

The Whistleblowers Protection Bill, 2014

Salient Features and a Quick Analysis of Shortcomings

Background

In August 2010 the Government of India tabled a Bill in the Lok Sabha seeking approval for a legal framework whose objective is to protect persons making a disclosure about wrong doing in State agencies. Given India's recent history of victimisation including murders of honest and upright public servants who dared to make a confidential disclosure at the highest levels of Government, about violations of law or offences they knew their colleagues had committed, a law seeking to protect such 'Whistleblowers' is highly welcome. The Government of India drafted the *Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010*, popularly known as "Whistleblower Bill" without even a semblance of public consultation. However after the Whistleblower Bill was tabled in Parliament, the Department of Personnel and Training- the nodal department for this Bill, placed it on its website and gave people a month's duration to comment on its provisions. This step is without precedent in India's legislative history because the Government has rarely initiated a public consultation process after tabling a Bill in Parliament. It is the prerogative of Parliament to deliberate on a Bill and invite people's comments after its introduction in either House. In September, the Whistleblower Bill was referred to the Standing Committee of Parliament related to Personnel, Law and Justice (the Standing Committee) for detailed deliberations. The Standing Committee invited comments from the people on the contents of the Bill. Many citizens, activists, civil society organizations, academics and serving bureaucrats made submissions to the Committee demanding that the Bill be strengthened. The Committee accepted many of these suggestions and recommended their incorporation in the Bill. The Government complied with most of these recommendations and even renamed the Bill as **Whistleblowers Protection Bill** (WBP Bill). The Lok Sabha approved this Bill in December 2011 without much debate during the heated discussion around the Lokpal and Lokayuktas Bill. Debate on the Bill began in the Rajya Sabha in 2012 but was stalled by the demise of a Union Minister.

The Rajya Sabha passed the Whistleblowers Protection Bill (WBP Bill) on 21 February, 2014 without making any changes to the version approved by the Lok Sabha earlier. The text of the Bill as approved by the Upper House of Parliament is yet to be uploaded on the websites of Parliament and the Government. This is one of the last pieces of legislation approved during the last session of the current Parliament. Though several Opposition members pressed for amendments the Central Government pushed for the passage of the Bill without any change and promised to bring in the changes through other constitutional methods (such as an Ordinance) soon. Had the amendments been approved in the Rajya Sabha the Bill would have had to go back to the Lok Sabha for approval again. As this was the last day of Parliament's session the political parties agreed on this compromise. A new Lok Sabha will be elected after the general elections- likely to be held in April-May 2014.

I. Salient Features of the Whistleblowers Protection Bill:

The WBP Bill has the following features:

a) Whistleblowers may make complaints about:

- corruption (as defined in the *Prevention of Corruption Act, 1983*);
- willful misuse of power or discretion which may lead to demonstrable loss to the Government or wrongful gain to any person including a public servant; and
- commission of or attempts to commit offences recognized under law by any public servant-
to the competent authority.

b) The following authorities are competent to receive whistleblower complaints:

- The Prime Minister at the Centre and the Chief Minister in the States against Ministers of the Union or the States respectively;
- The respective Chairpersons of the House against members of Parliament or the State Legislatures (other than those who may be Ministers);
- The High Court in relation to any judge or judicial officer or arbitrator in the States (judges of the High Courts and the Supreme Courts are not covered by this law as the Judicial Standards and Accountability Bill is pending in Parliament. However this Bill will lapse after the current Lok Sabha is dissolved after the general elections this year);
- The Central Vigilance Commission or such other authority as the Central Government may notify for all other public authorities and public sector undertakings at the Union level; and
- The State Vigilance Commission or such other authority as the State Government may notify in due course to receive complaints against public authorities and state level public sector undertakings.

c) Any public servant, person or whistleblower may make a complaint (in hard copy or by electronic mail) in good faith to the competent authority with full details and accompanying documents within seven years of the occurrence of the wrongdoing [except matters referred to a commission of inquiry under the *Commissions of Inquiry Act, 1952* or where a formal inquiry under the *Public Servants (Inquiries Act) 1850* has been launched].

d) A complaint will not be inquired into if it does not mention the name of the public servant complained against or if the identity of the public servant or the complainant is found to be incorrect or false.

- e) **The identity of the complainant will not be revealed without his/her written consent.** Any person negligently or *mala fidely* reveals the identity of the whistleblower may be sentenced up to three years in prison and also pay a fine upto Rs. 50,000 (USD 800).
- f) **Knowingly and *mala fidely* making a false complaint will invite a two year prison term and a fine up to Rs. 30,000 (USD 480).**
- g) **The competent authority may make discreet inquires or open inquiry and also seek the explanation of the public servant complained against and within three months take any of the following steps:**
- Recommend that formal proceedings be initiated against the public servant complained against;
 - Take appropriate steps to redress the loss caused to the Government;
 - Recommend initiation of appropriate criminal proceedings against the person complained against;
 - Recommend taking corrective measures;
 - Recommend any other necessary measure for the purpose of the law; or
 - Close the case (complainant must be given an opportunity to object to the closure order).
- h) **A public authority receiving a recommendation from the competent authority must comply with it within three months or record reasons for not doing so** (there is no requirement to intimate the competent authority about its decision not to comply with the recommendation nor is it required to challenge the recommendation before a court of law).
- i) **The competent authority has the powers of a civil court to inquire into complaints it receives and all proceedings before it will be deemed to be judicial proceedings.** However it may not compel any person to disclose information contained in official records pertaining to matters of national security or foreign relations during the course of an inquiry. Similarly disclosure of records that may constitute contempt of court or cause defamation or lead to incitement to an offence may not be disclosed. A Secretary level officer has the power to issue a certificate preventing such disclosure and such certificate shall be binding and conclusive.
- j) **The competent authority may impose a penalty of up to Rs. 50,000 (USD 800) on the public authority or official for not cooperating with the inquiry process or refusing to provide reports when required.**

- k) **The competent authority may set up its own inquiring staff or enlist the services of the Central Bureau of Investigation or the police or other authorities to inquire into complaints it receives.**
- l) **The competent authority must ensure that no whistleblowing public servant is victimised (although what amounts to 'victimisation' is not defined in the law)**
- m) **If other citizens and organisations blowing the whistle are victimized the competent authority may pass appropriate orders for protecting them or avoiding such victimization. The burden of proving that there was no victimisation of the whistleblower is on the public authority complained against (reversal of burden of proof).**
- n) **The directions of the competent authority to protect a whistleblower from victimisation or avoid victimisation are binding on the public authority. The competent authority may also pass interim orders for protecting witnesses who come forward to depose in an inquiry into a whistleblower complaint.**
- o) **The competent authority may also make orders to stop the continuation of any corrupt practices in a public authority as a result of its inquiry into a whistleblower complaint.**
- p) **If an offence under this law is committed by anybody in a department, its Head will be deemed guilty and will be liable for prosecution and punishment unless he/she proves that he/she acted diligently or that the offence was committed without his/her knowledge.**
- q) **If an offence under this law is committed by a company every person in charge of conducting the business of the company will be liable for prosecution and punishment unless they can prove their innocence.**
- r) **Courts will take cognizance of these offences (listed immediately above) only upon a complaint made by the competent authority.**
- s) **Penalties imposed by the competent authority may appealed against only in a High Court of jurisdiction.**
- t) **Competent authorities must prepare and submit annual reports about the implementation of this law to the Central or State Governments (as the case may be). The respective Governments have the duty to table these reports in parliament or the State Legislature (as the case may be).**

- u) **The law provides for protection of action taken in good faith.**
- v) **The Central and State Government may make Rules for carrying out the provisions of this law.**
- w) **The competent authorities may make regulations for carrying out their functions.**
- x) **All rules and regulations made under this law must be tabled before Parliament or the State Legislature (as the case may be).**
- y) **The Central Government may within two years pass orders clarifying any aspect of this law.**
- z) **The Public Interest Disclosure Resolution of the Central Government issued in 2004 stands repealed.**

II. How good is India's Whistleblowers Protection Bill?

In its current shape and form India's Whistleblower Bill fares poorly international standards and also those underpinning the whistleblower protection laws in many countries. Given below is a snapshot of the extent of match between the provisions of India's Whistleblowers Bill and the internationally accepted standards of Whistleblower legislation.¹

| No. | Brief Description of the International Standard | <i>Whistleblowers Protection Bill, 2014- A comparison</i> |
|------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------|
| 1. | Provide the whistleblower a safe alternative to silence | Partially covered |
| 2. | 'Public interest disclosure' must include all <i>bona fide</i> warnings of various types of unlawful acts, including all serious human rights violations | Partially covered |
| 3. | Public interest disclosure must include wrong doings committed by Ministers | Covered (except the Prime Minister) |
| 4. | Public interest disclosure must cover wrong doing in the private sector | Not covered |
| 5. | Whistleblowers in the public sector including members of the armed forces and intelligence | Covered |

¹ These standards are based on a study of similar laws in developed countries like the USA, the UK, Canada New Zealand, Norway and Romania and developing countries like South Africa, Ghana and Uganda as well as the common minimum standards for such legislation recognised by the Council of Europe. These standards are available on the website of the Council of Europe at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm> accessed on 10 September, 2013.

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| | services and employees of the private sector must be covered | |
| 6. | Issues in employment law relating to protection of the whistleblower against retaliatory action must be codified | Not codified |
| 7. | Issues in criminal law and procedure for protecting the whistleblower and other witnesses against criminal prosecution for defamation or breach of official or business secrecy must be codified | Partially covered |
| 8. | Issues in relation to media law- protection of journalistic sources must be codified | Not covered (whistle-blowing to the media is not allowed) |
| 9. | Public and private sector bodies must be incentivised to establish internal mechanisms for whistle-blowing | Not covered (no mechanism in public authorities to prescribed for receiving whistleblower complaints) |
| 10. | The whistleblower must be provided with guidance and counseling | Not covered |
| 11. | Disclosures of wrong doing must be properly investigated and information must reach the senior management promptly | Not covered (wrong doing is inquired into by the Competent Authority with the head of the department providing comments) |
| 12. | The whistleblower must be informed about the progress of investigation into the disclosure and provided with a copy of the final report and recommendations for corrective action | Partially covered |
| 13. | The whistleblower's identity must not be disclosed without his/ her consent or in order to avert serious and imminent threats to public interest | Covered |
| 14. | The whistleblower must have recourse to an enforcement mechanism to make a complaint against victimisation, have it investigated and be able to claim interim relief and appropriate compensation | Partially covered (no mention of interim order to prevent victimization or give suitable compensation for a victim) |
| 15. | Whistle-blowing to external authorities including the media, subject to specific conditions, must be protected | Not covered |
| 16. | The whistleblower must be treated as having acted in good faith if he/ she had reasonable grounds to be believe that the information disclosed was true even if it turns out later that the wrong doing had | Whistleblowing to the media covered despite the Supreme Court recognising this as a legitimate disclosure method in the matter of |

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| | not occurred | <i>Indirect Tax Practitioners Association vs R K Jain</i> [(2010) 8SCC 281 |
| 17. | The law must create a risk for the person who victimises a whistle-blowing employee through possible sanctions including removal from office | Partially covered |
| 18. | In a case of victimisation of a whistleblower, the law must reverse the burden of proof on the employer | Covered |
| 19. | The law must provide for consequences for accusations made in bad faith | Covered |
| 20. | The law must be monitored and evaluated at regular intervals by independent bodies | Covered |

III. Lacunae in the Whistleblowers Bill:

Despite being much better than the original version tabled in the Lok Sabha in 2010 the current version falls short of international best practice standards for the aforementioned reasons:

1. The Bill does not permit a whistleblower to complain about acts of corruption, willful abuse of power or willful misuse of discretion or offences committed by the Prime Minister (at the Centre) or any of the Chief Ministers (in the States);
2. The *Lokpal* (National level apex anti-corruption and Grievance Redress agency) which will be established under the *Lokpal & Lokayuktas Act, 2013* becomes, will have no role to play in the scheme of protection of Whistleblowers unless the Central and State Government notify them as competent authorities. Under the Lokpal Act any person may make a complaint about an act of corruption allegedly committed by the Prime Minister to the Lokpal. However the Whistleblower Bill does not say what will happen to an allegation of corruption against a Prime Minister if sent to the Central Vigilance Commission. Ideally, the Lokpal should also have been mentioned as a competent authority under the WBP Act for the purpose of receiving complaints.
3. Further, under the *Lokpal and Lokayuktas Act*, complaints of corruption allegedly committed by officers of the three elite All India Services must be made to the Lokpal. The Central Vigilance Commission cannot inquire into such complaints without the direction of the Lokpal. What will happen to whistleblower complaints against officers of these elite services when made under the WBP Act must be clarified in the WBP Rules.
4. The Bill does not recognise whistleblowing against human rights violations and unlawful acts affecting the environment, public health and safety as valid. This remains as a major lacuna despite strong civil society demand for its inclusion.

5. The Bill does not specify a procedure for inquiring into complaints of about acts of corruption, willful abuse of power or willful misuse of discretion or offences committed by members of the lower judiciary because the inquiry procedure that other competent authorities will adopt under Chapter III of the Bill is not suitable for the lower judiciary. Lower courts are under the administrative supervision fo the respective High Courts in the States. Inquiring into actions of corruption of judges and judicial officers will require permission of the High Court.
6. Many States have not established the institution of Lokayukta or State Vigilance Commission. Where such bodies do not exist, the Whistleblowers Bill permits the State Government to designate any authority to inquire into complaints of wrongdoing and protect the whistleblower. This is an unsatisfactory arrangement because these bodies are likely to be government-controlled and their effectiveness in inquiring into complaints and protecting whistleblowers may be compromised.
7. There is no mention of what will happen to a case if the inquiry cannot be completed within three months. Such cases must not lapse due to the doctrine of *laches*.
8. The Bill does not clarify whether sanction for prosecuting serving officers of Government is required under Section 197 of the *Criminal procedure Code, 1973* and/or Section 19 of the *Prevention of Corruption Act, 1988* for launching criminal cases against them
9. The Whistleblowers Bill however, does not include a definition of ‘victimisation’ of the whistleblower despite the Parliamentary Committee and the Law Commission (in 2006) recommending one.
10. The Whistleblowers Bill does not contain any mechanism for protecting RTI users and activists who turn whistleblowers despite the Parliamentary Committee’s recommendation that such a mechanism be included in the law.
11. The Whistleblowers Bill does not protect persons who volunteer to give additional information related to a whistleblower complaint that is under inquiry unless they are recognized as witnesses formally.
12. The Whistleblowers Bill does not cover wrongdoing in the private sector despite the Second Administrative Reforms Commission recommending its inclusion in a comprehensive whistleblower protection law. MPs who spoke on the Bill in the Rajya Sabha demanded that the scope of the Bill be expanded to cover the private sector as well.
13. The Whistleblowers Bill does not permit a whistleblower to publicise the allegations of wrong doing and related facts through the media when authorities fail to take adequate action on a complaint.

Epilogue

India's Whistleblowers Bill is unique in the world as it recognizes any individual or NGO as a whistleblower. This means, RTI activists, anti-corruption crusaders and human rights defenders can be potential whistleblowers. But the Whistleblowers Bill does not do adequate justice to an important principle that defines India's vision as a polity aspiring to become a responsible democracy in the world. At the time of framing of the Indian Constitution, its founders adopted as the national motto a hoary principle contained in the two-millenia old *Mundaka Upaniṣad*: "*Satyamēva jayate*"² which translates as "truth alone triumphs". For truth to triumph, avenues that permit falsehood and corruption to prevail must be foreclosed. Enabling whistleblowers to make disclosures of wrong doing and protecting them are the stated purposes of the present Whistleblower Protection Bill. The national motto cannot be realized unless the lacunae pointed above are corrected before Parliament passes a much stronger law to protect whistleblowers.

**Compiled by Venkatesh Nayak, Access to Information Programme, Commonwealth Human Rights Initiative (CHRI), New Delhi.
25 February, 2014.**

² "*satyamēva jayate nāṅṛtam...*" which translates as "It is truth that conquers and not falsehood...": *Mundaka Upaniṣad* (III.1.6), translation by Sri Aurobindo, 1920. See complete *Sanskṛt* verse and English translation on the website of Wikipedia: http://en.wikipedia.org/wiki/Satyameva_Jayate and Bernard's website dedicated to Sri Aurobindo and the Mother: <http://intyoga.online.fr/mundaka.htm> respectively, accessed on 10 September, 2013.. I would like to thank Mr. P M Bhat a crusader for truth and transparency for drawing my attention to the connection between a whistleblower law and this noble and elegant but oft neglected national motto.