov.pdf> (last visited Feb 26, 2016)

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Aastha Dawan & Arjun Singh, *Serious Fraud Investigation Office (SFIO) An Analysis of working under Companies Act*, 122 SCL 17 (Mag) 2013.

¹⁰⁵ Certified Fraud Examiner's 2014 Report to the Nations on Occupational Fraud and abuse, 19, fig 11, (last visited March 25, 2016) <https://www.acfe.com/rtn/docs/2014-report-to-nations.pdf>.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ Alexander Dyck, Adair Morse & Luigi Zingales, *Who blows the whistle on corporate fraud?*, THE JOURNAL OF FINANCE, 2213-2253, Vol 65, No 6, Dec 2010, <http://www.jstor.org/stable/23324409>.

complaints, implementation of friendly whistle blowing policies, and the presence of more independent directors in audit committees.¹⁰⁸ Here, the role of internal whistle blowers in the company and protection of their rights become very important as many a times they can act as checks and guards in the way business is carried out in companies. More often they have first hand information of frauds that is happening or is likely to happen. It is also pertinent to note that by providing better protection to whistleblowers the directors, auditors, other officers, employees of the company all, would be encouraged to blow the whistle to protect the best interest of the company. Effective whistle blowing can happen in companies only if there is a conducive environment where the whistle blower feels safe to report matters without retaliation from employers, provisions for anonymous complaints and protection to his job. Hence there is a real need to provide better protection to whistle blowers in listed companies in India under the existing legal frame work.

Hence, it may be recommended that-

- Rather than setting up more bodies corporate frauds can be effectively prevented by alert insiders in the company and policy makers and regulators must understand the relevance of them and implement better provisions for the protection of their rights.
- Introduction of more friendly provisions in companies like protection from retaliation, anonymity or confidentiality of complaints, rewards-incentives for reporting, witness protection programmes, twenty four hours hotline service by a third party.
- Enforcing effective communication mechanisms to create awareness on employees regarding the existence of a hotline channel, building employees' willingness to use it by building trust and developing employee's ability to identify potential wrong doing.¹⁰⁹
- Increasing confidence among employees that their tips will remain confidential, communicating how a whistleblower report can lead to an investigation and appropriate disciplinary action and emphasising the role of every employee in preventing and detecting fraud and use of hotline for such purposes without fear.¹¹⁰
- SEBI taking up a direct role in monitoring whistleblowing mechanisms in corporations and providing direct access to complain in cases when there is a failure by companies.
- Whistleblowing mechanisms can be effectively implemented in Indian companies with adequate support from the government, regulators and senior management of the organisation.

¹⁰⁸ Gladys Lee, Neil Fargher, *Companies Use of Whistle-Blowing to Detect Fraud: An Examination of Corporate Whistle-Blowing Policies*, JOURNAL OF BUSINESS ETHICS, 283-295, May 2013, Volume 114, Issue 2.

¹⁰⁹ DELOITTE, Lead by example: Making whistleblowing Programs successful in corporate India-A Deloitte Forensic India Survey Report, <http://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-whistleblowing-survey-2014-noexp.pdf>. (Last visited Feb 24, 2016)

¹¹⁰ *Id.*

- Finally, the last call should be made by the senior management of companies ,as often, committed senior management can bring in the desired change they want in their organisation.

