

Effectiveness of Whistleblower Mechanisms in Preventing Corporate Fraud: A Critical Study under the Companies Act, 2013, with Special Reference to Indian Companies

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Abstract

This paper is a thorough critical legal analysis of the statute whistleblower regimes under the corporate law regime in India, examining the effectiveness of the Vigil Mechanism put in place under Section 177 of the Companies Act 2013 in combination with the regulatory provisions of the Securities and Exchange Board of India (SEBI). Whistle-blowing is an important internal control mechanism and a corporate governance tool designed for the detection, deterrent and disclosure of corporate financial fraud, operational malpractices and siphoning of funds, and violation of fiduciary duty. The legal framework on corporate whistleblowing in India, however, shows systemic structural deficiencies, notably the absence of effective anti-retaliation remedies in statute, lax enforcement procedures, no independent outside reporting avenues, and conflicts of interest in management hierarchies within the company. This paper critiques the internal vigilance mechanisms that are often incapable of preventing corporate fraud on a large scale, analysing why this is the case by examining statutory provisions, comparative international models (such as Sarbanes-Oxley Act USA, the Dodd-Frank Act USA and the Public Interest Disclosure Act UK) and significant corporate governance failures in India. The analysis shows that statutory obligations have given rise to formal compliance mechanisms, but there is no substantive protection in law, such as statutory monetary bounties, broad anti-retaliation causes of action before dedicated tribunals or enforceable confidentiality assurances for private sector employees. This study thus proposes that the Indian legal system should move from a self-regulatory, adherence to procedure to a more independent, incentivised and well-progressed statutory regime to ensure substantive accountability of the companies and protection of public funds.

I. Introduction and Theoretical Foundations of Corporate Whistleblowing

One of the most important ways of exposing corporate financial crimes is through whistle blowing, which is the disclosure of illegal, unethical or fraudulent corporate business practices by the internal people of the organization.¹ Modern enterprise, in the corporate form, is distinguished by the separation of ownership and control and thus exhibits fundamental imbalances in information between the managers

¹ See JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 21–28 (2002).

who make decisions, the directors, the retail shareholders, the regulatory agencies, and the statutory auditors².

Legislative oversight of financial operations, including regular financial audits and regulatory reporting, often fail to catch sophisticated financial engineering, off-balance-sheet accounting schemes, related-party asset stripping and insider trading. Corporate insiders whether they be mid-level accountants, internal auditors or operational engineers or executive assistants have access to company information in real time that is enriched with context³ Conversely, the management representatives who regularly assist statutory auditors are engaged in a different game, and they are vulnerable to any deliberate concealment strategies that executive management is playing by its insiders who have access to company information in real time, enriched with context. As a result, it is the organization's insiders who often get the first inkling of irregularities and can reveal fraudulent activity that is going on behind the scenes before it becomes a corporate meltdown.

The institutionalization of whistleblower protection is premised on the fact that, in today's context, the whistle-blower is no longer regarded as being a disloyal employee but as a valuable instrument for the enforcement of the law and a public market integrity guardian⁴. Institutional retaliation against whistleblowers can be severe, including constructive dismissal, professional blacklisting, career destruction, civil litigation for breach of confidentiality covenants and social ostracization. A legal system which demands or fosters self-reporting, without providing effective and strong statutory protections, therefore gives a perverse incentive: rational actors opt for silence over reporting, and the more things go wrong, the closer the company gets to bankruptcy.⁵

India's statutory codification of corporate whistleblowing went through a structural change with introduction of Companies Act, 2013. Before 2013, there were no uniformed and comprehensive whistleblower provisions in the Indian corporate world as they were mostly limited to non-mandatory provisions of the SEBI Listing Agreement⁶. The Companies Act, 2013, completely overhaul this system with the introduction of the "Vigil Mechanism" as provided under Section 177(9) which requires every listed company (and prescribed classes of public company) to establish a mechanism for complaints from directors and employees to be submitted on a genuine basis and where it is required, access to the chairperson of the Audit Committee must be available.

The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015⁷ further enhanced this requirement for listed entities with Regulation 22, which requires the companies to develop a whistleblower policy for reporting illegal or unethical practices by the stakeholders such as the individual employees and the union representatives of the listed companies. Again, as a result of the various insider trading scandals, SEBI in 2019 made changes to the Prohibition of Insider Trading (PIT) Regulations to

² See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64–70 (2005).

³ See David M. Trubek & Alvaro Santos, *Introduction: The Third Wave of Law and Development Studies and the Emergence of a New Neoliberalism*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1, 8–15 (David M. Trubek & Alvaro Santos eds., 2006).

⁴ See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 762–68 (2005).

⁵ See GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 24–31 (2011).

⁶ See The Companies Act, 2013, § 177(9), No. 18, Acts of Parliament, 2013 (India).

⁷ See Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, pt. III sec. 4, reg. 22 (Sept. 2, 2015).

introduce an Informant Mechanism under which the SEBI may pay a reward to any individual who comes forward and reports the violation of insider trading directly to the market regulator without fear of any action by the trade participants⁸.

While all these legislative and regulatory developments, the day-to-day functioning of whistleblower mechanisms in the Indian corporate world shows that there is a huge disconnect between the laws and the actual practice of preventing frauds. The existing one, however, does not establish comprehensive remedies in law for retaliation⁹, including for example the wrongful termination, demotion or harassment of the whistleblower, and does not seem to provide for a clear separation of the powers of the vigil mechanism and the powers of corporate management and the Audit Committee, which have administrative control over the mechanism.

II. Statutory Architecture and Regulatory Framework in the context of Indian corporate law :

In order to assess the effectiveness of the Indian corporate whistleblowing regime, a detailed analysis of the key provisions from the primary legislation, delegated legislation and regulations that shape the current regime is required. The statutory basis for the core is in section 177 of the Companies Act 2013 together with rule 7 in the Companies (Meetings of Board and its Powers) Rules 2014. The Vigil Mechanism under Section 177(9) must be instituted in the following three classes of corporate entities: (i) all listed companies; (ii) Companies that accept deposits from the public and (iii) Companies that borrow funds from banks and public financial Institutions exceeding fifty crore rupees.

The operation of the mechanism is defined in Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014. If the company is required to establish an Audit Committee under Section 177(1), the Audit Committee has to monitor the vigil mechanism. If a company is not required to establish an Audit Committee, then the Board of Directors shall appoint a director to serve as the Audit Committee for the purposes of this vigil mechanism, to whom directors and employees can make their grievances. In situations where frivolous complaints are repeatedly made by a director or employee, the Audit Committee or the nominated director shall consider appropriate action against the person who made the complaints, which can include reprimands.

On the regulatory side, SEBI has increased the disclosure requirements with respect to whistleblower for listed public entities under the SEBI (LODR) Regulations 2015. Regulation 4(2)(d)(iv) requires listed entities to develop a sound whistle blower policy to allow for the expression of concern by stakeholders (individual employees, employee representative bodies etc) regarding any illegal or unethical practice. The Audit Committee, in accordance with Regulation 18, in conjunction with Schedule II Part C, has to review the functioning of the whistleblower mechanism periodically. Moreover, under Regulation 34(3) read with Schedule V, listed entities will be required to disclose in their corporate governance reports on their vigil mechanism, comprising detailed disclosures in relation to denial of access to the Audit Committee chairman to any personnel.

The Prohibition of Insider Trading Regulations (2019) by SEBI are one of the specific regulatory developments. In view of the fact that the internal vigil mechanism provided in section 177 of the

⁸ See Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2019, Gazette of India, pt. III sec. 4, reg. 7A–7M (Sept. 17, 2019).

⁹ See OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 480–95 (2d ed. 2014).

Companies Act often was not able to detect the covert insider trading activities, SEBI introduced chapter IIIA into the PIT Regulations, which has been called the “Informant Mechanism”. Within this scheme, a person is allowed to file a Voluntary Information Disclosure Form (VIDF) directly with the Office of Informant Protection (OIP) of the SEBI. The PIT Regulations provide for a financial reward mechanism for disclosures, which stipulates that the reward shall be 10% of the final monetary recovery by SEBI provided the amount of the monetary recovery exceeds one crore rupees. Importantly, Regulation 7I of the amended PIT Regulations clearly prevents any employer from taking any action against an employee as a result of the filing of a VIDF, including discharging, demoting, suspending, threatening, harassing and discriminating against the employee.

The SEBI PIT Informant Mechanism is an important step in the legal arena, but it has limited application to securities market insider trading offenses. Not applicable to accounting fraud, diversion of assets, manipulation of transactions with related parties or concealment of default on the loans under the Companies Act, 2013. Accordingly, where analysed from a critical legal theory prism, Indian disclosers continue to be dependent in the majority of corporate fraud categories on the general Vigil Mechanism enshrined in Section 177 of the Companies Act 2013 which has a wide number of legal shortcomings:

First, Section 177 does not include substantive anti-retaliation causes of action. Though under Section 177(10) the mechanism must "provide for adequate safeguards against victimisation", the definition of victimisation is not provided in the statute nor is any statutory forum like the National Company Law Tribunal (NCLT) or labor courts provided to allow for interim injunctions against retaliatory dismissals and reinstatement of the employee or for punitive damages¹⁰.

Secondly, the administrative structure of the Vigil Mechanism basically raises a structural conflict of interest. Companies Act has given the supervision of the vigil mechanism to the Audit Committee of the company. Auditors: An independent majority of the directors of the Company make up the Audit Committee in accordance with Section 177(2). In a concentrated promoter control structure, however, the Audit Committee is regularly under pressure from the controlling family promoters,¹¹ executives, and/or top management officials to cover up the whistleblower disclosure, to protect the executives and penalize the whistleblower, ostensibly to resolve "frivolous complaints".

Third, the Companies Act does not provide a statutory right for a company whistle blower to report initially to an external law enforcement or regulatory authority. The Indian model is different from the international one, which allows immediate direct notification to state regulators, where it is assumed that corporate remedies have been exhausted. If an employee circumvents the internal Audit Committee and tells the media or regulatory bodies about the financial fraud, he may lose the protections afforded by his job and could be charged with breach of trade secrets or civil action for defamation and breach of duty of employment¹².

III. Judicial and Empirical Pathology: Corporate Scandals and Structural Failures.

The following are some examples of large-scale corporate frauds to highlight the theoretical and structural inadequacies of India's corporate whistleblower regime, where the internal vigil system has failed to detect

¹⁰ See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 132–45 (3d ed. 2008).

¹¹ See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7, 9–20 (John Williamson ed., 1990).

¹² See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 63–71 (David M. Trubek & Alvaro Santos eds., 2006).

and/or curb systemic financial abuse. The examination of these corporate governance failures has shown the way in which statutory compliance may mask the operation of the companies.

The first such spur in India for the need of corporate governance reform was the Satyam Computer Services Limited disaster in 2009¹³. While Satyam had formal internal audit mechanisms and corporate governance certificates mandated by the then applicable SEBI listing regulations, there was no internal whistleblower disclosure on the part of Satyam. It wasn't until the chairman issued a confession letter to the board after a scheme to siphon off corporate funds to purchase related real estate entities failed that the fraud was discovered. The Satyam debacle has exposed the failings of formal internal controls and audit committees in the case of executive management's coordinated financial fabrication, and the absence of protected channels of reporting outside executive control by employees.

The crisis at Infrastructure Leasing & Financial Services (IL&FS) in 2018 has proved that the statutory Vigil Mechanism under Section 177 has not been able to remedy these structural weaknesses and problems. The default of IL&FS, one of the largest systemic financial infrastructure development and finance firms, led to a liquidity crisis in financial markets of India. The internal risk officers, who alerted their executive committees to asset quality concerns, were blocked from raising those concerns for years by the executive committees in violation of the guidelines of Section 177. The internal risk officers who warned their executive committees about asset quality were silenced for years by the executive committees, in contravention of Section 177 guidelines¹⁴. The examples of control of corporate operations by dominant executive boards and absence of any safeguards for internal disclosers who speak against the official financial narratives by the company-appointed committee-based internal vigil mechanisms have been illustrated by the IL&FS issue. The IL & FS governance failure has shown that in cases of firm control by dominant executive boards, internal vigil mechanisms based on committees appointed by the company do not adequately protect the internal disclosers who raise a challenge to the official financial narratives. On a similar note, the corporate governance racket in 2019 involving Infosys Limited, also underscored the tension with top executive officials over disclosures from within. In the letter, the whistleblowers identified themselves as “Ethical Employees” and point-blank stated that they decided to report the allegations directly to the Board of Directors and the US Securities and Exchange Commission (SEC)¹⁵ because the allegations would be likely to be suppressed and retaliated against when reported through internal management channels. The incident revealed a general perception among corporate employees that internal vigil mechanisms under management are not feasible when allegations are made against a high ranking employee in the corporate organization.

The common denominator of these empirical cases is that the internal control features that have been set up under section 177 of the Companies Act largely fail to function as effective instruments of fraud prevention when these are directed by executive directors, controlling promoters or senior managers of the company. The institutional power is asymmetrical, that is, the blowback to whistleblowers is often

¹³ See ROBERTO MANGABEIRA UNGER, FREE TRADE FALLACY: THEORETICAL PRIORITIES AND ECONOMIC DEVELOPMENT 42–50 (2007).

¹⁴ See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 88–95 (2002).

¹⁵ See AMARTYA SEN, DEVELOPMENT AS FREEDOM 70–86 (1999); MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–32 (2011).

termination of employment or even personal suits, while the consequences for the firm or its officials for engaging in the wrongful behavior remain unclear.¹⁶

IV. Comparative study on the US, UK, and Indian frameworks :

Thus, it is best to compare the efficacy of the Indian regime with the well-developed international regimes, like the US and UK regimes, to assess the effectiveness of the Indian regime. International jurisprudence shows that to be effective, fraud prevention needs to have three elements of legislation: Statutory anti-retaliation protections by way of specialised courts, independent reporting lines to the regulatory authorities, and financial bounties or rewards.

SOX §806 precludes a publicly traded company or its subsidiary or officers from dismissing, demoting, suspending, threatening, harassing, or discriminating against an employee who discloses anything that the SEC deems to be in relation to securities fraud, mail fraud, wire fraud or violations of SEC rules and regulations. Importantly¹⁷, Section 806 provides whistleblowers with a clear statutory cause of action: If an employee is aggrieved, she may submit a complaint to the Occupational Safety and Health Administration (OSHA) within the Department of Labor. The whistleblower may file an action in the US District Court for de novo trial if OSHA fails to make a final decision within the statutory period. SOX remedies include, but are not limited to, mandatory reinstatement, full back pay and interest, special damages for mental anguish and litigation expenses such as attorneys' fees.

Four of the new regulations stemming from Dodd-Frank of 2010, however, dealt with the structural barriers to internal reporting by creating the SEC Whistleblower Program (Section 922)¹⁸. Dodd-Frank overcame the structural issues with internal reporting by permitting whistleblowers to report corporate violations to the SEC without first reporting them to the company. In order to encourage high-risk reporting, Section 922 provides for monetary bounties between ten and thirty percent of the monetary sanctions collected by the SEC for enforcement actions based on original whistleblowers' information where monetary sanctions are more than one million dollars. In addition, Dodd-Frank created an independent federal judicial anti-retaliation rule, which permits whistleblowers who have been subjected to adverse employment actions to directly file federal lawsuits seeking double back pay, reinstatement and legal costs.

The Public Interest Disclosure Act 1998 (PIDA) added protective provisions to the Employment Rights Act 1996 to protect workers in both the public and private sectors from detriment or unfair dismissal on the basis of making a "protected disclosure"¹⁹. A disclosure is eligible for protection if it concerns criminal activity, violation of legal duties, miscarriage of justice or health or safety issues. PIDA sets out the process of disclosure in a graduated manner; that is, it recommends that internal disclosure to the employer be made first, but if the worker reasonably believes that the information is true and within the scope of the regulators' powers, disclosure to "prescribed persons" (the Financial Conduct Authority and the Financial Reporting Council) is fully protected. Aggrieved workers are able to bring their claims before Employment

¹⁶ See JOHN RAWLS, A THEORY OF JUSTICE 60–75 (rev. ed. 1999).

¹⁷ See Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A; Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6.

¹⁸ See Michael M. Cernea, *Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement*, 35 ECON. & POL. WKLY. 3659, 3660–63 (2000).

¹⁹ See Public Interest Disclosure Act 1998, c. 23, § 1 (UK).

Tribunals which have unlimited powers in relation to the award of compensatory damages for loss of earnings, injury to feelings and automatic unfair dismissal.

The international regimes differ markedly from the Indian corporate regime in several ways, as can be seen when compared with the Indian corporate regime:

Jurisdictional Feature	India (Companies Act, 2013 & SEBI)	United States (SOX & Dodd-Frank)	United Kingdom (PIDA 1998)
Primary Legislation	Companies Act § 177; SEBI LODR Reg. 22; SEBI PIT Reg. Ch. IIIA	Sarbanes-Oxley § 806; Dodd-Frank § 922 (15 U.S.C. § 78u-6)	Employment Rights Act 1996 (inserted via PIDA 1998)
Statutory Scope	Prescribed public & listed companies; PIT limited to insider trading	Publicly traded companies, subsidiaries, & market participants	Universal coverage across public & private employment
Anti-Retaliation Forum	No statutory tribunal; internal company safeguards only	Federal OSHA administrative complaints & US District Courts	Specialized Employment Tribunals
Retaliatory Remedies	No statutory damages, reinstatement, or back pay provisions	Reinstatement, double back pay with interest, legal fees	Automatic unfair dismissal remedies; uncapped compensation
Financial Bounty System	Restricted to SEBI PIT Regulations (10% reward capped at ₹1 Cr)	Mandatory 10%–30% of total monetary sanctions collected	No financial bounties provided
External Reporting	Presumes internal exhaustion; limited direct statutory access	Direct reporting to SEC allowed immediately without internal notice	Tiered protection: internal, prescribed regulator, or public

The comparison shows the shortcomings of the Indian system. In India, the corporate employees who blow the whistle on financial fraud are only protected under Section 177 of the Companies Act and SEBI regulations, which do not have similar statutory anti-retaliation provisions to the ones provided in federal court in the U.S. or an employment tribunal in the U.K.²⁰ Therefore, the Indian Whistleblowers Protection

²⁰ See The Whistle Blowers Protection Act, 2011, No. 17, Acts of Parliament, 2014 (India).

Act is not broadly applicable, and leaves out all but public sector corporate employees from the protection it offers.

V. Critical Legal gaps in the Indian Corporate Whistleblower Regime.V. Critical Legal gaps in the Indian Corporate Whistleblower Regime :

A. Absence of Enforceable Anti-Retaliation Causes of Action and Specialized Remedies -

The biggest lacuna in the Indian framework is the lack of a statutory cause of action for retaliatory employment actions of private sector employees. The aim of Section 177(10) is to protect the employee from being subjected to "adequate safeguards against victimisation", but it is a procedural requirement that the company must meet and is not a substantive right that is available to the employee. Under no aspect of the Companies Act is there a direct statute of limitations for the victim of a company's violation of this requirement in the event the company terminates, demotes or harasses the whistleblower.

In the absence of any changes in the text of the Act, a person subjected to retaliatory discharge will not have an opportunity to approach NCLT under Section 177 and seek interim injunction to prevent his dismissal nor will NCLT be able to grant reinstatement, back payment or provide any compensation for retaliatory injury. The alternate remedial measures of the employee are ineffective, such as filing of a civil suit in ordinary civil courts for breach of employment contract and seeking remedies under the Industrial Disputes Act, 1947. Delays in civil courts in India are the norm and in most cases of breach of contract, it is limited to providing a notice period payment and not specific performance or reinstatement. In addition, the definition of workman in Section 2(s) of the Industrial Disputes Act does not cover white collared employees in corporations, managerial personnel and professionals who are not covered by the protection of the Labor Court. A lack of law creates a great imbalance of power and puts private sector whistleblowers at risk of employer retaliation.

B. Structural conflict of interest in internal administration-

The second structural fault is the delegation of the administration of the vigil mechanism to the internal organs of the company such as the Audit Committee or a nominated director. As described in Critical Legal Studies, law that bestows a self-regulating authority on dominant institutional players tends to reinforce and not limit the power of the dominant institutional players.

The Indian corporate governance framework has significant concentration of corporate ownership, with prominent families dominating the board through holding controlling equity shares and having influence over the composition of the board; while Audit Committees are required to have a majority of independent directors, the nomination of independent directors is done through the NOC, which is dominated by the promoter family and independent directors are the ones dependent on the management for information input and board remuneration. If a whistleblower complaint relates to accounting fraud or asset diversion or tax evasion by executive promoters or senior managers, it creates a conflict of interest if the Audit Committee has control of the complaint. The committee has an institutional interest in limiting the liability of the companies, shielding them from regulatory investigation, shielding the controlling executives and characterizing the whistleblower's disclosure as "frivolous" or "motivated by personal malice" under Rule 7 of the Companies Rules, 2014.

C. Lack of required confidentiality procedures and anonymity required by law -

The third shortcoming is the absence of the concept of strict confidentiality and statutory anonymity protections as per Section 177. The SEBI LODR provisions also have no statutory requirement to provide

confidentiality to members of the Audit Committee or vigil officers or to the corporate legal counsel receiving whistleblower complaints.

In corporate practice, the Audit Committee regularly refers the grievances to the internal legal counsel, executive human resource officer or external corporate auditors to collect facts in order to investigate a complaint within the company. In the course of this, many times the whistleblower's identity is leaked and subtly harassed at work, isolated, given bad performance ratings and manipulated for retrenchment. The Companies Act does not provide any criminal sanctions or civil penalties to any corporate officers if they intentionally or negligently provide information to a third party regarding an identity of a whistleblower. If employees report claims of privacy breaches internally, and there are no laws in place to monitor releases and punish those who violate employees' confidentiality, employees could be in a lot of trouble.

D. Restrictive External Reporting Rights, Regulatory Chill-

The fourth legal gap is in the unclear lines of authority concerning the legal right of corporate employees to directly inform public law enforcement agencies or market regulators regarding financial fraud, without first going through an internal company channel. The Vigil Mechanism is completely built around a simple corporate mechanism as per the standard text of Section 177.

If an employer employee identifies any financial fraud being committed by the executive management and is desirous to disclose the same to the Ministry of Corporate Affairs, Serious Fraud Investigation Office (SFIO), Enforcement Directorate (ED) or public media, then the employer may sue the employee for both civil and criminal offences. Often, companies force whistleblowers to sign non-disclosure agreements, employment confidentiality agreements and trade secret agreements to obtain a court injunction, or can file criminal complaints against the whistleblower for breach of trust according to Section 316 of Bharatiya Nyaya Sanhita (BNS), 2023. The Companies Act is silent on whether there is any protection for employees against civil or criminal liability for providing state law enforcement officials with confidential corporate records to help uncover financial crimes. This generates a “regulatory chill” while discouraging workers from going to state officials with complaints about corporate wrongdoing.

F. Weak Legal, Administrative and Financial Safeguards-

The fifth was the absence of a blanket bonus system that would reward companies for reporting frauds. In 2019, SEBI put in place a framework to incentivize insider trading infraction with monetary rewards through an Informant Mechanism which is limited to insider trading offenses. In the absence of any general corporate law or the Companies Act, 2013, to provide a corresponding system of rewards, the only remedy for the general corporate crimes such as corporate accounting fraud, manipulation of the balance sheets, siphoning of funds through shell companies and related party asset stripping is to file a complaint with the police.

Detecting complex corporate fraud is a complicated process that involves a lot of professional, financial and personal risk for the discloser. Often whistle-blowers face career and industry blacklisting, high legal costs, career damages and stress. When there is no statutory bounty program in place, like the Dodd-Frank program in the USA that rewards whistleblowers with a percentage of regulatory monetary recoveries, the personal cost of whistleblowing is much greater than the personal return. This imbalance deters employees from reporting corporate wrongdoings, and until the company fails financially, it keeps going unchecked.

VI. Comprehensive Reforms and Strategic:

A. The Companies Act's Anti-Retaliation Rules-

The Parliament of India should include specific and comprehensive anti-retaliation rights for corporate employees in the private sector in Section 177 of the Companies Act 2013. It should be updated to make sure that the term "retaliatory action" or "victimisation" refers to termination, demotion, suspension, threat, harassment, reduction in compensation, denial of promotion, discriminatory work assignment, constructive dismissal and blacklisting.

Most importantly, the new law should provide a direct lawsuit for aggrieved whistleblowers in a specialized court, namely, the National Company Law Tribunal (NCLT) or also specific labour Benches. The NCLT should have clear and specific statutory powers to grant interim injunctions to prevent any acts of retaliation in the form of termination of employment till final orders are passed, to direct the employers to put the employees back to their posts immediately or in alternate equivalent posts, to order payment of double back pay with compound interest and to award punitive damages to the individual officers of the company who authorised or issued such acts of retaliation.

B. The establishment of an Independent Centralized Corporate Whistleblower Portal:

The Ministry of Corporate Affairs (MCA) with the help of SEBI should come up with a reporting entity which will be centralized, independent and external the Corporate Fraud Disclosure Office (CFDO) to address the inherent conflict of interest in ICs. The Companies Act should be amended to provide a right for internal corporate exhaustion to be waived for disclosures to be made to the CFDO by a corporate whistleblower in respect of financial fraud.

The CFDO should have a staff of forensic accountants, corporate lawyers, and investigators and be an independent, statutory clearinghouse. If the CFDO receives a disclosure, he or she would review the disclosure and determine if there is a prima facie case of corporate fraud, asset diversion or accounting manipulation. On the other hand, if the facts are found to be true, the CFDO may start its own investigations either via SFIO or SEBI or it may pass binding directions to the independent directors of the company to conduct forensic audit from outside the company with the proper regulatory supervision. Increase the separation of whistleblowers from internal pressure to suppress disclosures by promoters and from internal pressure to suppress disclosures by management. Protect whistleblowers from internal pressure to inhibit disclosure by promoters and management.

C. Protection of Student Privacy and Confidentiality-

The Companies Act should be amended to put in place strong statutory confidentiality obligations for all disclosures under Section 177 or to regulatory authorities. The law shall provide for the strict confidentiality of the identity of a whistleblower, as well as information that might lead to the identification of the whistleblower, and shall prohibit disclosure, except as required by court order during criminal proceedings, unless such confidentiality is expressly provided for in the law by written consent of the whistleblower.

In addition, statutes should provide "safe-harbor" protections for whistleblowers to prevent them from facing civil and criminal liability for supplying proprietary corporate documents or data to regulatory or judicial authorities to help expose financial crimes. The statute should specifically repeal contractual non-disclosure agreements (NDAs), trade secret covenants and employment duty restrictions that seek to prevent an employee from reporting to a state regulator the illegal conduct of the company.

D. Growth of Financial Incentive and Bounty Programs in Corporate Law-

The MCA and SEBI should follow the footsteps of SEBI which has introduced monetary bounty progra-

in the case of PIT Informant Mechanism amendments in 2019 and extend it to the corpus of corporate law. The Companies Act needs to include a system of rewards for the original whistleblower who provides information which enables action to be taken against the misappropriation of corporate assets, fraudulent financial statements or systemic violations of the regulations.

The reward should be a percentage (from 10 to 30 percent) of the monetary penalties, asset recoveries, and/or disgorgements obtained by state agencies (such as the SFIO, ED or MCA) through the disclosure. A generalized bounty model removes the risk of being a corporate discloser, thereby giving a financial reward for any company's internal discloser to challenge any corporate fraud.

VII. Conclusion

The formal recognition of whistleblowing as an integral part of corporate governance in India with the introduction of the Vigil Mechanism in the Companies Act 2013, s.177, was a significant event. But a careful examination of the law shows that a mere request to companies to set up internal vigilance systems is not enough to ward off complex fraud. Internal vigil mechanisms turn out to be more of a token compliance exercise that can be easily duped by controlling promoters and executive management, in the absence of statutory anti-retaliation provisions, independent external reporting systems, strict legal confidentiality assurances and financial rewards.

Corporate fraud creates substantial social costs, undermining investor confidence, causing the loss of shareholder value, and robbing the economic system of its resources. The modern regulatory state should acknowledge that corporate whistleblowers are protected guardians of the integrity of the public market and acknowledge that they play a vital role in building an effective system of fraud prevention. Indian legislators need to shift from a "provider only" approach to corporate compliance to a "provider as well as protector" approach with emphasis on rights. India can guarantee that the economy grows on the principles of transparency, accountability and social justice by implementing separate legislation for protection of whistle blowers from the private sector, setting up independent regulatory disclosures systems under SEBI and MCA, and imposing strict legal responsibilities on any company that retaliates against a whistle blower.

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2. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64–70 (2005).
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4. See Philip Alston, Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals, 27 HUM. RTS. Q. 755, 762–68 (2005).
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11. See John Williamson, What Washington Means by Policy Reform, in LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7, 9–20 (John Williamson ed., 1990).
12. See Duncan Kennedy, Three Globalizations of Law and Legal Thought: 1850–2000, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 63–71 (David M. Trubek & Alvaro Santos eds., 2006).
13. See ROBERTO MANGABEIRA UNGER, FREE TRADE FALLACY: THEORETICAL PRIORITIES AND ECONOMIC DEVELOPMENT 42–50 (2007).
14. See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 88–95 (2002).
15. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 70–86 (1999); MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–32 (2011).
16. See JOHN RAWLS, A THEORY OF JUSTICE 60–75 (rev. ed. 1999).
17. See Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A; Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6.
18. See Michael M. Cernea, Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement, 35 ECON. & POL. WKLY. 3659, 3660–63 (2000).
19. See Public Interest Disclosure Act 1998, c. 23, § 1 (UK).
20. See The Whistle Blowers Protection Act, 2011, No. 17, Acts of Parliament, 2014 (India).