

CITIZENS WHISTLE BLOWERS FORUM

a forum against corruption

Chairman

Justice A.P. Shah

(FORMER CHIEF JUSTICE DELHI HIGH COURT)

Other Founder Members

Professor Aruna Roy

(FORMER IAS & SOCIAL ACTIVIST)

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Mr. Prashant Bhushan

(SENIOR ADVOCATE & PIL ACTIVIST)

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(FORMER CHIEF INFORMATION COMMISSIONER)

Shri Narendra Modi
Hon'ble Prime Minister of India,
 South Block,
 Raisina Hill,
New Delhi – 110 001.



Date: July 30, 2018

Hon'ble Prime Minister,

Sub: Ill-conceived legislations and poor implementation which is encouraging Corruption

I am writing to you on behalf of the Citizens Whistle Blowers Forum (CWBF): an organization formed to help fight corruption. The scope of its Charter includes, amongst others, to co-ordinate and liaise with relevant authorities for enactment of effective laws and legislations and for their effective implementation.

Under your dynamic and able leadership, the government has taken several commendable initiatives to fight corruption. These include but are not limited to measures to tackle the menace of black money, tax evasion, shell companies, benami properties etc. We are however concerned that much of the good work done by the government could be un-done because of some ill-conceived amendments in various legislations. Instead of increasing transparency & accountability and making the deterrents for the wrong doers far more stiffer, an attempt is being made to dilute various legislations which could result in a spurt in corporate offences especially.

We therefore consider it our duty to bring the concerns, elaborated below, to your kind notice and are confident that necessary directions will be issued by you to ensure that the fight against corruption is not allowed to be derailed under any circumstances.

A) ISSUES RELATED TO COMPANIES ACT, 2013 (ACT)

I Proposed decriminalization of the Act

The Companies Act of 2013 (Act) promised to usher in a new era in corporate governance. It claimed to draw heavily on lessons learnt from "Satyam", the largest accounting fraud in the history of corporate India and imposed significant responsibilities on Key Managerial persons, Independent Directors and the Auditors for strict compliance with the Act. In particular, Section 447 was introduced in the Act to deal severely with cases of fraud. Violation of the same attracted imprisonment of upto ten years and fines of upto three times the amount involved in the fraud.

The past few months have seen cases like Kingfisher Airlines & United Spirits (Vijay Mallya group), Nirav Modi, Mehul Choksi, Fortis healthcare etc, coming to light. The Non Performing Assets of the Bank (NPAs) are at all time high of about 10 lakh crores, thanks largely to the open loot of public sector banks by some. To address the eroding capital base of the banks, they are now being re-capitalized with tax payer's money.

The genesis of most the above referred scams and such other corporate frauds : be it by way of funds diversion, window dressing by showing inflated turnover between related entities or by grossly over valuing stocks to avail higher credit limits from the banks, lies in the manipulation of books of accounts and blatant violations of other provisions of the Companies Act by various stakeholders: unscrupulous company managements and advisors/consultants, delinquent auditors, inefficient bankers etc.

It is true that the seeds of many of the above referred scams were sown before the deterrents incorporated in the Companies Act 2013 became effective. They were however expected to arrest any further decay of the system. At a time when new skeletons are tumbling out of the closet and the deterrents should have been made stricter and wider, the Act is ironically proposed to be decriminalized, that too with undue haste.

The Ministry of Corporate Affairs, vide its notification dated July 13, 2018, has formed a Committee to review the punishment prescribed for various offences under the Companies Act, 2013. The Committee has to give its recommendations within a very short period of 30 days. As it is, most of the offences are any way compoundable. The Committee has to evaluate if the existing compoundable offences can be treated as mere "civil offences" and if the existing non-compoundable offences can be categorized as compoundable offences. **If implemented, the Act will be severely diluted and the much**

needed deterrent of criminal punishment will be done away with. This must not be allowed to happen in the larger public interest. Instead several provisions need to be strengthened/reintroduced.

II Undesirable practice of appointment of political nominees on PSU Boards must be done away with

It is sad to see that the NDA government has shown utter callousness in dealing with the management of the PSUs. At least 10 BJP politicians/spokespersons have been nominated on the Boards of important PSUs including Hindustan Petroleum Corporation, BHEL, NALCO and Cotton Corporation of India. In particular, Mr. Sambit Patra and Ms. Shazia Ilmi have been appointed as Independent Directors on the Board of ONGC and Engineers India respectively.

The appointment of these persons on boards of PSUs does not bode well for governance. They do not possess the required skills and capabilities to effectively discharge the role of the Directors. Further, if these PSUs were to be involved in acts of malfeasance, the responsibility for the same would evidently devolve on both the PMO and the Ministry of Corporate Affairs.

III Provisions related to appointment of Directors need tightening

Section 164 of the Act lists down various disqualifications for appointment of Directors. Sub section (1)(d) read with Rule 2(1)(s) of the Companies (Specification of Definition Details) Rules, 2014 implies that the disqualification is limited to conviction by a court of any offence involving moral turpitude or for any offence under the Companies Act alone. As such, there is no bar on any person even if convicted by a court for tax evasion, money laundering etc. to become a Director of company. Surely, this could not have been the intention of the lawmakers and needs to be corrected urgently.

IV Limits on political donations must be restored

The Finance Act, 2017 had surreptitiously done away with the limits on political donations prescribed earlier under Section 182 of the Companies Act. It removed the earlier limit of 7.5 per cent of the company's average three-year net profits for political donations. The companies are no longer required to disclose the names of the parties to which political donations are made. The

said amendment has resulted in ensuring complete opacity to the detriment of the various corporate stakeholders.

Removal of the company's limit of 7.5% of the average net profit of the last three financial years not only heightens the odds of conflict of interest but will also drastically increase black money and corruption. This will also lead to the creation of shell companies and rise of benami transactions to channelize the undocumented money into the political and electoral process in India.

Corporate political funding will increase manifold as there is no limit to how much the companies can donate. Removal of the statutory ceiling of 7.5% of average profits on donation to political parties will enable even loss-making companies to make donations of any amount to political parties out of their capital or reserves at the cost of the poor shareholders.

B) Electoral Bonds, Amendments to Representation of Peoples Act, 1951, FCRA, RBI Act and the Income tax Act.

Further aggravating the problems caused by removing the ceiling on political funding under the Companies Act, the Finance Act of 2017 had introduced the use of electoral bonds which is exempt from disclosure under the Representation of Peoples Act, 1951. This opens the doors for unchecked, unknown funding to political parties. When the then Finance Minister Shri Arun Jaitley had announced his intention to clean up political funding in his Budget speech in 2017, the country was optimistic about this government planning to tackle one of the most entrenched sources of corruption and illicit money in the country. Instead, what eventually emerged was a scheme that actually made political funding less transparent than before. With electoral bonds, the public will have no clue from where the money came and how much went to each political party.

The Finance Act, 2016 had also amended the Foreign Contribution Regulation Act (FCRA), 2010, to allow foreign companies with subsidiaries in India to fund political parties in India, thereby effectively exposing the Indian politics and democracy to international lobbyists who may want to further their agenda. These Amendments pose a serious danger to the autonomy of the country and are bound to adversely affect national security, electoral transparency, encourage corrupt practices in politics and have made the unholy nexus between politics and corporate houses more opaque and treacherous and is bound to be misused by special interest groups and corporate lobbyists.

Amendments made to the Reserve Bank of India Act, 1934, and Income Tax Act, 1961 to facilitate such insidious purposes have further affected transparency in political funding. The consequence of the amendments is that now the annual contribution reports of political parties to be furnished to the Election Commission of India need not mention names and addresses of those contributing by way of electoral bonds. This will have a major implication on transparency in political funding.

The above ill conceived legislations also open up the possibility of companies being brought into existence by unscrupulous elements primarily for routing funds to political parties through anonymous and opaque instruments like electoral bonds. This has increased the opacity of funding of political parties and the danger of quid pro quo for benefits passed on to such companies or their group companies by the elected government.

C) WHISTLEBLOWERS ACT, RTI ACT, LOKPAL...

The **Whistleblowers Protection (WBP) Act** which was passed in February 2014, has not been operationalised till date even as scores of whistleblowers continue to be attacked and killed for exposing corruption. Instead of promulgating rules to operationalise the law, the government had moved an amendment bill in Parliament in May 2015 which, amongst others, sought to severely dilute the Act by removing safeguards available to whistleblowers from prosecution under the Official Secrets Act.

Multiple attempts have been made to weaken the **Right to Information Act**. Recent media reports indicate that the proposed amendments seek, without any public consultation, to fundamentally compromise the independence and standing of information commissions by empowering the central and state governments to decide salaries and tenure of information commissioners. Earlier, Rule 12 of proposed RTI Rules of 2017 suggested that *the proceedings pending before the Commission shall abate on the death of the appellant*. Given the Indian reality where RTI applicants are often harassed, threatened, physically attacked or even killed, such provisions provide a perverse incentive to vested interests to silence the information seeker through coercion or physical harm.

Lokpal and Lokayuktas Act: Though the current government came to power on the plank of anti-corruption, it has failed to operationalise the Lokpal & Lokayuktas Act. Lokpal and Lokayuktas Act, 2013 was in itself a far cry from the Jan Lokpal Bill proposed by India Against Corruption. Four years after

the Lokpal Act was passed by Parliament, no Lokpal has been appointed. The 2013 Act required both the public servants and their families to declare their assets and sources of income periodically. NDA government diluted this in 2016 to exempt public servants' families from disclosing their assets and sources of income. The amendment militates against the very purpose of the Lokpal, which was established to receive and inquire into complaints related to offences punishable under the Prevention of Corruption Act (PCA).

D) LAWS ARE AS GOOD AS THEIR IMPLEMENTATION

It is appreciated that this government is passing new laws such as Fugitive Economic Offenders Bill etc. to strengthen its hands in the fight against corruption. However, the effective implementation of even the existing laws leaves much to be desired and dilutes their impact.

Satyam, the biggest accounting scandal till date in the history of corporate India came to light on January 7, 2009. Thousands of investors lost their life long savings. LIC alone suffered loss of Rs.950 crores.

The Serious Frauds and Investigation office, an arm of MCA, submitted its report in April 2009 confirming: (1) falsification of accounts and (2) complicity of the auditors, Price Waterhouse, in the fraud. The United States Securities and Exchange Commission (SEC) and Public Company Accounting Oversight Board (PCAOB) vide their orders dated April 5, 2011 also found Price Waterhouse guilty and collectively fined them US dollars 7.5 million (Rs.38 crores app).

Stung by the scale and its impact, the Hon'ble Supreme Court had ordered the trial to be completed within two years. For various reasons, the Special CBI Court finally gave its verdict on April 9, 2015; almost 6 years after the fraud came to light. It handed out 7 years jail terms to Raju and 9 other accused including the two Price Waterhouse Partners.

Barely a month later, a metropolitan Sessions Court in Hyderabad granted bail to Satyam Computers founder B Ramalinga Raju and nine others including Price Waterhouse auditors and suspended their seven-year rigorous imprisonment.

Despite such a strong verdict in its favour, the orders of the Session Court are yet to be appealed by the CBI. At a time when top bureaucrats, ministers, former chief of the Indian Air force, etc. are being hauled up in Courts, it appears that an invisible hand is protecting Price Waterhouse and Satyam management. Can there be different sets of laws for the Rich and Powerful ?

To make matters worse, Pwc which has been found embroiled in a number of scams including manipulating their own books of accounts, engaging in a "benami" transaction besides violating the FDI Policy, Chartered Accountants Act, Companies Act etc. is being given lucrative government/PSU contracts.

The above was brought to your notice earlier also vide our letters dated July 10, 2017 and October 9, 2017 but no action has been taken till date.

E) SUMMARY

Corporate scams and debilitated legislations can cripple the economy and have deep and far reaching impact on the economic, moral and ethical spine of the country. **They can even jeopardize national security.**

It must also be appreciated that reform measures cannot be approached in a fragmented manner but need a holistic approach. It is high time that the government should look at all the relevant issues in an integrated manner and adopt reforms that not only subserve the interests of some chosen corporates, individuals and political parties but also the interests of the public at large by promoting transparency and accountability which in turn will serve the dual purpose of contributing significantly to the growth of the economy and maintenance of Law and Order thereby freeing the government to concentrate on Governance.

We therefore request you to issue urgent instructions with respect to the following:

- 1) Ministry of Corporate Affairs should put on hold the proposed hasty decriminalization of the Companies Act, 2013 and instead hold extensive public deliberations, including consideration of the recommendations made by us, for further strengthening of the Act in the larger public interest.
- 2) CBI should immediately file appeal against the orders of the Sessions Court in the Satyam scam to restore public confidence that no one is above the Rule of Law.
- 3) Immediate appointment of Lokpal and operationalization of the Whistle Blowers Act.

- 4) Immediate termination of all the existing Government/PSU contracts awarded to Pwc, imposing ban on all fresh contracts and for initiation of criminal action against them for their involvement in various scams as detailed in our letters of July 10, 2017 and October 9, 2017.

In conclusion, we wish to point out that any campaign against corruption can become effective only when there is a basic change in the mindset of the government in favour of greater transparency and accountability through civil society participation at all levels of decision taking, devolution of authority and decentralisation of governance, more importantly, strengthening of the democratic processes in every sphere of activity of the government. Bits and pieces of legislation without an overarching objective, we are afraid, will not deliver.

Thanking you,

Yours truly,

On behalf of the CITIZENS WHISTLE BLOWERS FORUM

A. P. Shah
Justice A. P. Shah (Retd.)
Chairman



Copies:

- 1) Shri Arun Jaitley, Hon'ble Minister for Corporate Affairs, Shastri Bhawan, New Delhi - 110 001.
- 2) Shri Alok Verma, Director, Central Bureau of Investigations, Plot No. 5-B, CGO Complex, Lodhi Road, J.N. Stadium Marg, New Delhi - 110 003

