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WHISTLEBLOWING AS AN ELEMENT OF CORPORATE GOVERNANCE IN MAURITIUS; A COMPARATIVE STUDY

Ambareen Beebeejaun[1]

[1](*Lecturer, Department of Law, Faculty of Law and Management, University of Mauritius Reduit, Mauritius)*

Abstract: *Whistleblowing is simply speaking out the malpractices. It is an action that helps in exposing an entity's illegal activities to the public and even signals employers about irregularities that occur in the workplace with the view of rectifying those mistakes in advance. Being an element of good corporate governance, whistleblowing is regarded as a mechanism and process established by organisations to monitor business activities and to take decisions for implementing business objectives effectively and successfully. The purpose of this research paper is to analyse the effectiveness and completeness of the laws relating to whistleblowing in Mauritius. For this purpose, a comparative study is conducted on the related laws of other countries such as the UK and the US against the corresponding provisions of Mauritius laws. Thereafter, recommendations will be suggested on how to improve the existing legal framework on whistleblowing in Mauritius for the purpose of benefitting all stakeholders concerned.*

Keywords: Whistleblowing in Mauritius, Corporate Governance and Whistleblowing, Mauritius and reporting malpractices, corporate governance in Mauritius
Research Area: Corporate Governance
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1. INTRODUCTION

Over the past few years, the term corporate governance has received unprecedented attention by scholars, practitioners, academics, economists and even decision-makers. This is mainly attributed to the various corporate scandals and financial catastrophes that have occurred in this 19th century ranging from Enrol, WorldCom, Lehman Brothers, Barings Bank scandals amongst others. Consequently, it is commonly agreed that by establishing a system or mechanism that regulates the cohesion of an organisation's ownership and management functioning, these corporate failures may be prevented or the damages may be reduced if not completely eliminated.

In fact, corporate governance is described as the set of structures and behaviours by which a company or other entity is directed and managed (Cadbury Report, 1992). This definition is further expanded by the Organisation for Economic Cooperation and Development (OECD, 2019) which states that corporate governance is the structure through which the objectives of the company are set and the means of attaining those objectives and monitoring performance are determined. In addition, the OECD highlights that corporate governance needs to provide incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders, and also need to facilitate effective monitoring. In other words, it is widely acknowledged that good corporate governance can improve economic efficiency and as such, all organisations are encouraged to adopt corporate governance and even the laws of some countries have made it compulsory for some types of entities to implement a framework of corporate governance failure of which constitutes an offence.

Despite the implementation of a corporate governance framework, the positive results that should accrue to an organisation from good corporate governance cannot be guaranteed if an effective monitoring system is not in place. This principle concurs with the view of Foucalt (2017) who states that "our society is not one of spectacle but of surveillance". This proverb transforms into a maxim that enables the state authority to regulate the disorder of both individuals and corporate bodies in the respective countries. Since surveillance cannot self-effectuate, it requires some mechanisms and systems to make it active. Consequently, corporate governance has come up with the principle of monitoring and closely associated with surveillance, is the whistleblowing element. Whistleblowing is an act whereby an individual (known as the whistleblower) reports an unlawful activity or rather wrongdoing within a company to a particular authority or the general public (Seeburun, 2019). Indeed, Macey (2017) believes that whistleblowers are now an integral component of the recently regulated system of corporate governance that is supposed to result in better monitoring and control of managerial misconduct in large publicly held corporations. In other words, whistleblowing is considered as a preventive measure for major corporate disasters within the economy and it is the most effective method to detect corruption in the private and public companies (Wolf, 2014).

Being aware of the positive implications arising from the whistleblowing policy, the Mauritius Parliament has enacted various legislations that make reference to whistleblowing and give protection to whistleblowers ranging from the Code of Corporate Governance 2016, the Prevention of Corruption Act 2002, the Good Governance and Integrity Reporting Act 2015 amongst others. This research aims at assessing the accuracy and completeness of the legal provisions on whistleblowing in Mauritius with a view to analyse the shortcomings in the laws and to seek ways to address these loopholes. For this purpose, the research methodology comprises of a comparative study which is conducted on the laws of other countries such as the UK and the US against the corresponding laws of Mauritius. The UK and the US have been selected because they are considered to be countries that have extensive and substantive legislation on corporate governance (PwC, 2017).

This first part of the research paper has introduced the concept of whistleblowing, the research objectives and research methods have also been set out. The other parts of the paper are structured as follows: Part 2 emphasizes on the literature review and on the laws of Mauritius, Part 3 elaborates on the laws of the UK and the US, Part 4 is the comparative study and recommendations section, and finally, Part 5 concludes the research.

2. LITERATURE REVIEW

This part of the paper will emphasise on whistleblowing as an element of corporate governance and will also discuss the extent to which whistleblowing is encouraged in practice. For this purpose, existing studies on this topic are referred to in this section. Thereafter, the various pieces of legislation on whistleblowing in Mauritius will be assessed.

(a) Whistleblowing and Whistlebowers

The concept of whistleblowing originates from the 90s whereby enforcement officials used to "blow the whistle" so as to alert police officers of a particular danger or rather a crime being committed. Whistleblowing has gained much attention from the Enron's case whereby Sherron Watkins who was an employee reported to the CEO about the flows in accounting reports which led to the dissolution of the company and this caused a dramatic change within the American economy. Whistleblowing has always been omnipresent in the corporate world in different forms even when many countries had not yet recognised the concept. In fact, the term "whistleblowing" does not have a universally specific definition thus this allows a

choice to people to have either a short definition or a more circumstantial definition which means a fully-fledged definition. For instance, Ralph Nader was one of the first researchers to have defined whistleblowing in 1972 as "an act of a man and a woman who believes in the public interest overrides the interest of the organisation he serves and publicly blows the whistle if the organisation is involved in corrupt, illegal, fraudulent and harmful activities". The Bowers definition provides for the "act of an individual worker or a group of workers raising concern so as to prevent possible malpractice or dangers to the public" (Bowers et al., 1999). Another definition provided by Glazer and Glazer (1989) highlights that the aim of whistleblowing is to avoid harming others rather than the whistleblower himself who tries first to find a solution within the organisation itself and who has evidence to prove to the appropriate entity the act concerned.

Despite all these definitions, the most commonly referred definition by academic scholars is the one by Miceli and Near (1985) who defined whistleblowing as the "disclosure by organization members (former or current) of the illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action". The two researchers also made an observation of whistleblowing not only as one particular step in the process but rather as a "process with many sub processes".

With regards to the term whistleblowers, they are the person who reports against any unlawful acts. It is quite complex to classify someone as a whistleblower as this depends on several aspects. Statements concerning personal characteristics are normally misleading (Alford, 2002). For instance, the personalities of the whistleblowers are either seen as ingenuous within the company or "described to possess locus of control within the organizations upon dispositional variables as their values and beliefs" (Brower and Yang, 2004). In other words, two categories of whistleblowers exist, one that is presumed to be noble and altruistic and the second one, are rather selfish and avaricious. On one hand, studies show that whistleblowers are rebellious people, on the other hand, they are perceived to be "patriotic and more traditional" (Jos et al., 1989). The reseacher Jos et al. (1989) analysed the whistleblowers and found that most of the whistleblowers are well-established persons who sit in a powerful position and it is that power that allowed them to make disclosures.

It is important to note that the intentions of each whistleblower are quite different from each other. When it comes to what pushes someone to blow the whistle, reference should be made to the three categories provided by Heyes (2015) which are "conscience cleaning", "welfarist motives" and the "desire to punish". The researcher highlights that, firstly the "conscience cleaning" whistleblowers make disclosure with a view to clean his conscience in the sense that he prefers voicing out rather than living with the burden of not disclosing an unlawful act which has caused prejudice to many people. Secondly, the "welfarist motives" has a "cost-benefit element" whereby the whistleblower believes that the report will do more good than harm. And thirdly, the "desire to punish" category implies that the whistleblower wants to punish the ones in the higher level for they have committed an illegal and unlawful act. On one point of view, it can be observed that these 3 motives do not overlap, however, researches and studies have not been able to prove the relationship between these 3 motives (Miceli and Near, 1992). Thus it is quite difficult to figure out whether the motives are the actual decision to go for whistleblowing.

(b) The case for and Against Whistleblowing

Yeh (2017) argues that whistleblowing employees have a critical function to disclose corporate misbehaviour. In this respect, these employees are likely to report on any

irregularities concerning the company in any of the following three ways, firstly disclosure is made to the public, secondly, reporting to traditional corporate monitors rather than to companies' executives or managers and thirdly, disclose to in-house consulting or supervising departments. Yet, the most typical way to report irregularities is through disclosure to the board of directors, a method which has proved its effectiveness. For example, in the corporate scandal involving WorldCom, it was the vice president of internal auditing, Mrs Cooper who disclosed to the board false accounting treatment. Thereafter, this has led to WorldCom disclosing to the general public the manoeuvre of the company's chief financial officer to manipulate accounts. Due to Mrs Cooper's initiative, the chief executive officer's fraudulent actions did not succeed.

Furthermore, some scholars such as Thurlow (1806) advocate that whistleblowing is an indispensable tool for ensuring good corporate governance practices by questioning whether "a corporation has a conscience when it has no soul to be damned and nobody to be kicked?". This quote suggests that companies have neither bodies to be punished nor souls to be condemned and hence they do as they like. That is why, numerous countries such as the UK and the US suggest that an effective policy of whistleblowing be established at the level of the corporation, one which would encourage employees to report inconsistencies or irregularities, and which would also protect the interests of the whistleblower.

In addition, whistleblowing is often perceived to resolve the problem of information asymmetry that is, by making use of corporate employees as the monitor. This is because employees have better information advantage than traditional monitoring actors since employees have more knowledge of corporate business and are more sensitive to ordinary activities occurring in companies (Alexander, 2004). Accordingly, it can be deduced that employees are the supervisors of mismanagement and any illegal actions committed by management. In fact, research conducted by Yeh (2017) reveals that nearly one-third of economic crimes and fraudulent conduct occurring in companies were disclosed by corporate employees. Nowadays, employees are regarded as more than simple agents of companies who have to be loyal to their employers, but they are deemed to act for the best interest of the public. Also, they are required to report wrongdoings in a manner that would decrease damage to the shareholders and the public in general. Hence, developing a proper policy of whistleblowing becomes imperative to reduce or eliminate wrongful behaviour or misconduct.

It is also believed that whistleblowing helps in reducing organisational waste and mismanagement (Heyes, 2015). This is because by disclosing wrongdoers' actions to upper management, organisations are able to take the necessary steps to reduce losses in terms of either tangible expenses or intangible attritions. While tangible expenses refer to legal costs and expenditure to reduce the damage once occurred, intangible attritions comprise of the time taken to investigate in irregularities, employees assigned to conduct the investigation and any disruption in working conditions. Hence, as a preventive measure, whistleblowing can prompt entities to remedy the situation and even correct wrongdoings rapidly such that these expenses do not have to be incurred.

Additionally, Yeh (2017) believes that an effective policy of whistleblowing within an organisation boosts employees' morale. The researcher states that when employees are aware that they are encouraged to report irregularities or wrongdoings, they feel honoured to take steps to improve the integrity of the company and promote internal corporate governance. Similarly, a research conducted by Zalkind (1987) reveals that employees who are encouraged to report irregularities are more satisfied with their working environments than those who detect illegal activities but choose to turn a blind eye. In this way, whistleblowing

is regarded as an effective mechanism that brings greater cohesion for employees in business affairs and the workplace and therefore, enhances the positive attitude of employees.

Indeed, without proper reporting of wrongdoings and irregularities, organisations may find themselves in legal issues and thereby facing an increase in legal costs. For instance, failure to abide by the legal requirement to file financial statements with the appropriate regulatory bodies will entail fines and penalties. By reporting lateness to file these documents, whistleblowers can give the respective entities a warning in advance about the likelihood of facing legal actions, and as such, these organisations may rectify their mistakes accordingly and without being known by outsiders.

Moreover, some international organisations such as Transparency International use whistleblowing as a means to assess the efficiency of the local anti-corruption system. In this respect, whistleblowing policies are encouraged to be established in entities such that the reputation of the country concerned is enhanced or preserved (Calland and Dehn, 2004).

Nevertheless, the whistleblowing mechanism is not free from inconvenience. Employees often encounter some problems when disclosing their knowledge or reporting irregularities and wrongdoings. Primarily, employees owe fiduciary duties to their employers, which implies that they have the duty to be loyal, to obey and to keep the information confidential during the term of their employment. Since the duty of loyalty comprises of an obligation to do everything that benefits employers and organisations (Belson, 2015), whistleblowing the corporation's acts and omissions may result in the breach of this particular duty. This issue is further accentuated if there are no adequate laws in the relevant country that obliges an employee to disclose wrongdoings or irregularities during the course of an inquiry or investigation. Eventually, breach of fiduciary duties may entail dismissal or even monetary damages on the employees.

Alternatively, whistleblowing may have devastating effects on the career path of employees (Lois, 1993). The latter may face retaliation from employers such as a denial of promotion prospects or other work benefits, co-workers' harassment or other means of discrimination. Despite these issues, whistleblowing employees may feel alienated by colleagues and suffer from isolation therein. A frustrating workplace may, in turn, backfire on the employee's personal life as Wehane (1992) observed. These personal problems include a huge amount of legal costs that employees spend against employer's retaliatory actions and possibly, the expenditure involved in the breakdown of marriages. Additionally, whistleblowing employees have difficulty to be engaged in other companies who fear the consequences of employing blacklisted workers and potential breach of duty of loyalty towards them due to such person's previous disloyal records (Lois, 1993).

Apart from negative effects on the whistleblowing employees, some scholars argue that whistleblowing also has an adverse impact on society at large. Basically, since it is public nature to be influenced by the behaviour of whistleblowers, upon disclosing an organisation's wrongdoings, the public will be inclined to inquire on these disclosures through various means such as the media, private detectives, law practitioners or consultants. In this respect, the organisational fraud may bring chaos to society and will exhaust social resources which can indirectly influence people's lives. For instance, in Mauritius, back in the year 2015, the BAI/Brammer Bank Scandal occurred which relates to an insurance company in which numerous people had subscribed insurance policies and invested their monies in the Brammer Bank. It was notified to the public that both BAI and Brammer Bank were being operated as ponzi schemes which led to the winding up and liquidation of both entities. The effects of this external whistleblowing are still being experienced nowadays due

to the loss of jobs of several people, loss of investment by the public, loss of confidence in the financial and banking sector of Mauritius, bad repute of the economy of Mauritius and some people even suffered from poor health conditions for fear of losing all their monies saved during a lifetime. Despite these expected negative effects, the government of Mauritius went on disclosing these organisation's wrongdoings to the public in the belief that these disclosures will prevent social members from being fooled in the future by organisational's tricks (Uppiah, 2018).

(c) Mauritius Laws on Whistleblowing

Mauritius does not have any particular legislation for whistleblowers. However, there are some other laws which are illustrated below which deals with whistleblowing issues.

(i) The Constitution of Mauritius

The Constitution is the Supreme Law of Mauritius, guarantees the fundamental rights and freedoms of an individual which is illustrated by its Section 3. Along with within these fundamental rights, there is a provision regarding 'Protection of Freedom of Expression' under the Section 12 of the Constitution which is also protected under the Article 10 of the European Convention on Human Rights. Since Mauritius is a democratic state, Section 12 of the Constitution empowers an individual with the capability to have an opinion.

Indeed, if somebody blows the whistle, it is normal that he would want to disclose information against malpractice without any prejudice. Considering the fact that the whistleblower is a holder of the fundamental rights to which he is inherently entitled to, he is more likely to be protected through the Section 12 of the Constitution which provides, "Without a person's consent, a person's freedom of expression cannot be deprived from him that is he has the right to have an opinion and to share ideas and information without any hindrance".

However, when referring to the right of freedom of expression, one should cater to the laws of defamation. This implies that where one person has the right to express himself truthfully as well as disclose any information freely, the other person has the right to not be the victim of allegations which could tarnish his reputation. The balance between the freedom to speech and the right to protect a person's name is an important component to be established during the whistleblowing process.

(ii) The United Nations Convention Against Corruption (UNCAC)

The UNCAC is the multilateral treaty adopted by the UN's General Assembly on October 2003 and one of the first countries to have signed the Convention was Mauritius and the latter ratified it one year later in December 2004. It is the first anti-corruption convention and it is legally binding on the signatory countries. This convention is not only global but it also identifies the significance of preventive and punitive measures throughout its provisions. The UNCAC emphasises on the need of providing the proper framework of reporting corruption and it also recognises the need for whistleblowing protection through the following articles whereby state parties should take certain measures for:

- the reporting by public officials on acts of corruption to appropriate authorities – Article 8(4),
- accessing to anti-corruption bodies to which anyone can anonymously report incidents that constitute an offence – Article 13(2),
- encouraging persons who were implicated in the commission of an offence to report to competent authorities for investigative and evidentiary purposes – Article 37 (1), and

- encouraging citizens to report an offence to the national investigating and prosecuting authorities – Article 39(2).

The above articles are important measures that can be taken to allow reporting against an offence but the most relevant article to whistleblowing is the Article 33 of UNCAC, which provides that, "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".

In other words, as per the Article 33 of the UNCAC, the state parties should do an evaluation process to include appropriate measures in their domestic legal system so as protect whistleblower against unjustified disciplinary procedure like constructive dismissal which is also known as a forced resignation. However, it is important to note that political corruption which is one of the major concerns of the country is not covered by the UNCAC for example, if a common man reports against a political figure, the common man is more likely to suffer harm than remedy as opposed to the political figure especially if the latter forms part of the government (Seeburun, 2019).

(iii) The Prevention of Corruption Act 2002 (POCA)

The Prevention of Corruption Act was enacted in 2002 to combat and punish corruption and fraud. For the purpose of this act, a Commission was established under Section 19 of the POCA which is known as the Independent Commission against Corruption (ICAC). The independence of the ICAC is guaranteed by the POCA.

The ICAC is an anti-corruption agency which is mandated to come up with and implement strategies to prevent corruption. The commission is established as a body corporate by the Act which makes it accountable legally and administratively. The functions of the ICAC are illustrated by Section 20 of the POCA; the three main functions being, firstly, investigation and enforcement of the law against any person which in its opinion is corrupted, secondly prevention which implies elimination of all aspects which would lead to corruption and thirdly education so as to make the public aware of the consequences of corruption.

While Section 43 of the POCA provides for any person who wants to report an act of corruption can do so anonymously and in writing or orally, Section 48 of the same Act provides for the protection of informers. This section implies that if a person commits an act of victimisation (injury, harassment, adverse treatment, discrimination) against an informer, he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding Rs 50,000 and to imprisonment not exceeding one year as per the Section 49(5) of the POCA.

(iv) The Employment Rights Act 2008 (ERA)

The Permanent Relations Tribunal which was created under the Industrial Relations Act has been replaced by the Employment Relations Tribunal (ERT) under the Employment Rights Act 2008 (ERA). The particular section of the ERA which could possibly deal with whistleblowing is Section 68 which provides, "Any worker may make a complaint to the Permanent Secretary against his employer or any agent of the employer, in respect of any matter arising out of his employment".

Another section which can be related to whistleblowing is Section 38(1)(e) of the ERA which talks about "Protection against termination of agreement". This Section provides that "an agreement shall not be terminated by an employer by reason of the worker's filing in

good faith of a complaint, or participating in proceedings against an employer involving alleged breach of any terms and conditions of employment". In fact, the said Section relates specifically to the procedure concerning the aftermath of a complaint made by a worker.

(v) The Mauritius Code of Corporate Governance 2016 (Code)

Following the major financial scandals (Enron, Madoff etc), the world has come to realise the importance of corporate governance. The Code of Corporate Governance 2003 which was based on the Kings Report of South Africa was repealed by the National Code of Corporate Governance 2016. This 2016 Code establishes the eight principles of corporate governance whereby an 'apply and explain' concept was used in the local context. However, the Code is not compulsory on all companies since only those entities which qualify as "public interest entities" have to bind by the Code. These "public interest entities" comprise of firms holding a licence issued by either the Bank of Mauritius, the Mauritius Financial Services Commission or those entities that are listed on the Stock Exchange of Mauritius.

The two principles which relate to whistleblowing mechanisms in the Code in organisations are mentioned below:

- As per the implementation guidance of Principle 4 of the Code which provides for "Director Duties, Remuneration and Performance", a code of ethics is imperative for all entities. As such, while developing the code of ethics, it is explicitly stated in the Code that all boards are encouraged to put whistleblowing procedures in place and to describe these in their Code of ethics.
- Within the implementation guidance of the Principle 5 which is on "Risk Governance and Internal Control", it is mentioned in the Code that the risk section of an organisation's annual report should include, "Report on whistle-blowing rules and procedures; possible protections could include confidential hotlines, access to a confidential and independent person or office, safe harbours and rewards, or immunity to whistle blowers". In this way, having a complete set of the report gives a signal to employees, shareholders and other stakeholders as well as the public in general that whistleblowers are afforded protection by the respective entities.

(vi) Good Governance and Integrity Reporting Act 2015 (GGIRA)

The objective of this Act is to develop a culture of good governance and integrity reporting in public as well as in private sectors and to encourage disclosure of malpractices along with protecting the persons who are making disclosures as a sense of duty and good faith. In this respect, Section 20 of the GGIRA provides for the "Protection of persons making report" whereby it is stipulated that when a person makes a genuine disclosure or report to the Agency or there are reasonable grounds to believe that it is true information, he is not to be liable civilly or criminally. Additionally, in Section 20 itself, it is mentioned that in case of victimisation or retaliation against the person making the disclosure, the offender will be liable to a fine as well as imprisonment.

Besides the laws of Mauritius which provide a legal framework for whistleblowing in specific circumstances and the protection of whistleblowers as well, there exist two main bodies in Mauritius which form part of the institutional framework on the subject matter in the country. These are:

(i) Transparency Mauritius (TM)

Transparency Mauritius was incorporated in 1998 and is affiliated with the Transparency International. While TM is an independent, non-political and non-partisan body

corporate, its main aim is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. In this regard, TM has adopted several measures to combat corruption one amongst the most notable ones is the setting up of the Advocacy and Legal Advice Centre (ALAC) in 2010. The ALAC is established to make it easy for citizens to be advised and report against corruption within private and public institutions as well as to propose solutions. One of the main reasons to establish the ALAC is that it helps citizens to be aware of their rights and hence proceed with the development and filing of the complaint by properly advising the citizen which in turn facilitates the work of anti-corruption agencies which would then investigate in the matter. Moreover, TM has a hotline and website whereby any person can report any wrongdoing.

Furthermore, TM has been working on many initiatives to sensitise the youth about the negative consequences of corruption like "*Les Regards des Jeunesse sur la Politique et la Corruption"* and it has also established a youth parliament whereby participants debate on crucial aspects such as human rights, corruption amongst others. It is also looking forward to including talks and seminars against corruption in colleges and youth clubs in view of including the younger generation in the fight against corruption.

(ii) Whistleblowing Council

In 2014, the Mauritius Institute of Directors (MIOD) and the TM have collaborated in the setting up of a Whistleblowing Council. The aim of this Council is to promote whistleblowing within the private sector, analyse trends and make recommendations accordingly, act as an advisory council to the stakeholders and to raise awareness concerning whistleblowing policies.

A concept paper on "Whistleblowing Mauritius", was launched in 2015 whereby recommendations to implement the law was provided. One of the recommendations is the implementation of an Independent Whistleblowing Service (IWS) which would cater for the proper management of whistleblowing but as of date, no such law or service is available.

The absence of particular whistleblowing law and the legal framework relating to whistleblowers protection in general raises concern as to whether Mauritius is encouraging irregularities or inconsistencies reporting or not. Accordingly, the laws of other countries that are known to have legislated proper whistleblowing mechanisms are consulted with a view to proposing the requisite recommendations for Mauritius to adopt.

3. WHISTLEBLOWING LAWS IN THE US

This part of the paper elaborates on US laws relating to whistleblowing and whistleblowers protection and the impact of the recent amendments. Some of these laws are the False Claims Act, Whistleblower Protection Act, Sarbanes Oxley Act and Dodd Frank Act and there are some laws which are specific to the particular field like the Seaman's Protection Act and the Wendell H Ford Aviation Investment and Reform Act. It is to be noted that most of the legislations in the US are more inclined towards external whistleblowing.

(a) False Claims Act 1863 (FCA)

The FCA was enacted in 1863 under the administration of Abraham Lincoln so as to combat fraud against the government during the Civil War. The making of fraudulent claims to get the government to pay for the goods or services are forbidden in this Act. This piece of legislation allows persons who have been a witness of any kind of unlawful practice to sue the other party in the suit of the government which is stated by the qui tam provision. If the suit is successful and the government intervenes, the plaintiff or rather the

whistleblower/relator is to receive a reward of 15%-25% of the government's total recovery or in case the government does not intervene, the whistleblower shall receive the reward of 25%-30% of the total recovery which obviously would increase the number of whistleblowers given this financial incentive. In addition, as per the FCA, if any person files a false claim against the government, he is civilly liable whereby he has to pay the damages twice and the penalty which does not exceed $10,000. The Act was successful in the sense that it protected the country's interest and it was an inexpensive way for the government to sue those who illegally usurp its funds since it is the whistleblower who would sue the profiteer and the government did not have to spend in legal actions (Seeburun, 2019).

However, the FCA was seen ineffective during World War II since there was already the Department of Justice which is mandated to investigate and prosecute the wrongdoers. Then came the 1986 amendment whereby several changes were made. Some of the major changes were the increase in the financial reward and protection of whistleblowers. The anti-retaliation provision set out in Section 31 US 3730(h) of the FCA protects the whistleblowers against retaliation and harassment internally or externally and it is to be noted that this provision even protects them prior to the filing of the case. Following this amendment, the FCA is considered the only effective legislation in the country (Aarora, 2011). This is evidenced by the fact that from 1986 to 2018, the US government has recovered $59 billion through a lawsuit and in 2018 only, there was around there were 767 new False Claims Act lawsuits filed; of which 645 were initiated by whistleblowers (National Whistleblower Centre , 2019). It is also noteworthy to highlight that this Act allows anonymous disclosure and also the Act previously protected only those from the public sector. However, following the Enron case, it now caters for the private sector as well. Accordingly, approximately 30 states in the US including California, New York, Michigan have adopted the FCA to combat fraud.

(b) Whistleblowing Protection Act 1989 (WPA)

The Civil Service Reform Act of 1978 was previously known to protect federal whistleblowers and their rights. Then in 1989, the WPA was enacted so as to enhance protection for the rights of Federal employees, to avoid retaliation, and to help eliminate wrongdoing within the Government (Section 2 of the WPA). In particular, the WPA provides statutory protections for federal employees who engage in whistleblowing and makes a disclosure evidencing illegal or improper government activities (Whitaker, 2007). For this purpose, the WPA has adopted two ways to protect whistleblowers; firstly, it simplified the procedures that were to be followed by the employees when reporting any type of misconduct or retaliation and secondly, the Office of Special Counsel (**OSC**) was separated from the Merit Systems Protection Board whereby the OSC which was an investigative and prosecutorial agency, had to represent the whistleblowers. However, the OSC can cater only for disclosures made by the federal employees and disclosures required by Executive Orders. For example, information concerning national defence was not to be handled by the OSC. Additionally, as per section 2303 of the WPA, if there has been any misconduct prior to the violation of the law, gross mismanagement, gross waste of funds, abuse of authority or any substantial and specific danger to public health or safety, the federal employee could report the matter. If after having reported a matter, a whistleblower has been the victim of unfair treatment, he is empowered to refer the matter to the OSC who upon investigation will ask the agency to take corrective measures.

Despite the fact that the WPA was quite good legislation upon its protection, it was believed that in practice, the protection afforded to whistleblowers was quite weak. Thus in 2012, the then President Barack Obama signed the Whistleblower Protection Enhancement Act (WPEA) which has the objective to enhance the protection of federal employees by

updating the WPA through closing administrative loopholes, ending the Federal Circuit Court's monopoly on appeals, and discontinue rolling back any rights (Anon, 2018). The changes that pertained with the WPEA were; the term "disclosure" was defined, there have been some procedural changes, the protection of whistleblowers within the Transportation Security Administration. Moreover, the WPEA overlaps several cases whereby loopholes of the WPA were exploited like in Huffman v. Office of Personnel Management (2001) whereby it was stated that "disclosures that are provided in the WPA are not the complaints to someone about his own conduct in the sense that when someone reports to the wrongdoer about a particular misconduct on behalf of the wrongdoer who is already aware of what he has done, it is not considered to be disclosure". The WPEA also solved the issues which prevented employees to blow the whistle through the Section 104(b) of the WPEA which stipulated that employers cannot use non-disclosure agreement so as to restrict their employees from blowing the whistle against any misconduct.

(c) Sarbanes Oxley Act 2002 (SOX)

The Sarbanes Oxley Act is a federal law which was enacted in 2002 with a view to protect investors or shareholders against fraudulent activities within a company and also to enhance the reliability of corporate disclosures. It was named under its sponsors Senator Paul Sarbanes and Michael Oxley. The SOX Act was considered one of the most important security legislation after the Securities and Exchange Commission of 1934 (**SEC**).

The year of 2000 has known several financial scandals such as the Enron and the WorldCom which had caused a major breakdown in the US financial industry. Enron was one of the most successful industries in the US and it was considered as being the most financially stable. Apparently, some years before, the government removed all the barriers from the oil and gas industry with a view of attracting more competitors but little did they know that the companies would be more flexible to commit fraudulent activities. Thus, other companies, as well as Enron, did not want to miss the situation and took advantage of it whereby the executives of Enron tampered with accounts with a view to increasing the company's profits thereby increasing the share price in the stock market which would apparently hide its debts. Consequently, the investors had lost faith in the financial markets as well as in the corporate financial statements provided by companies. Hence to regain that trust from the investors, Congress came up with this new legislation. There are several strict rules that have been adopted by the SOX Act to prevent corporate frauds. For example, the SOX Act established the Public Company Accounting Oversight Board to check upon the accounting industry and as per the Section 401 of the Act, the company executives are to check personally if these are properly drafted. If the SEC finds that there is a manifest error in the financial statements, the company executive is to be held liable.

In addition, the Act provides for the protection of those who want to report a fraud that is the whistleblowers as in the Enron case, the employees were known to be aware of the fraud that was committed but they did want to disclose any information due to fear of retaliation. In this respect, Section 806 of the Act provides for the anti-retaliation provision which protects employees who report a corporate fraud against any form of retaliation. Usually, it is the Occupational Safety and Health Administration which is responsible for anti-retaliation provision but the SOX Act also provides for prohibited acts of retaliation which are "victimisation, harassment, demotion, termination of employment, suspension".

Accordingly, as per the SOX Act, if an employer retaliates against a whistleblower who reported about fraudulent activity, he is liable to a 10 years' imprisonment. Nevertheless, the issue with the anti-retaliation provision is that it provides for a limited time of 180 days

(previously 90 days) for the whistleblower to report the unlawful retaliation which starts from the date the whistleblower becomes conscious of being unlawfully retaliated.

Another major limitation of the SOX Act is that the employer is required to provide only one evidence as to why the employee would have still been dismissed despite the disclosure made by him whereas, for the whistleblower, he has to prove three cumbersome elements that are; his involvement in a protected activity, the fact that the employer knew of the protected activity and he was subject to discrimination due to the disclosure (Steinberg and Kaufman, 2005).

(d) Dodd Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd Frank Act)

President Barack Obama signed the Dodd Frank Act in 2010 so as to prevent the financial crisis of 2008 from happening again. The financial crisis of 2008 led to a high level of unemployment in the US because companies were not able to operate due to the increased financial instability which in turn caused a downturn effect within the global economy. Most of the scholars blamed the lack of regulations within financial institutions which according to them have caused the crisis. It is only then that the government of US came up with the Dodd Frank Act which would be known as the legislation for financial reforms to cater to the inadequacy of the regulations within the financial sector. The Act was named after Senator Chris Dodd and Barney Frank and is considered to be more effective that the Glass-Stegall Act of 1933 which was introduced when the financial stock market crashed in 1929.

Despite being comprehensive, the Dodd Frank Act is quite complex in the sense that it has a major area of reforms which are the "Banking and Financial Firm Reform, Federal Reserve Reform and the Consumer Protection Reforms". However, it was reported that in 2018, the actual President has "rolled back" some regulations upon the banking reforms so as to be less harsh upon small banks (Werner, 2018).

Concerning whistleblowing, the Dodd Frank Act has established the SEC Whistleblower Program which protects those who come up to report a financial and security fraud. Within this program, the whistleblower is allowed to disclose anonymously and the anonymity is protected even when the investigation is being carried out. The anti-retaliation provisions protect any whistleblower that has been treated unfairly upon filing an action to the SEC and the Dodd Frank enhances the protection by allowing the employee to sue the employer for discrimination. In case it is proved that the employee was prejudiced due to retaliation, the employer is to cover all the legal expenses and compensate the employee as well. Additionally, the program provides rewards to those whistleblowers who report an unlawful practice to the SEC unlike the SOX Act. At its Section 922, the Dodd Frank Act even extended the days from 90 to 180 for whistleblowers to report against any case of unlawful retaliation upon them.

One of the limitations of this Act pertains to the limitation of the anti-retaliation provision following the decision made in *The Somers v. Digital Realty (2018)*. This case followed the judgment held in *Asadi v. G.E. Energy (US 2013)* which stated that the anti-retaliation provision does not protect employees who report unlawful practices to their managers that is internal. In other words, if the employee reports to the SEC, it is only then that the Dodd Frank Act will extend protection to him.

4. WHISTLEBLOWING LAWS IN THE UK

This part of the paper emphasises on the whistleblowing protection laws in the UK and will discuss the recent changes in the related laws of the UK. Compared to the US, the UK has only one legislation which caters for whistleblowing protection for both public and private sectors and it is the Public Interest Disclosure Act of 1998 (**PIDA**).

Before 1998, there was no whistleblower protection law in the UK. However, the growing number of scandals and accidents at work during the 1990s compelled the UK to consider a whistleblowing legislation for investigating against these scandals and accidents. It is believed that if employees would disclose any unlawful act, these scandals could have been prevented. Consequently, in 1995, Richard Shepherd was the one who proposed the bill and he was given assistance by the government which eventually led to the enactment of the PIDA 1999. The UK Employment Rights Act 1996 was also amended by the PIDA whereby Section 2(47B) states that the worker has the right, to not be subject, to any harm by any act or by the deliberate failure to act, by his employer done because the worker was involved in a protected disclosure. The main objective of the PIDA is to protect the whistleblowers who report an unlawful practice against the unfair treatment or victimisation imposed by employers which are also known as an act of retaliation. In the case of any act of retaliation, the employee may refer the matter to the employment tribunal who would decide whether actions should be taken based on the evidence provided whereby the employer shall provide compensations to the employee. Indeed, the PIDA extends its protection to whistleblowers within the public, private and voluntary sectors which excludes self-employed professionals, intelligence services (police officers) and voluntary workers (workers from charitable trusts).

However, the PIDA does not impose on employers the requirement to have an internal whistleblowing policy. For this purpose, the employees can use any existing procedures that the employer has in place. Additionally, the PIDA does not impose on employees to report against misconduct to the employers before turning to other authorities but it is advisable for an employer to notify employees about how their personal data will be processed during the course of an enquiry arising from whistleblowing in order to comply with data protection legislation.

One particular limitation of the PIDA is that it does not protect employees from discrimination in a particular circumstance whereby employers from other firms may reject their job applications for they are known in the industry to have made disclosures in the previous jobs. Furthermore, the PIDA does not provide for protection and relief mechanism from the mental trauma caused through whistleblowing. The increased costs of whistleblowing cases push employees to resolve the dispute through arbitration rather than going through the tribunal procedure which works as an advantage to employers as the potential whistleblower shall now accept a particular agreement. Thus instead of disclosing wrongdoing that could affect the public interest, the employee will rather keep silence which may lead to other scandals. This statement is supported by the court's judgment in the case *Parson v. Airplus (2018)*, where the tribunal held that the PIDA does not protect employees who report against wrongdoing which is based on self-interest but rather those whose disclosures are against the public interest.

While the PIDA has been a model for whistleblowing protection legislation within several jurisdictions, it is commonly agreed that the UK should consider updating the 20 year old legislation for example by including a penalty clause which would punish those who take severe action against whistleblowers (Halt, 2018).

5. COMPARATIVE STUDY

This part of the paper highlights the main differences of Mauritius laws against the laws of the UK and the US concerning whistleblowing. Consequently, the loopholes embedded in Mauritius legislation can be deciphered and the appropriate recommendations may then be suggested to close these loopholes.

The corporate scandals that have occurred in the 90s have led to the creation of whistleblowing framework today. The rising disclosures of illegal practices on behalf of companies have allowed whistleblowing to evolve whereby more legislation had to be passed and amendments had to be made to existing one so as to make the law stricter on this particular concept.

Whistleblowing laws differ from one country to another which implies that in some counties there is a specific legislation which covers all the aspect of whistleblowing protection and in others, there are some scattered provisions of whistleblowing protection in various pieces of legislation, and in the remaining parts of the world, the whistleblowing legislation, as well as the provision for whistleblowing protection, does not even exist. In this respect, as discussed in this paper, there are different legal frameworks of whistleblowing protection within different countries namely Mauritius, the US and the UK. A summary of the main differences is illustrated in the below Table 1:

Details	**Mauritius**	**The UK**	**The US**
Specific whistleblowing law	X	✓	✓
Whistleblowing protection in various laws	✓	✓	✓
Penalty Provision in case of failure to provide protection to whistleblowers	✓	X	✓
The requirement to have internal whistleblowing policy for all companies	X	X	✓
Financial incentive to whistleblowers	X	X	✓

Table 1: Summary of differences in whistleblowing laws among Mauritius, the UK and the US

As per Table 1 above, it can be seen that the US has a comprehensive legal framework surrounding the whistleblowing mechanism and protection afforded to whistleblowers. One amongst the notable differences concerning whistleblowing is that Mauritius does not have a particular whistleblowing law in place as compared to the UK and the US. As such, the absence of a particular legal regime makes it difficult and hesitant for individuals to report any matter of wrongdoings or irregularities since firstly these persons are not aware who to turn to and secondly, they are not guaranteed protection against victimisation or unfair dismissal. Despite the fact that whistleblowers protection provisions may be seen in some scattered pieces of legislation in Mauritius, individuals are not reassured

because each of these laws has different procedures for reporting wrongdoings. In addition, in some circumstances, the onus lies of the person who does the reporting to prove that he is being discriminated or victimised because of whistleblowing against his employers (Mauritius ERA). This may prove to be costly, cumbersome and time-consuming for whistleblowers who will be reluctant to report irregularities due to these inconveniences. Additionally, while the need to establish an internal policy of whistleblowing is provided for by the Mauritius Code, this same Code is not binding on all types of companies unlike the US. That is, only those entities that qualify as "public interest entities" have to compulsorily abide by the Code. Moreover, unlike from Mauritius and the UK, the US has put in place a reward system to encourage people to report wrongdoings through the FCA provided that the suit is successful.

6. RECOMMENDATIONS AND CONCLUSION

This part of the paper recommends some suggestions as to how to enhance the legal framework on whistleblowing in Mauritius with the view of minimising corporate scandals. Thereafter, a conclusion based on the research work carried out will be drawn up.

(a) Recommendations

Based on the comparative study conducted in this paper, it is hereby suggested that a new statute for whistleblowing protection be enacted just like the US and the UK have done since, at present, the legal provisions on whistleblowing protection in Mauritius are not complete for affording the adequate protection to whistleblowers. Hence, a new detailed and stand-alone law is required to implement a proper procedural system for both internal and external reporting as well as to give protection and relief to whistleblowers. In addition, the proposed law needs to make provision regarding the protection of individuals making anonymous disclosures for instance, a confidentiality agreement may be a procedure to safeguard the identity of whistleblowers. Furthermore, inspired by the US FCA 1986, it is advisable the proposed Mauritius whistleblowing law encourages financial reward to whistleblowers in the case their complaint proves successful and valid. Nevertheless, the relevant caveat and prerequisites have to be catered for this particular monetary reward. Lastly, the whistleblowing law should provide for an appropriate supervisory and monitoring body that will ensure compliance with the whistleblowing legal framework and which would also provide for training and guidance on matters concerning whistleblowing.

(b) Conclusion

The research objective of this paper is to assess Mauritius laws on whistleblowing, to find loopholes inherent in the present system and to suggest measures to enhance the legal framework on whistleblowing. For this purpose, Part 1 has illustrated the background of whistleblowing along with research methodology which comprises of the black letter approach and the comparative analysis. Part 2 has discussed the emergence of whistleblowing as an element of corporate governance and the case for and against reporting wrongful activities has been assessed. Thereafter, this paper has elaborated on the laws of Mauritius, the UK and the US on whistleblowing and the comparative section herein demonstrates that there are particular distinctions in the way the legal framework surrounding whistleblowing is construed. Finally, the last part of this paper has provided for some recommendations to come up with more appropriate legislation governing whistleblowing with the view of affording better protection to whistleblowers and ensuring that the whistleblowing protection law is being complied with.

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