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An Overview of Whistle Blower Protection Policy in India

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ABSTRACT

Reports on unethical and illegitimate practices that fail to come into public notice make the Act of whistle-blowing an indispensable tool to tackle the act of corruption that engulfs the modern-day regime. The establishment of a concrete machinery for its proper functioning thus becomes essential. The essay entails the development of the Whistle Blower Protection Act, 2014 and the pretext for its institution. It covers the constitutional and ethical justification of Whistle-blowing by throwing light on the right to information and transparency guaranteed to every citizen. Further scrutinization of the Act reveals the deficiencies that can be rectified by referencing the international standards for the protection of whistle-blowers and adopting them in India to bring the law *par* with other developed legislations.

REASON FOR CHOOSING THE ESSAY TOPIC

What are 'good reasons' to protect whistle-blowers? The first answer that comes to mind while going through numerous case studies is that because whistle-blowers disclose information in the public interest, they deserve protection against the organisational retaliation. A detailed and

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thorough analysis is required to find a solution to the impending protection that these individuals call. The Whistle Blower Protection Act, 2014 provides for provisions which are of significant relevance in contemporary constitutional law as it pertains to discuss the fundamental issues related to the right to information, right to know, transparency and accountability in governance and bureaucracy and how they should balance with similar matters of privacy and security. Thus, we need to formulate an inquiry into the same.

DECLARATION REGARDING ORIGINALITY OF THE ESSAY

We with this declare that the essay titled “*An Overview of Whistle Blower Protection Policy in India*” is true and correct to the best of our knowledge. The work presented is the original representation of our ideas, further to which the ideas of other scholars have been included. We have adequately cited and referenced the sources. We also declare that we have adhered to all principles of academic honesty and integrity and have not misrepresented or fabricated or falsified any idea/data/fact/source in our submission.

INTRODUCTION

Angel Gurría, Secretary-General, OECD has remarked in a very accurate manner that “*Integrity, Transparency and the fight against corruption have to be a part of the culture. They must be taught as fundamental values.*” Corruption is an impediment that is not just restricted to being a moral or political wrong but is an internationally recognised human rights violation. Eradication of corruption and simultaneously safeguarding the witnesses and victims along with the prevention of any related harm to them is what makes the protection of whistle-blowers an essential issue in today’s contemporary world.

Whistle-blowers are those individuals who expose wrongdoings, such as fraud, misconduct or illegal and corrupt activities, in the public interest to a competent governmental authority. The Whistle Blower Protection Act, 2014 (*hereinafter referred as the ‘WBP Act’*)

came in existence to protect such whistle-blowers after several fatal cases were recorded which have been nothing but clear indicators for the need of more stringent regulations to ensure the safety and security of the informants. The case of *Satyendra Dubey* was of crucial importance for the Constitution of the Act, as the complaint about the improper handling and construction of roads under the NHA I project cost him his life due to the careless mistake of the officials of disclosing the complainants' identity.

The Bill for whistle-blower protection was initiated in 1993 by the then Chief Vigilance Commissioner, Mr N. Vittal after which the Law Commission of India's Report on '*Public Interest Disclosure Bill*'³ recommended the establishment of law for the protection whistle-blowers. The Government of India ratified the Public Interest Disclosure and Protection of Informers Resolution in 2004, which enabled the Chief Vigilance Commission to receive complaints of corruption after the Supreme Court of India provided specific directions. Ancillary to this Act, the RTI Act, 2005 and the Public Services Bill 2003 (Draft) are instituting for the organisation of requisite machinery to encourage further protection. Soon, the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 or the Whistle Blower Bill was passed in the Lok Sabha by 2011 and in the Rajya Sabha by 2014.⁴

This Bill aims to allow whistle-blowers to make complaints against corruption, (as defined under PoC Act, 1983) wilful misuse of power or discretion for wrongful gain or loss to the Government or any other public servant inclusive of criminal offences. They are doing this towards certain competent authorities in good faith and on reasonable grounds, which would ensure the protection of their identity. The Act further suggests penalties and punishments against the incorrect or *mala fide* conduct of the wrongdoers. The most recent amendment to the Act made in 2015 proposed to forbid the disclosure of information protected by the Official Secrets Act, 1923, which is contrary to the original statute and further defines 10 prohibited categories upon which the Government authorised Authority is responsible for deciding as to the disclosure of the information. This amendment, however, only seems to be diluting the essence of the statute instead of strengthening it.

³ Law Commission of India, *179th Report on the Public Interest Disclosures and Protection of Informers*, D.O.No6(3) (72) /2001-LC (LS) (Dec. 14, 2001).

⁴THE INSTITUTE OF COMPANIES SECRETARIES OF INDIA, WHISTLEBLOWING BALANCING ON A TIGHT ROPE (2017).

ETHICALITY AND CONSTITUTIONALITY OF WHISTLE-BLOWING

John Rawls writes: “*One who engages in civil disobedience, addresses the sense of justice of the majority of the community and declares that in one’s considered opinion the principles of social cooperation among and equal men are not being respected.*”⁵ The most effective tool against the arbitrary Authority of a State is considered to be an act of Whistle-blowing. The same has been experienced in the past by the country during the 20th-century Civil Disobedience.

In non-democratic states where the dictatorial or monarchical power remains unquestioned, it is certainly plausible that the authorities would label the Act of Whistleblowing as espionage or sedition. However, in the modern-day deliberative democracies like India where the allocation of state power has been derived out of collective consensus, the ethicality of Whistle-blowing may still be argued against at multiple junctures. This argument though, can still be fairly outweighed, and Whistleblowing can be justified if the State conceals from the public some serious governmental wrongdoings or those programs that ought to have been disclosed at a public forum. Further, if the whistle-blower takes necessary measures to minimise the damage anticipated from the fault lines, the action taken by him is protected under the purview of it being in the public interest.

The case of *Edward Snowden*, where he blew the whistle on the illegal surveillance programmes and the black sites that were operating under the garner of ‘state security’ by the CIA and NSA, it did not make the Act constitutionally sound even though the programmes were covered under one of the statutes.⁶ Though the legality of Snowden’s claims may be questioned, his stance regarding how the public should have been informed of such policies being run at such a massive scale cannot be denied.

In India, the *magnum opus* of the Constitution is present in Part-III of the Constitution describing the fundamental rights which cannot be abrogated and are intrinsic to every

⁵ JOHN RAWLS, A THEORY OF JUSTICE (Cambridge, Mass.: Harvard University Press, revised ed. 1999).

⁶ *Klayman v. Obama* 957 F. Supp. 2d 1 (United States, District Court, District of Columbia. Dec. 16, 2013); *American Civil Liberties Union et al. v. James R. Clapper et al.* 13 Civ. 3994 (2014).

individual. Under this, one of the most widely debated and discussed provision is that of Article 19 and Article 21 describing the Right to Freedom and the Right to Life and Liberty, respectively.

In a transnational era, it is crucial to expand the concept of liberty itself where individuals must be liberated to formulate an opinion. It is a prized privilege to speak one's mind, although not always with perfect taste, on all public institutions. Further, this opportunity should be encouraged for vigorous advocacy as well as an abstract discussion.⁷ Thus, what is necessary in these circumstances is a free flow of information so that the democracies can be built through open societies that share information. The ambit of Article 21, which is more extensive than that of Article 19(1)(a) confers on each individual a right to know, which includes the freedom of information.

Whistle-blowing as an extension to Right to Information

In the modern-day, Whistle-blowing has become more and more complicated because of the increased inclination of the Government towards the formulation of a "big brother state." The whistle-blowing has led to challenges in generating accountability and transparency in the system due to increased surveillance and sanction over confidential government data. The emergence of a nexus of legislations like the RTI Act & Jurisprudence available on the significance of freedom of information, India has tried to tackle the obstacles by legitimising the Right to Privacy which is also an extension to the Right to Freedom of Information.⁸

Over a while, champions of human freedom of thought and expression have realised that intellectual paralysis creeps over a society which denies, in a subtle form, the freedom of thought and expression to its members.⁹ The RTI Act is a tool to ensure that the freedom of thought and expression, because without the availability of apt information, an individual will always be misguided which will result in the formation of fictional opinions. The fascist uprising of the Nazi Germany and Mussolinian Italy had deep-rooted connections to these seeds of misinformation. The RTI law has empowered the common man to have access to information

⁷ New York Times Company vs. L.B. Sullivan, 376 U.S. 254 (U.S. Supreme Court, 1964).

⁸ KS Puttaswamy v. Union of India (2017) 1 SCC 809.

⁹ Indirect Tax Practitioners v. R.K. Jain (2010) 8 SCC 281.

from public authorities — which only government officials were privy to — making every citizen a potential whistle-blower.¹⁰

The fundamental principle behind Whistle-blowing is related to the drive against eliminating corruption from the country's bureaucracy.¹¹ A socially and morally developed nation is what the framers of the Constitution had aspired for thus, for these objectives to be accomplished, an exhaustive and integrated WhistleBlower Protection policy should be of primary importance which provides every individual with the freedom and liberty to ensure that the right questions are asked from the government authorities to maintain transparency and clarity in governance and administration.

The WBP Act has been created to be in accordance with the RTI Act as per the amendment proposed in 2015 which states that non-disclosure of certain categorial information cannot be done unless it has been obtained under the RTI Act.¹² However, the amendment already passed in the Lok Sabha will further combine the purpose of both these legislations. While the RTI devolves information to every citizen, the WBP Act has been introduced to ensure that complaints of corruption and malpractices are reported to the competent authorities so that necessary action be taken against the culprits. For instance, information that has not been procured under RTI by government officials themselves, cannot be brought under the WBP Act which again will cause a hindrance in the fulfilment of the objective of the Act itself.

THE WHISTLE BLOWER PROTECTION ACT, 2014

As the name suggests, the Act has the primary objective to establish a mechanism for the protection the individuals, inclusive of non-governmental organisations and personals¹³, who make disclosures in the public interest. The sound statutory framework is created solely so that cases like that of *Manjunath Shanmugam* of the Indian Oil Corporation case and *Dr Anand Rai* of the infamous Vyapam Scam are not repeated.

¹⁰ Anjali Bhardwaj, Amrita Johri, *Don't Shoot the Messenger*, THE HINDU, Aug. 1, 2017.

¹¹ Nimisha Bhargava, Dr. Mani K. Madala *An Overview of Whistleblowing: Indian Perspective*, 4 INTERNATIONAL JOURNAL OF INNOVATIVE RESEARCH IN SCIENCE, ENGINEERING AND TECHNOLOGY, Issue 2, (February 2015).

¹² The Whistle Blower Protection (Amendment) Bill, 2015, No. 154.

¹³ S.3, The Whistle Blowers Protection Act, 2014, No. 17, Acts of Parliament (India).

The Act prescribes certain powers to the Competent Authority for ascertaining the legitimacy of the complainant and the complaint. Here the Authority has the discretion to reveal the identity of the whistle-blower under necessary conditions with the complainants' prior consent. However, matters related to inquiries under the Public Servants (Inquiries) Act, 1850 and Commissions of Inquiry Act, 1952 or *bona fide* acts in the discharge of duty by the employee are outside the ambit for consideration of the Competent Authority. The Competent Authority is not allowed to take notice of disclosures which are determined by the Court or Tribunal - authorised to do so. The Authority also assumes the role & powers of a Civil Court in some prescribed matters.

The WBP Act further prohibits the cognisance of those acts which disclose information which is likely to affect the sovereignty and integrity of the country prejudicially. Affects the strategic, scientific or economic interests of the State, created tension in the relationship with a foreign state, or lead to the incitement of an offence. Furthermore, any information which involves the disclosure of cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers except as provided for under the RTI Act are all prohibited.

Chapter V of the WBP Act¹⁴ deals specifically with the protection to persons making such disclosure and gives surety of non-victimisation of such persons. The CVC is responsible for concealing the identity of the whistle-blowers along with related documents unless decided otherwise by them. Such identity can only be disclosed on orders of the Court, which will allow providing redressal to the complainant either based on an application or its information. It has the power to pass interim orders to prevent any act of corruption continuing during the inquiry.

After beholding numerous mortalities, the Constitution of the Act has shown to give a boost to the freedom of press and information in India, yet it cannot be said to be comprehensive in all respects.

Comparative Analysis of the WBP Act with International Standards

The highest source of whistle-blower protection is found in International Law. Article 33 of the United Nations Convention Against Corruption provides for appropriate measures for the

¹⁴*id.*, S. 11-14.

protection of persons who report any fact concerning acts of corruption to competent authorities in the municipal law of the State.¹⁵ Transparency International is a global anti-corruption watchdog organisation, which has also recommended India to introduce effective legislation to protect the whistle-blowers.

The G20 created in the post-World War II era, to bring economic and financial stability across the globe has during its Cannes Summit in 2011 proposed standards and guidelines for monitoring anti-corruption activities for the member states. The current Indian legislation, while protecting the whistle-blowers, fails to fulfil multiple guidelines ranging from non-codification of provisions relating to retaliatory action to non-establishment of internal channels for reporting within the public sector. These standards also seek to protect individuals whose disclosure of wrongdoing is found to be incorrect, which are of paramount importance in the Indian scenario. The *D.K Ravicase* is a standpoint to show the ineffectiveness of the Act. He was a civil servant who conducted major tax evasion raids during his tenure as Additional Commissioner of Commercial Taxes (Enforcement) in October 2014. His suspicious death and protests in its aftermath indicate the failure of the concerned authorities to provide him protection after the exposures made by him.

Further, the WBP Act also lacks provisions elaborating upon the protection of employees whose employers allege the former to be a whistle-blower. The Act also disallows inquiry of a complaint if it does not mention the identity of the complainant, thus making no provision to safeguard the anonymity of the complainant.¹⁶

The lack of proper guidance, counselling or feedback to the whistle-blowers accompanied by non-incentivisation for them to come forward is another peril that needs to be instantly resolved. By not encouraging the Act of Whistleblowing or providing whistle-blowers with positive reinforcements such as the possibility of financial rewards like that practised through the US False Claims Act which allows a whistle-blower to receive up to 30% of the amount recovered by the Government or in South Korea which offers whistle-blowers up to 20% of the retrieved amount, the instances of confronting a crime within the system are reduced.

¹⁵UN General Assembly, United Nations Convention Against Corruption, art. 33, Oct. 31, 2003, A/58/422.

¹⁶ G20 Anti-Corruption Action Plan Protection of Whistleblowers, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation* (2011).

The ambit of Competent Authority, which holds power to scrutinise the information revealed and give protection, set in the legislation is severely restricted to internal governing bodies and persons and excludes channels of media, journalists as well as the Local by not protecting sources divulging information to these agencies. The Supreme Court in the prominent case of *Indirect Tax Practitioners Assn v. R.K. Jain*¹⁷ observed that reporting of misconduct by external whistle-blowers to outside entities like media, law enforcement or watchdog agencies, or other local, State, or federal agencies is a legitimate means of reporting and should not be silenced. For that very reason, such sources should be eligible for the same protection as are other complainants. Despite the recommendation of LCI¹⁸, no laws exist in India for the protection of the sources which deliver such information, e.g. Journalists, making them prone to the risk of their identity being revealed. In Sweden, however, such a source's anonymity is protected under its Constitution, and breach of this confidentiality agreement is a criminal offence being punishable up to a term of one year or fine.

The national-level apex anti-corruption and grievance redressal agency, the Lokpal established under the Lokpal & Lokayuktas Act, 2013 allows any person to make a complaint concerning any act of corruption allegedly committed by the Prime Minister which is not covered under the WBP Act. This Act can be an ancillary to the WBP Act. Therefore, the Lokpal should be notified as a Competent Authority to receive such complaints.¹⁹ These reforms must be institutionalised to strengthen the Act.

CONCLUSION

“*Not all heroes wear capes.*” In 2002, the United States of America realised that national security could not bend an individual's rights and liberties to an extent where a democratic nation ends up becoming a tyranny. As has been iterated above, it is essential that along with economic development, a nation evolves socially and culturally; therefore, legislation providing for whistle-blower protection is a sine qua non.

¹⁷ (2010) 8 SCC 281.

¹⁸ Law Commission of India, *93rd Report on Disclosure of Sources of Information By Mass Media*, D D.O. No. F. 2(2)/83-L.C. (Sep. 9, 1983).

¹⁹ *Salient Features & a Quick Analysis of the Whistleblower Protection Bill, 2014*, RTI (Feb. 27, 2014), <http://www.rtifoundationofindia.com/salient-features-quick-analysis-whistleblowers-pro>.

Encouraging Whistle-blowing on acts of suspected corruption is essential in safeguarding the public interest and promoting a culture of public accountability and integrity. Impairments in providing adequate protection will none other than creating an environment of hostility amongst the persons making disclosures and deter them from reporting the wrongdoings voluntarily. Therefore, statutes like the Right to Information Act, 2005 and Whistle Blower Protection Act, 2014 are symbolic of a high level of constitutional values that our nation upholds.