

Critical Analysis of Whistleblower Protection Act 2011

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Abstract

The Act provides a mechanism whereby the complaints regarding the alleged corrupt Activities and the misuse of power, by public servants are received and investigated. More importantly it also protects anyone who discloses alleged wrong doing in government bodies, projects and offices from being victimized. The Act also ensures the punishment for false or frivolous complaints. The preamble of the act states the intention of the act that is protection of the whistle blower. Various penalties have been provided if the complainant is victimized or there has been delay in providing the information relating to the complaint made by the complainant.

Key words: Whistleblower, Complainant, Competent Authority, Protection, Victimization

Prologue

Corruption and other illegal act have created the need of a tool to curb such activities. There is a wide spread acceptance that whistle blowing is an important tool in the fight against fraud and corruption. The death of so many RTI activists¹ and also death of Satyendra Dubey² and Manjunath Shanmugham³ is proof enough that informers and whistle blower need protection.

In light of India's recent history of exploitation together with murders of honest and upright public servants/informers/ whistleblowers who dared to form a confidential speech act at the

very best levels of state, concerning violations of law or offences they knew their colleagues had committed, a law seeking to shield such 'Whistleblowers' is very welcome. This paper gives arguments discussing about the significance of whistleblower's protection law for India, giving examples of a negative retaliation and reprisals faced by the whistleblowers of India and recommendations relating to the flaws in the Whistle blower protection Act 2011.

Definitions of Whistleblower: Whistle blowing is not new nowadays with every now and then a new corporate malpractice coming into light. Whistle blowing could be understood as of anything related to the disclosure of violation of rules and regulations, law or violation of any safety regulation leading to the hazardous consequences by any person known or unknown to the organization, it could also mean to disclosing any practice by the individual which

- 1 Many RTI activists have lost their lives some of them are Satish Shetty(Mah), Arun Sawant(Mah) Vishram Laxman Dodia(Guj), Sashidhar Mishra (Bihar), Sola Ranga Rao(Andhra)
- 2 Anil Dharker, Whistleblowing , a casualty, the Hindu Online edition, 14 December 2003
- 3 Atiq Khan, Manjunath Case : Court Commutes Death Sentence, The Hindu, 12 December, 2009

could malign the reputation of the organization and in turn as in a unfavorable for the company's financial interests.

A *whistleblower* is an informer he is a person who tells the public or someone in authority about alleged dishonest or illegal activities occurring in a governmental department, a public or private organization or a company. Ralph nadir, U.S . civic activist is said to have coined the phrase in early 1970, to provide a positive connotation and to avoid the negative terms such a "informers" and "snitch"⁴.According to him ,Whistle blowing is, "an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves , blows the whistle that the organization is involved in corrupt, illegal, fraudulent and harmful activity".

Meaning and definition of the terms: Whistleblower is a combination of two words **whistle +blower**, the act of whistle blowing brings an activity to a sharp conclusion as if by the blast of a whistle.⁵

According to *John A. Grey* (2004), the term "whistle-blower" refers primarily to an employee who, in good faith, attempts to have the employer stop conduct that the employee reasonably believes to be injurious to the public and a violation of the law either through internal efforts or by disclosing the illegal conduct externally to the press or law enforcement agencies.⁶

Australian academic *Jubb* (1999) defines, "whistle blowing is a deliberate nonobligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access

4 whistleblower-Wikipedia <https://en.m.wikipedia.org> retrieved on 10.02.2018 at 2.30 pm

5 Oxford English Dictionary

6 John A Grey(2004), The Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute is needed, 33U BAL.T.L.REV.225, 227-228(2004).

nontrivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing"⁷.

International Labour Organization (ILO) also defines whistle blowing as "the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers"⁸.

Thus, from the above definitions, when whistleblowing is examined as a process it necessitates laws or policies that provide a clear description of the following:

1. what types of wrongdoing should be disclosed,
2. to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation),
3. how and by whom the alleged wrongdoing should be investigated,
4. the mechanisms and procedures that are in place to encourage persons to disclose wrongdoing while protecting the whistleblower from any disciplinary action or adverse consequence for reporting the wrongdoing, and
5. the steps to be taken if adverse consequences are, or appear to be, imposed on the whistleblower.

Examples of brutality against whistleblowers

7 Jubb Peter B (1999), whistle blowing: a restrictive definition and interpretation, Journal of Business ethics, Vol 21, Issue 1, pp 77-94.

8 Brown,A., Lewis,D., Moberly,R., Vandekerckhove,W. (2014).International Handbook on Whistleblowing, Edward Elgar Publishing Limited

In the spate of rising brutality against the Whistleblowers in India, the researcher makes the account of the following recent events: In August, 2011, 35-year-old, activist *Shehla Mahsood*, who had filed countless RTI applications and levelled allegations of corruption against local politicians associated with illegal diamond mining, was shot dead on her way to an anti-corruption protest in Madhya Pradesh. In October, 2011 in Haryana, a journalist *Ramesh Singla*, who had been writing articles about illegal mining business in the state, was killed in a suspected hit and run case. In February, 2012, 42-year-old, *Premnath Jha*, who had filed several right-to-information applications regarding several construction projects in Maharashtra, was gunned down while riding home on motorcycle⁹.

Whistle Blower Protection Mechanism In India

Process of Codification of The Whistle Blower Protection Act 2011

In 2007 the report of Second Administrative Reforms Commission recommended that, a specific law be enacted to protect Whistleblower. The Act was introduced on August 26, 2010. Referred to the Standing Committee on 16, 2010. Report of the Standing Committee submitted on June 9, 2011. Passed in Lok Sabha on 27 December 2011.¹⁰In May 2011 India became the 152nd country to ratify the United Nations Convention against Corruption. With ratification of the convention, India is obligated to implement the provisions of the convention which includes “Protection of witnesses, suspects and victims”

9 See: Whistle Blowers, <http://www.quora.com/Whistleblowers/Who-are-some-of-the-famous-whistleblowers-in-India>, Visited on: 03-09-2014; Also see: http://www.salon.com/2013/02/04/indias_war_on_whistleblowers_partner/, Visited on: 04-09-2014]

10 https://en.wikipedia.org/wiki/Whistle_Blower_Protection_Act,_2011#cite_note-The_Whistleblowers_Protection_Act-20

and “Protection of reporting persons.” The Lok Sabha¹¹ approved the Act in December 2011. The Debate on the Act began in the Rajya Sabha¹² in 2012 but was stalled by the demise of the Union Minister. The Whistleblowers Protection Act, 2011¹³ was passed by Rajya Sabha in Parliament on February 21, 2014. The Act replaced the 2004 government resolution¹⁴, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training Government of India, (21/4/2004).), which gave the Central Vigilance Competent Authority (CVC) the power to Act on complaints from whistleblowers and sets up a mechanism to receive complaints of corruption or wilful misuse of power by a public servant.¹⁵

Whistle Blowers Protection Act, 2011

Whistle Blowers Protection Act, 2011 is an Act which provides a mechanism to investigate alleged corruption and misuse of power by public servants and also to protect anyone who exposes alleged wrongdoing in government bodies. The wrongdoing might take the form of fraud, corruption or mismanagement. The Act will also ensure punishment for false or frivolous complaints. This intention of the act is made clear by the preamble of the Act.

Key Features of the Act

1. Application of the Act:

The provisions of this Act shall not apply to the armed forces of the Union, being the Special Protection Group constituted under the Special

11 Lower Houses of the Indian Parliament

12 Upper House of the Indian Parliament

13 Hereinafter referred to as the Act

14 Resolution No. 89 (Public Interest Disclosure and Protection of Informers (PIDPI) Resolution

15 Legislative Brief, PRS Legislative Research, available at <http://www.prsindia.org/uploads/media/Public%20Disclosure/Legislative%20Brief%20-%20Public%20Interest%20Disclosure%20Bil.pdf>, last seen 7/ 07/2015.)

Protection Group Act, 1988. Army has not been brought under the umbrella of the law.

2. Public Interest Disclosure: 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.

Disclosure: Sub-section (d) of section 3¹⁶ provides exhaustive definition of *Disclosure*.

Disclosure can be made of the following:

1. an attempt to commit or Competent Authority of an offence under the Prevention of Corruption Act, 1988;
2. willful misuse of power or willful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party;
3. attempt to commit or Competent Authority of a criminal offence by a public servant.
4. The disclosure is accepted by the Competent Authority through written or electronic communication against the public servant and includes public interest disclosure referred to in sub-section (2) of section 4;

3. Procedure of Inquiry

The Act, under section 5 provides for the procedure of inquiry. The Competent Authority, at first, should ascertain the identity of the complainant and has to protect such identity unless the complainant has revealed it to any other authority. It shall then decide whether the matter needs to be investigated based on the disclosure or after making discreet inquiries. On the decision of the investigation, it should seek an explanation from the head of the concerned

department, office, or as the case maybe. The Competent Authority has to protect the identity of the complainant to the head of the organisation or department unless it becomes imminently necessary to do so. Even then, the head of the organisation cannot reveal the identity of the complainant. After conducting the inquiry, if the Competent Authority feels that there is no substantial matter or merit in the case, it shall close the case or if the inquiry substantiates allegation of corruption or misuse of power, it shall recommend certain measures to the public authority within the jurisdiction of the Competent Authority. The Act also provides or the measures to be taken such as it can initiate proceedings against the concerned public servant or it can take steps to redress the loss that has been caused to the government. It can also recommend the initiation of criminal proceedings against the official or necessary corrective measure. Other than these, it can take any other action which is imminent for the purpose of the Act.

4. Exemption from Inquiry

The Act exempts certain matter under section 8 from inquiry of the Competent Authority such as when it has been decided by a Court or Tribunal, if a public inquiry has been ordered, or if the complaint is made seven years after the action. The Act also exempts disclosure of proceedings of the Cabinet if it is likely to affect the sovereignty of India, security of the state, friendly relations with foreign states, public order, decency or morality which has to be certified by the Secretary to the State or Central Government.

5. Safeguards for Persons Making Disclosure

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

16 Whistle Blowers Protection Act, 2011

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. It can also direct that the public servant who made the disclosure may be restored to his previous position. The Vigilance Competent Authority shall 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 Competent Authority is empowered to pass interim orders to prevent any act of corruption continuing during inquiry.

6. Powers of competent authority

The competent authority has been empowered with various powers to control the whole mechanism of the disclosure. competent authority is empowered to:

- first put the complainant's identity under a scanner to comply with section[5(1(a)],
- second, demand supporting documents [section 4(5)] and use its civil-court like powers to summon his attendance at hearings as per section[7(2)(a)]
- thirdly, threaten to dismiss his complaint as being 'frivolous' or 'vexatious' or otherwise not worth investigating as per section[7 (6) (a)] or
- finally find the complainant guilty of false and misleading disclosure, and award up to two years imprisonment and up to 30,000 fine as per section 17.

Chapter IV deals with the judicial powers of the competent authority. The section 7 of the act

enumerates the judicial Powers of Competent Authority

For the assistance in the inquiry, the authority may require any public servant who will be able to provide with relevant documents or furnish information. The statute confers the competent authority with the powers of a civil court¹⁷ while trying a suit under the Code of Civil Procedure, 1908. Similar to the civil court procedures the following matters can be accessed, namely:-

- Any person's attendance can be enforced by summoning and examined on oath.
- Ask for any public record from any court of office to be produced for strengthening of the inquiry.
- Setting up of commissions for the examination of witnesses and documents.

The designated agency has no liability to maintain confidentiality of the information obtained by or provided to the Government or any public servant, whether enforceable under the Official Secrets Act, 1923. The competent authority, while exercising similar powers that of the civil court, shall ensure protection of the identity of the complainant.

7. Penalties

The Act, under section 15, lays down that for not furnishing reports to the Vigilance Competent Authority, a fine of up to Rs 250 shall be imposed for each day till the report is submitted. The total penalty amount however cannot exceed Rs 50,000. The penalty for revealing the identity

¹⁷ Section 7(3) the competent authority shall be deemed to be a civil court for the purpose of the section 195 and chapter XXVI of the code of criminal procedure, 1973, and every proceeding before the competent authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code.

of complainant negligently or due to mala fide reasons, the penalty is imprisonment for up to 3 years and a fine of up to Rs 50,000. When a person knowingly makes false or misleading disclosures with mala fide intentions, the penalty is imprisonment up to 2 years and a fine of up to Rs 30,000. Any person aggrieved by an order of the Vigilance Competent Authority relating to imposition of penalty for not furnishing reports or revealing identity of complainant may file an appeal to the High Court within 60 days.

Recommendations

The introduction of this Act is a welcome step towards the fight against corruption and protection of those who provide for the public interest disclosure. There are many but the first step is itself suffering from various deficiencies and flaws.

The Act provides that the Competent Authority shall not investigate any disclosure involving an allegation, if the complaint is made after the expiry of seven years from the date on which the action complained against is alleged to have taken place. This provision will be used by the bureaucracy to deter the investigation on the basis of technical ground, i.e. whether or not the complainant, make the complaint of offence within a period of Seven years, rather than the merits of the case. On the contrary, the cases of corruption should be investigated on the sole ground of merit. A case of corruption does not become pardonable after seven years. Another matter that is of grave concern is that an exception has been created in favour of the armed forces without well defined reasons. The Right to Information Act, 2005 does not create an exception in favor of armed forces and even the intelligence agencies have not been fully exempted from its purview and such organizations

are fully disclosable in relation to human rights violation and corruption. Recently, country has witnessed two major scams like Adarsh Scam¹⁸ and Sukhna scam¹⁹ which fall under the purview of Indian army. When a matter relates with public importance and national economy than in those cases it should not be shielded with special/army laws. The people who unearth the corruption or willful misuse of power needs protection from harassment and departmental suffering. It can only be provided when they get statutory protection with full enforcement. Army cannot be aloof from these things. Therefore, their affair should be brought under the umbrella of the law. This Act aims at tackling corruption and thus, there seems no reasonable excuse for such outright exemptions. However, certain matters such as those in relation of national security and others may be exempted for obvious reasons.

It is of utmost necessity that the judges of the higher judiciary should be brought within the ambit of this Act. The Act provides for receiving complaints even through electronic method which is quite necessary in modern times. However, the use of electronic methods may not be so safe for the whistleblower and thus it is important that stringent rules and regulations be framed in this regard such that the identity of the whistleblower is kept secret at any cost. An absence of a fool proof mechanism in this respect would definitely deter prospective complainants due to fear of victimization which would then defeat the very object of this law. Another suggestion would be that an anonymous complaint should not be rejected on the sole ground of anonymity in a case where the facts mentioned in the case and various supporting documents provide for a prima facie

18 Adarsh Housing Scam: Ashok Chavan Deposes Before Inquiry Panel, The Hindu, 30 June 2011

19 Sukhna Land Scam Was An Aberration: Antony, The Hindu. 1 February, 2010

case. An important recommendation in this regard is that the identity of the complainant should not be revealed even to the head of department concerned without the complainant's consent as the protection of identity of the complainant is pivotal for the successful implementation of this statute. Another observation is that the main intention of the complainant while making a disclosure is the protection of public interest and undue burden should not be put on the person for providing substantial proof to support his/her case. It would be unreasonable to expect an ordinary citizen who is at the receiving end of the minimal resources and the sufferer of corruption to provide sufficient proof to substantiate his/her complaint. It is suggested that the Competent Authority should take reasonable steps so that when a prime facie case is made out, he should be able to follow up the complaint to its own logical conclusion. A particular time limit should be provided within which the Competent Authority has to complete the investigation. And it could also be provided that if the time period is to be extended, it cannot go beyond a certain point. This Act, however, does not provide any rule in case of the recommendation of the Competent Authority are not adhered to. Owing to this lacunae the implementation of the recommendation cannot be ensured. Hence, this gives an excuse for defeating the very objective of this legislation, delaying the implementation²⁰.

Another important aspect is that the Act does not define victimization thus leaving a grey area which could definitely be exploited for the benefit of those in power.

20 <http://www.ethic-intelligence.com/experts/10574-whistleblowinginindia/> Visited on:05.01.2018 IST 2:40 Pm

Another important deterrence against whistle blowing may emerge in the form of quantum of punishment for frivolous or mala fide complaints. While it is necessary that such complainants be punished, the possibility of exploiting this provision for the harassment of the innocent whistleblowers cannot be avoided. In cases where the accused is all powerful, this provision will have a great deterring effect on the public.

Thus, it is of imminent necessity that the quantum of punishment be substantially reduced. Also, the Competent Authority should exercise great caution while labeling a complaint as frivolous or mala fide. It cannot be termed so merely on the ground that the allegations are not proved beyond reasonable doubt. The focus has to be on the intention and not on the outcome. Furthermore, the establishment of proper and special courts for this specific law will be a great supplement to this enactment. It is true that corruption cannot be totally driven out of any society but it is also true that proper laws and effective implementation of such laws will definitely reduce the ever rising levels of corruption.

Conclusion

The Act, along with having certain substantial irregularities falls short on procedural as well. The incidences even though have been in light since 1991 have not been able to provide a mechanism which ensures protection of the person making the complaint and provides rights against victimization. Several recommendations by the law commission and committees have been made but there are unable to bring about a proper legislation on the purpose.

The government on the one hand doesn't want to loose control and thus dilutes the law in place by adding the amendments. The amendment

bill which has been passed in Lok Sabha is highly criticised as being likely to dissuade anyone from blowing the lid off corruption in the government or bureaucracy. Activists believe that the amendment bill's concern for protecting "national security" and exempting information under the Official Secrets Act is meant to dilute the Whistleblowers Protection Act and eventually turn the law into a dead-letter and a tooth less legislation. People will have to resort to other means. Like approaching the media, or to the political party which will provide more protection. It has become a meaningless law just giving more jobs to bureaucrat.

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