



**SHAREHOLDER ACTIVISM & WHISTLE BLOWER PROTECTION: GOVERNANCE ISSUES IN PUBLIC
COMPANIES IN INDIA**

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ABSTRACT

The article reveals that the current state of whistle blower protection and the nature of shareholder activism in India. The law against whistle blower lacks uniformity and leaves the private sector employee exposed. It discusses the need to standardize the protections granted to both public and private sector whistle blowers through comprehensive legislation. It further suggests that in addition to legislation, organizational policy on whistle blowing is needed. The article also argues about the role of shareholder activism in organizational governance. This article suggests activists may recoup expenses through informed trading of target firms' stock when stocks are liquid. We show that stock liquidity increases the probability of activism but does less so for potentially overvalued firms. We also document that activists accumulate more stocks in targets when stock is more liquid.

Key Words: Shareholder activism, whistle blower, corporate governance, employee law, stock price.

INTRODUCTION

The following bodies are the main actors in Corporate Governance. 1) The Chief Executive Officer, i.e. the top person in the organization & the top management of the organization 2) The board of directors 3) The shareholders the other actors who influence governance in corporations or firms are the employees, suppliers, customers, creditors and the community i.e. all the stake holders for the organization.

The reason there has been an increased emphasis on Corporate Governance is because of the often-conflicting reasons:

Table.1. Stakeholders and Performance Expectation

Sl. No.	Stakeholder	Performance Expectations
1.	Investor	Expects high dividend and capital appreciation in the organization.
2.	Lender	Expects timely repayment of loan and interest
3.	Supplier	Expects fair terms and timely payments
4.	Employee	Expects good working environment, fair remuneration and security
5.	Customer	Expects Quality product & services at fair price (value for money)
6.	Government	Expects the company to partner in nation building by paying taxes or directly spending on social projects

Research has shown that good corporate governance can lead to improved share price performance. There is evidence that there is an enormous potential for superior performance by companies, which have got good corporate governance mechanism and the greatest benefit is in developing companies. Studies have indicated that investors are keener to invest in a better-governed company. Corporate Governance can be a very powerful tool for development especially in country like India. The following issues are important for good Corporate Governance:

- The rights and obligation of shareholders
- Equitable treatment of all stakeholders
- The role of all stakeholders clearly defined and the linkage for corporate governance established.
- Transparency, disclosure of information and audit
- The role of board of directors clearly defined.
- The role of non-executive members of the board clearly defined.
- Executive management and compensation and performance clearly defined.

The various issues that companies could possibly face are:

- Monitoring the Role/effectiveness of the Board of Directors
- Remuneration of the Board Members and other employees in the company
- Responsibilities and accountability for Audit Committees financial reporting process, monitoring the choice of accounting policies and principles, monitoring internal control process and policy decisions for hiring and performance of the external auditors
- Issues and concerns of Government Regulations
- Understand the strategic issues of the competition

- Management labor market and concerns of control mechanisms

Implemented Measures based on recommendations of various committees’:

1) The mandatory recommendations of the Birla Committee (1999) are:

- Applies to all listed companies.
- Composition of Board of Directors: - Optimum combination of Executive and Non-Executive Directors
- Audit Committee: - With three independent Directors with one having financial and Accounting knowledge
- Issues pertaining to having a remuneration committee to investigate the remuneration of the Chairman, Managing Director (Chief Executive Officer) Board Members & other executive and employees of the organization.
- Board Procedures: At least 4 meetings of the Board in a year with maximum gap of 4 months between two meetings. The meetings should review operational plans, capital budgets, quarterly results, and minutes of committee’s meetings.
- A Director shall not be member of more than 10 committees and shall not act as chairman of more than 5 committees across all companies.
- Management discussion and Analysis report covering industry structure, opportunities, threats, risks, outlook, and internal control system.
- Procedure & mechanisms for information sharing with shareholders.

2) Non-Mandatory Recommendations of Birla-Committee:

- The issues pertaining to:
- Role of Chairman, the Managing Director or the CEO
- Remuneration Committee of the Board
- Shareholders right for receiving half yearly Financial Performance
- Sale of whole or substantial part of the undertaking
- Corporate restructuring
- Venturing into new Business

3) Implementation of Recommendations of Birla Committee passed by the Indian Parliament.

- 4) By introduction of clauses 49 in the listing agreement with stock exchange. Provisions of clause – 49 are:**
- Composition of Board-in case of full time Chairman, 50% Non-Executive Directors and 50% Executive Directors.

- Constituting of Audit Committee – with 3 independent directors with Chairman having sound Financial Background, Finance Directors and internal Audit head to be special invitees and minimum of 3 meetings to be convened.
- Responsible for review of financial performance on half yearly/ annually basis/ appointment / removal / remuneration of auditors, review of internal control systems and its adequacy.
- Remuneration of Directors: - Remuneration of nonexecutive Directors to be decided by the board. Details of remuneration package, stock options, performance incentives of Directors to be disclosed.
- Board Procedures: - At least 4 meetings in a year. Director not to be member of more than 10 committees and chairman of more than 5 committees across all companies.

CHANGES BROUGHT ABOUT BY THE COMPANIES ACT 2013

The separation between the posts of the Managing Director & Chairman to ensure independent and efficient decision making. Nomination committee to be chaired by independent director and formed of effective mix of directors for the purpose of screening and appointing non-executive directors (including independent) and fixing their term of appointment. Such procedure should to be disclosed in the annual report. Limit to directorship of any Director to include public limited and subsidiaries of public companies. For an executive director, maximum no. of companies wherein he can serve as non-executive director should be restricted to seven. Specifying performance benchmark for deciding remuneration of directors. Remuneration policy should be laid for board specifying proper mix of fixed and flexible pay-out. Performance related incentive to be specifically emphasized for executive directors. Specific policy bearing fixed and flexible component (in form of share of net profit/ESOP) to be specified for remuneration of non-executive directors. Minimum lock in period after his exit from the Board to be fixed. In case of remuneration of Independent Directors, payment should not be made in the form of stock options or profit linked commission, which may hamper their independence. Remuneration committee to decide the Directors' pay-outs. This consists of at least one independent director to determine remuneration packages of all executive directors. The basis of this committee is to determine the principle, basis and rationale behind remuneration.

SHAREHOLDER ACTIVISM

Activism refers to a range of activities by one or more of publicly traded corporations shareholders that are intended to result in some change in the corporation. Shareholder activism at best can be split up across 4 verticals based on the level of aggression shown by the investors, these are: Hedge fund activism – seeks a significant change to the company's strategy, financial structure, management or board. Vote No campaigns – A lot of companies such as "ingovern" have entered

this space of proxy advisory to facilitate knowledgeable voting. Say on Pay – which was largely triggered by Dodd-Frank’s “say on pay” advisory vote.

The 1980s prominently saw a rise in shareholder activism with the likes of Carl Icahn, Nelson Peltz among many others. As time passed however activist shareholders gained the notorious nickname of “corporate raiders” for their insistence on breaking up companies for short term benefits. In spite of its potential pitfalls, Shareholder activism is considered as a one of the ways of making the management adhere to its primary motto of maximizing shareholder equity. The significance can be understood from the fact that there were 343 activist campaigns in the U.S in 2014, an exponential rise since 2008, signaling the consumer passivism is a passé. The primary strategies employed in Shareholder activism are as follows:

- Talking to the company & negotiating a consensus.
- Proxy wars through lobbying
- Media Campaigns which have become increasingly the most preferred way of dissent to bring about change.

“Vote no” campaigns are ones where investors urge shareholders to with-hold their votes from one or more of the board-nominated director candidates. However, these campaigns are rarely successful in forcing an involuntary ouster of a director, because at most companies this would require support from a majority of outstanding shares – not just a majority of the votes cast at the meeting, which is a much lower threshold.

“Shareholder Proposal” – The goal of these investors is usually to encourage one of the 4 types of change namely:

A change to the board’s governance policies or practices or change to board composition.

A change to company’s executive compensation plans

A change to the company’s oversight of certain functions (E.g. Audit, risk management etc.)

A change to the company’s behavior as a corporate citizen (E.g. Political spending or lobbying, environmental practices, labor practices etc.)

Given below is the rise in the “Shareholder proposal” way as a means of activism:



Process used by Shareholder Activists to identify target companies:

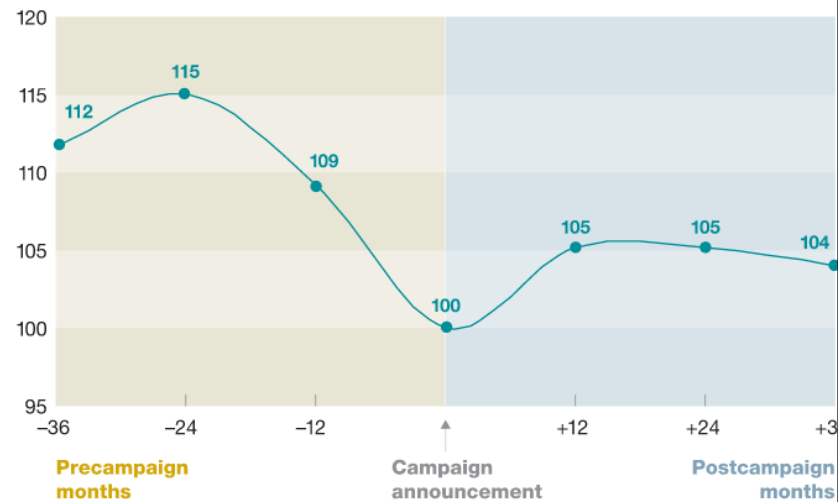
The company has a low market value relative to book value, but is profitable, generally has a well-regarded brand, and has sound operating cash flows and return on assets. Alternatively, the company’s cash reserves exceed both its own historic norms and those of its peers. This is a risk particularly when the market is unclear about the company’s rationale for the large reserve. For multi business companies, activists are also alert for one or more of the company’s business lines or sectors that are significantly underperforming in its market. Institutional investors own the vast majority of the company’s outstanding voting stock. The company’s board composition does not meet all of today’s “best practice” expectations. For example, activists know that other investors may be more likely to support their efforts when the board is perceived as being “stale”—that is, the board has had few new directors over the past three to five years, and most of the existing directors have served for very long periods. Companies that have been repeatedly targeted by non-hedge fund activists are also attractive to some hedge funds that are alert to the cumulative impact of shareholder dis-satisfaction.

EFFECTS OF SHAREHOLDER ACTIVISM

A McKinsey study actually shows the positive correlation between shareholder activism and a sustained increase in shareholder returns, as can be seen below:

Activist campaigns, on average, generate a sustained increase in shareholder returns.

Excess TRS¹ performance of activist campaigns, at companies with annual revenues of >\$1 billion, 2001–present²; index = 100 = day of campaign announcement



¹Total returns to shareholders relative to industry average.

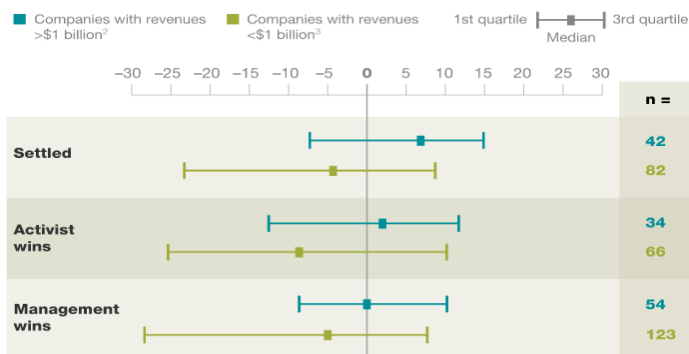
²n = 67. For purposes of this chart, we chose a more conservative sample that includes campaigns at companies with annual revenues of >\$1 billion for which historical 6-year TRS data are available. The trend is similar for a broader set of 112 companies of all sizes.

Source: Standard & Poor's Capital IQ; Thomson Reuters Datastream; McKinsey analysis

Furthermore, it went on to show that though activists seem to be resorting to aggressive means to achieve their ends, its actually the collaborative ways that have been yielding the desired returns, as shown below:

A collaborative settled outcome tends to lead to higher shareholder returns in the 3-year time horizon.

Median 3-year excess TRS¹ based on activist success, % excess TRS



¹Total returns to shareholders. Note that the TRS calculations baseline is 1 month prior to 13D filing, and excess TRS is benchmarked to the S&P 500. A management win is defined as a withdrawn complaint or scenario where shareholders voted down the activist plan. An activist win is defined as a campaign where management (independently or through shareholder vote) met all activist demands. A settlement is defined as a campaign where management or shareholders met some but not all activist demands.

²n = 130. Sample includes all campaigns at companies with annual revenues of >\$1 billion for which data were available.

³n = 271. Sample includes all campaigns at companies with annual revenues of <\$1 billion for which data were available.

Source: Standard & Poor's Capital IQ; McKinsey analysis

Prominent Shareholder Activists

Name	Achievements
Carl Icahn	Has conducted 65 campaigns in the last 10 years resulting in 26 board seats. Companies: Opposed Dell going private & was instrumental in spin-off of Motorola mobility from Motorola solutions.
Dan Loeb	Has conducted more than 30 campaigns in the last 10 years resulting in 10 board seats. Companies: Helped oust Scott Thompson & replaced him with Marissa Meyer as the CEO of Yahoo.
Bill Ackman	Has conducted more than 20 campaigns resulting in 5 board seats in the last 10 years. Companies: Fought for strategic & management change in JC Penny.
Nelson Peltz	Has conducted more than 15 campaigns resulting in 5-8 board seats. Companies: Acquisition of Heinz by Berkshire hatchway after acquiring half the board seats in Heinz by means of a proxy war.
David Einhorn	Has conducted more than 10 campaigns in the last 10 years resulting in 5 board seats. Companies: Raised concerns about the Lehman Bros before the collapse and has recently trained its guns towards Apple for distributing free cash as dividend to shareholders.

CASE STUDIES OF SHAREHOLDER ACTIVISM IN INDIA

TATA Motors & Maruti Suzuki

Shareholders are increasingly turning vocal and have successfully resisted attempts made by promoters, which are seen as detrimental to the company, such as fixing higher remuneration for directors in the absence of adequate profits. The spotlight was firmly on shareholder activism a day

after the public shareholders of Tata Motors scuttled the move to increase the remuneration for its directors through a postal ballot.

Tata Motors, however, is not the first instance of shareholders turning down pay hike proposal of key managerial personnel. Public shareholders had blocked attempts by promoters of Seamec and ARSS Infrastructure to fix higher pay for directors and related parties. Incidentally, the move comes close on the heels of mutual funds and insurance companies opposing carmaker Maruti Suzuki's proposal to transfer the upcoming Gujarat plant to its parent Suzuki Motor Corporation. Institutional investors had also opposed the complex restructuring deal announced in July last year involving cement majors ACC and Ambuja as the parent Holcim was considered the sole beneficiary. With e-voting coming in, it has become much easier to register protests now. Industry watchdogs predict that Shareholder activism would only increase as the awareness levels start increasing.

Diageo Plc. & Vijay Mallya

In November 2014, liquor major Diageo Plc and flamboyant business tycoon Vijay Mallya got the shock of their king-sized lives. Minority shareholders of United Spirits had, actually, voted down nine special resolutions connected to its pacts with entities controlled by Mallya's UB Group. At that extraordinary general meeting (EGM) in Bengaluru on November 28, 2014, minority shareholders did something that minority shareholders seldom do. Quite aggressively, and with intent, they rejected nine out of those 12 special resolutions.

The list which got shafted out included blockbusters: a Rs 1,340 crore-loan agreement with UB Holdings (UBHL), a property purchase agreement with UBHL, advertising agreements with Watson Limited, owner of Mallya's Formula One Team and two sponsorship agreements with Mallya-owned United Racing and Bloodstock Breeders, and United Mohun Bagan Football Team. Their shock stemmed from the fact that the setback happened despite them — Diageo and UB Group — together owning about 60 per cent of USL stocks. But they could not vote on the resolutions because these were related-party transactions. And for a resolution to be approved, it requires the support of at least 75 per cent of the voting shareholders.

Statistics which support that Shareholder Activism is here to stay:

10% of companies have board sizes of either more than 16 directors or less than 7 directors

13% of companies were non-compliant with Clause 49; with <50% IDs and no Independent Chairman

17% Directors attend less than 75% of Board Meetings

8% of Independent Directors have outside directorships in more than 10 public companies

22% of IDs have served on the Board for more than 9 years

Only 45 companies had Audit Committees comprising only of IDs

11 companies have not constituted a Remuneration Committee

36 companies have had the same Auditors for >10 years

WHISTLEBLOWER PROTECTION LAWS

Whistle blowing is a form of dissent. It is defined as "an act of a man or a woman who, believing in the public interest overrides the interest of the organization he serves, publicly blows the whistle if the organization is involved in corrupt, illegal, fraudulent or harmful activity." A bill for protection of Whistleblowers was first initiated in 1993 by Mr. N. Vittal (the then Chief Vigilance Commissioner). In December 2001, Law Commission recommended that in order to eliminate corruption, a law to protect whistleblowers was essential and submitted its report on 'Public Interest Disclosure Bill' to Mr. Arun Jaitley (then Minister of Law, Justice and Public Affairs) along with the draft bill. In January 2003, the draft of Public Interest Disclosure (Protection of Informers) Bill, 2002 was circulated. The murder of Satyendra Dubey in 2003 for exposing corruption in NHAI and the subsequent public and media outrage led to the demand for the enactment of a whistleblower's bill. Following the event, in 2004, the Supreme Court directed that machinery be put in place for acting on complaints from whistleblowers till a law is enacted. Government of India notified a resolution to enable Central Vigilance Commission to receive complaints of corruption for Central Authorities in May 2004. Right to Information Act was notified in October 2005. In 2006, The Public Services Bill 2006 (Draft) stated that within six months of the commencement of the act, the government must put into place mechanisms to provide protection to whistleblowers. In 2007, the report of the Second Administrative Reforms Commission also recommended that a specific law be enacted to protect whistleblowers. India is also a signatory (not ratified) to the UN Convention against Corruption since 2005, which enjoins states to facilitate reporting of corruption by public officials and provide protection against retaliation for witnesses and experts. On August 26, 2010 Union Minister of State for Personnel, Public Grievances and Pensions Prithviraj Chavan introduced the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010, or the Whistle-blower Bill, in the Lok Sabha. Since 2010, at least 12 RTI activists have been murdered for seeking information to "promote transparency and accountability in the working of every public authority" of India. Ms. Shehla Masood, a prominent woman RTI activist of Bhopal, Madhya Pradesh was murdered on 16 August 2011. The Bill was passed in Lok Sabha on December 27, 2011 along with proposed amendments. Most recent is murder of Premnath Jha, who was shot dead in Virar area of Mumbai on 26th February, 2012. His life was the price for seeking details regarding construction projects in Vasai-Virar area. He reportedly exposed several cases of corruptions and received threats on regular

basis. IPS officer Narendra Kumar was ran over by a tractor loaded with illegally mined stones in Banmore district (Madhya Pradesh) on March 8th, 2012, for his efforts to stop mining mafia.

IMPORTANT PROVISIONS OF THE WHISTLEBLOWER ACT 2011

On May 14, 2014, Indian President Pranab Mukherjee cleared the way for the Whistleblowers Protection Act. This action represents a much-needed change from the history of delay surrounding the original bill, which was first introduced in August 2010 and then took years to pass the two Houses of Parliament—it passed in Lok Sabha on December 11, 2011 and in Rajya Sabha on February 21, 2014. The new whistleblower law is a significant achievement. Nonetheless, the law has some important limitations, and there are outstanding concerns about whether the law will be enforced effectively and foster public confidence.

The new Whistleblower Protection Law gives the Central Vigilance Commission (CVC) the task of receiving complaints, assessing public disclosure requests, and safeguarding complainants. The law further strengthens protection for whistleblowers through stronger anti-retaliation provisions: The CVC has the power to order that whistleblowers who suffered employment retaliation be restored to their prior positions. Moreover, the new law puts the burden of proof on the public official to show that any adverse action taken against a whistleblower was not retaliatory. Another key feature of the new legislation is that it ensures confidentiality and penalizes any public official that reveals a complainant's identity, without proper approval, with up to three years imprisonment and a fine of up to 50,000 rupees. Additional penalties apply to organizations and individuals that fail to comply with CVC requests for information, or that knowingly provide incomplete, incorrect, or misleading information.

There have been multiple instances of threatening, harassment and even murder of various whistleblowers. An engineer, Satyendra Dubey, was murdered in November 2003; Dubey had blown the whistle in a corruption case in the National Highways Authority of India's Golden Quadrilateral project. Two years later, an Indian Oil Corporation officer, Shanmughan Manjunath, was murdered for sealing a petrol pump that was selling adulterated fuel. A movie/Film has been made based on the said incident titled 'Manjunath' (2014). Whistle Blowers Protection Act, 2011 is an Act of the Parliament of India which provides a mechanism to investigate alleged corruption and misuse of power by public servants and also protect anyone who exposes alleged wrongdoing in government bodies, projects and offices. The wrongdoing might take the form of fraud, corruption or mismanagement. The Act was approved by the Cabinet of India as part of a drive to eliminate corruption in the country's bureaucracy and passed by the Lok Sabha on 27 December 2011. The Bill

became an Act when it was passed by the Rajya Sabha on 21 February 2014 and received the President's assent on 9 May 2014.

The Bill has 30 sections divided into 7 chapters. The first chapter along with the other terms defines 'Competent Authority', 'Disclosure' and 'Public Servant'. Interestingly, the term 'victimization' (against which the bill is supposed to safeguard) has not been defined except for an implied reference in Section 10 (1), as 'by initiation of any proceedings or otherwise' whereas, contemporary foreign legislations in U.S.A, U.K and Canada provide an extensive definition of the term. 'Disclosure' is a complaint relating to commission or an attempt to commit a criminal offence, offence under Prevention of Corruption Act, 1988 and willful misuse of power or discretion causing either demonstrable loss to government or demonstrable gain to the public servant or third party. Second chapter lays down requirements of public interest disclosure and its exceptions. 'Public interest disclosure' is any disclosure made under this act. Only specific exception is 'Special Protection Group'. No action will be taken on an anonymous complaint irrespective of the significance of the disclosure.

Third chapter prescribes the manner in which inquiry regarding disclosure will be conducted. It has given the discretion of revealing the identity of the complainant to the competent authority for the purpose of seeking comments, explanation or report from the head of concerned department or organization. But, the head of the department cannot reveal the identity of the complainant under any circumstances. Insufficient grounds for inquiry will result in closure of matter by the competent authority. Competent Authority shall also not take note of any disclosure to the extent that it seeks to reopen any issue or case already settled. It shall not entertain any disclosure regarding which inquiry has already been launched under Public Servants Inquiries Act, 1850 and Commission of Inquiry Act, 1952. The time period for making disclosure has been raised from 5 years to 7 years.

Primary reading of Section 6 (4) suggests that the act has been given an overriding effect over Official Secrets Act, 1923 which will prevent public servants from taking shelter of obligation to maintain secrecy under provisions of the said act, while providing any information or document regarding disclosure, provided that such information or document does not jeopardize the interest of the integrity and sovereignty of the country, its security, public order.

Fifth chapter lays down provisions for protection of whistleblowers against victimization due to disclosure and states that a competent authority may on receipt of application regarding victimization or its apprehension, direct concerned public authority to protect and prevent victimization. Protection is extended to complainant, public servant, witnesses and other persons rendering assistance in inquiry under section 11. It is important to note that the act distinguishes

safeguard against victimization from protection, seemingly police protection. Safeguards against victimization are available only to complainant.

Sixth chapter prescribes penalties for various offences including penalty for frivolous disclosures i.e. imprisonment up to two years, fine up to Rs. 30,000 and penalty for revealing identity of the complainant which is imprisonment up to five years and fine up to Rs. 50,000. The Competent Authority shall prepare a consolidated Annual Report of the performance of its activities and forward it to the Central Government or State Government under Section 22, chapter seven. The Act, under section 3, provides that any public servant or any other person including a non-governmental organization may make a public interest disclosure to a Competent Authority. What is important under this Act is the term “Public Interest Disclosure” which is meant to be any disclosure by a public servant or any other person including any non-governmental organization before the Competent Authority notwithstanding anything contained in the provisions of the Official Secrets Act, 1923 in Public interest. Any disclosure made under this Act shall be treated as public interest disclosure for the purposes of this Act and shall be made before the Competent Authority and the complaint shall be received by such authority as may be specified by regulations made by the Competent Authority.

The name of the Act itself makes it very clear that the purpose of this act is the protection of the persons who make public interest disclosure or have assisted in such matters from possible victimization or harassment and the Central Government has to ensure such protection. The Competent Authority has been empowered to give proper direction to the concerned authorities for the protection of complainant or witness either on an application by the complainant or based on its own information. It can also direct that the public servant who made the disclosure may be restored to his previous position. The Vigilance Commission has to protect the identity of the complainant and related documents, unless it decides against doing so, or is required by a court to do so. Furthermore, the Commission is empowered to pass interim orders to prevent any act of corruption continuing during inquiry.

If any person is being victimized or likely to be victimized on the ground that he/she had filed a complaint or made disclosure or rendered assistance in inquiry than he/she may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimized or avoid his victimization.

However, the Whistleblowers Protection Act, 2011 has neither provisions to encourage whistleblowing (financial incentives), nor deals with corporate whistleblowers; it does not extend its jurisdiction to the private sector and it does not include the definition of victimization. Further, competent authorities under the Act are very limited and right of appeal is not provided to the complainant in case he/she is not satisfied by any order of the competent authority. Appeal provisions have been provided only relating to imposition of penalty.

Actions on anonymous complaints have not been included in the ambit of the Act. The Lokpal (National level apex anti-corruption and Grievance Redress agency) which will be established under the Lokpal & Lokayuktas Act, 2013 will have no role to play in the scheme of protection of Whistleblowers. The Lokpal should also have been mentioned as a competent authority under the Act for the purpose of receiving complaints. The Act does not specify a procedure for inquiring into complaints of about acts of corruption, willful abuse of power or willful misuse of discretion or offences committed by members of the lower judiciary. The law however lacks specific criminal penalties for physical attacks on whistleblowers—and given the number of violent attacks on complainants in the past, this is not a minor concern. Second, the law does not provide civil penalties for workplace retaliation. Thus, protection for whistleblowers under the bill is still inadequate. Moreover, whereas other countries like the United States, the United Kingdom and Canada define “disclosure” and “victimization” broadly for purposes of their respective whistleblower protection laws; India’s law does not define “victimization” and has a relatively narrow definition for “disclosure.” This again limits the effectiveness of any complainant safeguards.

RECOMMENDATION

- **Class Shares:** One of the biggest problems staring the tenets of corporate governance is the concept of Differential voting right shares or in an upgraded format, the consent shares. The DVR concept can be clearly understood by the fact that in spite of Mr. Zuckerberg not owning a considerable stake in Facebook, he still calls the shots because of his “ Gold ” shares which give him higher voting rights. The issue of Consent shares also came in light during the Alibaba IPO and during funding round of Alibaba in Snapdeal, where Alibaba had asked for consent rights i.e. whatever is decided Alibaba would retain the veto to decide which direction the company takes, however this was not accepted. The principle of 1 share 1 vote stands diluted in this context, what started as a ways to promote institutional participation has actually lead to its misuse. Therefore, there has to an amendment to a law which states how much of consent or class shares an investor can hold and if any in what circumstances he can exercise it and in which cases not.

- Enforcement of laws needs to be proper with stringent action being taken against rule breakers especially in cases where companies do not meet the requirements of the number of directors.
- With increasingly directors attending less & less meetings, the premise of corporate governance stands defeated, therefore a law has to be passed stipulating the minimum number of meetings that have been attended by the Directors.
- Constitution of a Remuneration Committee & Audit Committee comprising of majority independent directors should be looked into as a possibility to bring an additional layer of surety.
- The definition of victimization should be set in concrete with no room for interpretation just like in the U.S or U.K.
- The law however leaves one gap i.e. with regards to the anonymous reporting; therefore there have to be provisions that are included so as to look into this as well.
- The glaring gap in the current Whistle-blower protection act is the act does not cover private companies; therefore the law should be amended in such a way so as to let it encompass the private companies as well.
- In addition to the above, the recommendations of the ARC should be taken into consideration and Corporate Whistle-blowers also should be given cover, which the current act lacks.
- The inclusion of financial & legal incentives / penalties would enable the functioning of the act in both letter and spirit.
- The application of E-voting has only been made mandatory for large public companies with the others being given time, however this process has to be sped up to prevent shareholder apathy and encourage shareholders to have a say in the affairs of the company.
- Section 151 of the Company's Act 2013 calls for the appointment of an independent director to be elected by the minority shareholders, though it has been made mandatory, Companies seem to be using the loophole with regard to the definition of a minority investor.
- SEBI also has recently made it mandatory for Mutual Funds to put in public domain on a quarterly basis the decisions taken by them in the Board meetings, this rule should also be extended to FIs and other investment vehicles that investors use to aggregate their investments.
- The Vigilance Commission which has the power to hear pleas has no real power but advisory power making it a toothless tiger, therefore an amendment should be made so as to make the vigilance commission function impartially. (PRS India)
- The Whistle-blower protection also implicitly seeks to safeguard Ministers from its ambit as they

do not come under state or central government employees, therefore Ministers also should be included within the ambit of Whistle-blower act.

- Clause 4 - The Competent Authority may invite comments and opinion from the Head of the Department/ Board/ Corporation to which the disclosure of wrong-doing pertains and take this into consideration while making a determination about further action.
- The Whistle-blower act in its current form is silent on the mode of inquiry i.e. closed doors or open and this has to be viewed in light of no mechanisms being mandatorily put in place to address these i.e. lack of internal mechanisms in companies to address these issues.
- Obtaining the consent of the whistleblower should be made mandatory like in other countries. The law in India however allows the competent authority to declare the name to the Head of the department or the concerned authority while seeking opinion / comments.

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