

**SCOPE OF PROTECTION AVAILABLE TO  
WHISTLEBLOWERS: A CRITICAL ANALYSIS OF THE  
WHISTLE BLOWERS PROTECTION ACT, 2011**

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**Introduction:**

There are multiple Acts in India<sup>1</sup> which provide for the eradication of corruption from public sector. But all these Act are not sufficient enough to eradicate the corruption until the protection is provide to those who disclose corruption. 2G spectrum scam, 2008, Bihar fodder scam, Bofors scandal, Satyam scam, Indian coal allocation scam and Commonwealth Games scam are some examples to understand how corruption is prevalent in India. Whistle Blowers Protection Act is the first law of the country which protects the whistleblowers. However, before the passing of the Act, the Supreme Court acknowledged the need to afford some sort of protection (in the form of non-disclosure of identity) to persons who would give information about the malpractices of public authorities. In the case of *A.K. Roy v. Union of India*<sup>2</sup>, the Supreme Court held that-

“The disclosure of the identity of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination.”

Again, In April 2004 the Supreme Court pressed the government to protect the whistleblowers<sup>3</sup> by issuing an office order, the Public Interest Disclosures and Protection of Informers Resolutions, 2004, designating the Central Vigilance Commission (CVC) as the nodal agency to handle

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<sup>1</sup> The Prevention of Corruption Act, 1988, The Central Vigilance Commission Act, 2003, The Right to Information Act, 2005 and The Lokpal and Lokayuktas Act, 2013.

<sup>2</sup> (1982) 1 SCC 271.

<sup>3</sup> The Supreme Court of India took serious note of the death of the Whistleblowers i.e., Satyendra Dubey and Shanmughan Mnajunath.

complaints on corruption.<sup>4</sup> Later on the Indian Government introduced the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 in the Lok Sabha, with an objective to protect those who expose corruption and wrongdoing. The same was passed by the Lok Sabha on 27 December, 2011 and was passed by Rajya Sabha on 21 February, 2014 under the title “The Whistle Blowers Protection Act, 2011”. The Act received the assent of President on 9 May, 2014 but it has not come into force till now.

### **1. Need of the Act:**

The need of the Act for the protection of whistleblowers can be summarized as following:-

- (a) During the past decade, many scams and irregularities have become a regular feature of Indian Politics.
- (b) The murder of many whistleblowers in past, evoked widespread concern over the safety of whistleblowers in India. This led to the public and media outrage demanding the law for protection of whistleblowers.
- (c) There is also international pressure on India to enact a comprehensive law for the protection of whistleblowers. India is a signatory of many international instruments dealing with whistleblowers protection.
- (d) To encourage the people to make the public interest disclosures.

### **2. Study of the Provisions of the Act**

#### **2.1. Objectives of the Act:-**

- (i) The Act seeks to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption, or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure;

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<sup>4</sup> India doesn't have a law to protect whistleblower, *The Times of India*, March 29, 2010, available at: <http://timesofindia.indiatimes.com/india/India-doesnt-have-a-law-to-protect-whistleblower/articleshow/5736903.cms> . (Visited on April 12, 2015).

- (ii) to provide adequate safeguards against victimisation of the person making such complaint and matters connected therewith.

## **2.2. *Non applicability of the Official Secrets Act, 1923:-***

Under section 4 of the Act a disclosure made under this Act is not affected by the provisions of the Official Secrets Act, 1923. A public interest disclosure under section 4(1) can be made, notwithstanding anything contained in the provisions of the Official Secrets Act, 1923.

## **2.3. *Conditions or Requirements for making Public Interest Disclosure:-***

Section 4 of the Act provides requirements that must be fulfilled before making the public interest disclosure. It provides that –

- (i) Any public servant or any other person including any non-governmental organisation may make a public interest disclosure to the competent authority;<sup>5</sup>
- (ii) Any disclosure will be treated as public interest disclosure under this Act if it fulfils the conditions of disclosure as defined in section 3(d);<sup>6</sup>
- (iii) The disclosure should be made in good faith and it must be accompanied by the declaration stating that the information or allegation is substantial true;<sup>7</sup>
- (iv) Every disclosure shall be made in writing, or by electronic mail or electronic mail message with supporting documents or other materials;<sup>8</sup>
- (v) The disclosure or complaint should include the true identity of the person making the disclosure.<sup>9</sup>

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<sup>5</sup> The Whistle Blowers Protection Act, 2011, Section 4(1).

<sup>6</sup> The Whistle Blowers Protection Act, 2011, Section 3(d).

“Disclosure” means a complaint relating to, –

- (i) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988;
- (ii) 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;
- (iii) attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure referred to in subsection (2) of section 4.

<sup>7</sup> The Whistle Blowers Protection Act, 2011, Section 4(3).

<sup>8</sup> The Whistle Blowers Protection Act, 2011, Section 4(4).

<sup>9</sup> The Whistle Blowers Protection Act, 2011, Section 4(6).

**2.4. Punishment for false or frivolous disclosure:-**

Under the Act, the punishment is provided for mala fide and knowingly making false or frivolous disclosure.<sup>10</sup>

**2.5. Authority to whom public interest disclosure shall be made:-**

Every public interest disclosure shall be made before the Competent Authority. The Competent Authorities entitled to receive complaint or disclosure under the Act, are as follows:-

- i. The Prime Minister for Union Ministers.
- ii. The Chief Minister for Ministers of State or Union Territory.
- iii. Chairman of Council of States or Speaker of the House of the People for the MPs, as the case may be.
- iv. Chairman of the Legislative Council or Speaker of the Legislative Assembly for the MLAs, as the case may be.
- v. High Court in relation to any subordinate judge or arbitrator.
- vi. The Central Vigilance Commission/State Vigilance Commissions or other authority designated by the Central Government for Central Government employees and by respective State Governments for State Government employees, as the case may be.

**2.6. Powers and Functions of the Competent Authority:-**

The Act has provided various functions and powers to the competent authority for achieving the objectives of the Act. These powers and functions are as follows:-

- (i) Section 5 of the Act provides the powers and functions of the competent authority on receipt of public interest disclosure. It provides that on receipt of the public interest disclosure. It is the duty of the competent authority to –
  - (a) ascertain whether the complainant was the public servant or any other person;
  - (b) conceal the identity of the complainant.<sup>11</sup>

It also provides that it is the duty of competent authority not to disclose the identity of the complainant. After conducting an inquiry, if the competent authority is of the view that there are insufficient grounds for proceeding with an inquiry or the facts or allegations are frivolous or vexatious then it shall close the matter.

<sup>10</sup> The Whistle Blowers Protection Act, 2011, Section 17.

<sup>11</sup> The Whistle Blowers Protection Act, 2011, Section 5(1).

- (ii) The competent authority has the power to require any public servant or any other person who in its opinion has the information or produce documents to furnish such information or produce such document as may be necessary for inquiry.<sup>12</sup>
- (iii) The Competent Authority has all the powers of a Civil Court for the purpose of inquiry under this Act.  
It is the obligation of public authority to create an appropriate machinery for the purpose of dealing or inquiry into the disclosures sent to it under section 5(3). Such appropriate machinery will be subordinate to Competent Authority. The Competent Authority shall have superintendence over the working of machinery and may give directions for its proper functioning.<sup>13</sup>
- (iv) The Competent Authority has the power to take assistance of police authorities or any other authority as it deems appropriate to render assistance to complete the inquiry or obtaining information from the organisation.<sup>14</sup>
- (v) The Act empowers to Competent Authority to take necessary actions to safeguard the complainant from victimisation and issue suitable directions for the same.
- (vi) The Competent Authority has the power to direct the restoration of the public servant making the disclosure, to the status *quo ante*.<sup>15</sup>
- (vii) Where on the basis of application of the complainant, or witnesses or otherwise, the Competent Authority is of the opinion that either complainant or witnesses or any person rendering assisting for inquiry need protection, it shall issue appropriate directions to the concerned Government to take appropriate measures to protect such complainant or public servant or witness.<sup>16</sup>
- (viii) Under the Act, it is the duty of the Competent Authority to protect or conceal the identity of the complainant at all stages of inquiry or investigation.
- (ix) Where the Competent Authority is of the opinion that any corrupt practice required to be stopped during the continuation of any inquiry, it may pass such interim order as it deems fit.<sup>17</sup>
- (x) The Competent Authority has the power to make regulations, with the prior approval of the Central Government or State Government, as the case may be, for the purposes of giving effect to the provisions of this Act.<sup>18</sup>

<sup>12</sup> The Whistle Blowers Protection Act, 2011, Section 7(1).

<sup>13</sup> The Whistle Blowers Protection Act, 2011, Section 9(1).

<sup>14</sup> The Whistle Blowers Protection Act, 2011, Section 10.

<sup>15</sup> The Whistle Blowers Protection Act, 2011, Section 11(4).

<sup>16</sup> The Whistle Blowers Protection Act, 2011, Section 12.

<sup>17</sup> The Whistle Blowers Protection Act, 2011, Section 14.

<sup>18</sup> The Whistle Blowers Protection Act, 2011, Section 27.

**2.7. Matters not to be inquired by the Competent Authority:-**

Section 6 of the Act provides for certain matters where the Competent Authority has no power to entertain or inquire. It provides that the Competent Authority shall not entertain or inquire into any disclosure-

- (a) where the matter or issue has been determined by the Court or Tribunal;<sup>19</sup>
- (b) in which an inquiry has been ordered under the Public Servants (Inquiries) Act, 1850;
- (c) in which an inquiry has been ordered under the Commissions of Inquiry Act, 1952.<sup>20</sup>

It is further provided that if complaint is made after the expiry period of seven years from the date on which the action complained against is alleged to have taken place then the Competent Authority shall not investigate into the allegations.<sup>21</sup> It is also provided that the Competent Authority shall not question any bona fide action or bona fide discretion exercised in discharge of duty by the employee.

**2.8. Exclusion of certain matters from disclosure:-**

Under the Act certain matter are exempted from disclosure. These matters are- where any question, information or document is likely to prejudicially affect the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign state, public order etc.<sup>22</sup> Further, a person is exempted from giving any evidence or producing any document which he could not be compelled to give or produce in proceedings before a court.<sup>23</sup>

**2.9. Protection of complainant from victimisation:-**

Under the Act, it is the duty of Central Government to ensure that the complainant or public servant does not face victimisation by initiation of proceeding or otherwise on the ground that such person or public servant had made a disclosure or rendered assistance in the inquiry.<sup>24</sup> However, if the complainant or public servant is being victimised or likely to be victimised then he may file a complaint before the Competent Authority and such authority shall take necessary steps to protect such person from being

<sup>19</sup> The Whistle Blowers Protection Act, 2011, Section 6(1).

<sup>20</sup> The Whistle Blowers Protection Act, 2011, Section 6(2).

<sup>21</sup> The Whistle Blowers Protection Act, 2011, Section 6(3).

<sup>22</sup> The Whistle Blowers Protection Act, 2011, Section 8(1).

<sup>23</sup> The Whistle Blowers Protection Act, 2011, Section 8(2).

<sup>24</sup> The Whistle Blowers Protection Act, 2011, Section 11(1).

victimised or avoid his victimisation.<sup>25</sup> The directions given by Competent Authority shall be binding upon the public servant who is guilty of victimisation.<sup>26</sup>

#### **2.10. Protection of identity of the complainant:-**

The Act also provides that the Competent Authority shall conceal the identity of the complainant and the documents or information furnished by him for the purpose of inquiry. However, the identity of the complainant or documents or information can be disclosed in two circumstances-

- (a) where the Competent Authority so decides; or
- (b) where it is ordered by the Court.<sup>27</sup> The Act also lays down punishment for revealing the identity of complainant.<sup>28</sup>

#### **2.11. Burden of Proof:-**

The Act provides that where the complainant or public servant or any other person alleged victimisation before the Competent Authority, the burden of proof shall lie on the public authority to prove that the alleged action on the part of it is not victimisation.<sup>29</sup>

#### **2.12. Offences by companies:-**

Where a company is guilty of committing an offence under this Act, it shall be liable to be proceeded and punished along with every person who at the time offence was committed was in charge of or was responsible to the company for the conduct of the business of the company.<sup>30</sup> It is further provided that where the offence has been committed with the consent or connivance of, or is attributable to, any negligent on the part of any director, manager, secretary or other officer of company, such persons shall also be deemed guilty and liable to be punished.<sup>31</sup>

#### **2.13. Protection of actions taken in Good Faith:**

The Act protects the action taken or intended to be taken in good faith by the Competent Authority, officer, employees or person acting on its behalf.<sup>32</sup>

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<sup>25</sup> The Whistle Blowers Protection Act, 2011, Section 11(2).

<sup>26</sup> The Whistle Blowers Protection Act, 2011, Section 11(3).

<sup>27</sup> The Whistle Blowers Protection Act, 2011, Section 13.

<sup>28</sup> The Whistle Blowers Protection Act, 2011, Section 16.

<sup>29</sup> The Whistle Blowers Protection Act, 2011, Proviso 2 of section 11.

<sup>30</sup> The Whistle Blowers Protection Act, 2011, Section 19(1).

<sup>31</sup> The Whistle Blowers Protection Act, 2011, Section 19(2).

<sup>32</sup> The Whistle Blowers Protection Act, 2011, Section 24.

### **3. Loopholes of the Act**

No doubt, the Act is certainly a significant step to provide protection to the whistleblowers. But still it has some drawbacks too.

#### ***3.1. Scope of the Act is limited:-***

As the Act applies only to public sector and private sector is not included in it. Further, it does not cover the politicians or ministers who are at the top level of the hierarchy.<sup>33</sup>

#### ***3.2. No provision for incentive or reward:-***

The Act has no provision which provides the incentive/reward to support those persons who blew the whistle and helped the government to save public interest

#### ***3.3. No time limit for Inquiry:-***

The Act does not provide any time limit to complete the inquiry. The authority competent to make inquiry may drag on the inquiry for years. Further continuous delay in inquiry will dilute the purpose of the Act.

#### ***3.4. Identity of whistleblower can be disclosed:-***

Under the Act, the identity of whistleblower can be disclosed by the Competent Authority to the Head of the Department or office in certain situations.

#### ***3.5. No definition of the term “victimisation”:-***

Under the Act, when a complaint is filed that any person is being victimised or likely to be victimised then the Competent Authority shall take such action or issue suitable directions to protect such person from being victimised or avoid his victimisation. But, the Act nowhere defines the term “victimisation” which makes matters more confusing.

#### ***3.6. No provision for physical protection:-***

The protection of whistleblowers under the Act is inadequate. It only protects the complainant from victimisation. The Act has no provision which provides the physical protection to the whistleblower.

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<sup>33</sup> Nikita Pasan and Surbhi Jain, “Critical Analysis of the Whistle Blowers Protection Mechanism in Indian Law”, 4 *KIJECBM* 66 (2017), available at: <http://www.kaavpublications.org/journals/journal-1/article/article-1286.pdf>.



**3.7. No Provision for anonymous complaint:-**

Under the WPA, 2011, a complaint can't be filed anonymously. It is mandatory for the whistleblower to disclose his identity to the Competent Authority while making disclosure. Further the Act expressly states that no action will be taken if a disclosure does not indicate the identity of the complainant.

**3.8. No Provision to punish guilty Public Servant:-**

The Act nowhere provides any penalty or punishment to the public servant or public authority who found guilty of victimisation.

**3.9. Exclusion of unlawful acts affecting human rights, environment, public health and safety:-**

The Act does not recognise whistleblowing against human rights violations and unlawful acts affecting the environment, public health and safety as valid. This remains a major drawback despite strong civil society demand for its inclusion.<sup>34</sup>

**3.10. No provision for external whistleblowing:-**

The Act does not permit a whistleblower to publicise the allegations of wrongdoing and related facts through the media when authorities fail to take adequate action on a complaint.<sup>35</sup>

**4. Proposed Amendments to the Whistle Blowers Protection Act, 2011**

As the Bill of 2011 was taken up on the last day of the last Session of the 15<sup>th</sup> Lok Sabha, the official amendments to the Bill (aimed at safeguarding against disclosures affecting sovereignty and integrity of India, security of the State etc.) were not moved. The proposed amendments are of crucial nature and therefore, the Act can be brought into force only after necessary amendments are carried out.<sup>36</sup> For this purpose, the Government has introduced the Whistle Blowers Protection (Amendment) Bill, 2015 in the Lok Sabha on 11<sup>th</sup> May, 2015 which has been passed by the same on 13<sup>th</sup> May, 2015. The Bill is presently pending in the Rajya Sabha. Rules under the Act can be notified only after the Act is brought into force.<sup>37</sup> Thus, the Parliament may have

<sup>34</sup> *Ibid.*

<sup>35</sup> Venkatesh Nayak, "Undermining Whistle-Blower Protection in India", *available at:* <http://lcbackerblog.blogspot.in/2015/05/venkatesh-nayak-on-undermining-whistle.html>.

<sup>36</sup> Press Information Bureau (Government of India), Present Status of Whistleblowers Protection Act, 2011, (11<sup>th</sup> December, 2014), *available at:* <http://pib.nic.in/newsite/mbErel.aspx?relid=113101>.

<sup>37</sup> Press Information Bureau (Government of India), Whistle Blower's Amendment Bill, (30<sup>th</sup> November, 2016), *available at:* <http://pib.nic.in/newsite/PrintRelease.aspx?relid=154613>.

passed the Whistle Blowers Protection Act, 2011 in 2014 but this did not help save the lives of many whistleblowers<sup>38</sup> as the Government has doggedly refused to operationalise the law.<sup>39</sup>

##### **5. Analysis of the Whistle Blowers Protection (Amendment) Bill, 2015:**

The Amendment Bill, 2015, seems to be discreetly diluting the effectiveness of the Act in a major way and curtails the freedom of people to make public interest disclosures for the larger benefit of society. The Act itself is grappled with many issues or shortcomings, but instead of addressing those issues the Bill has further diluted the effectiveness of the Act. After studying the provisions of the Bill, it can be summarised that the Whistle Blowers Protection (Amendment) Bill, 2015 tries to dilute the principal Act (Whistle Blowers Protection Act, 2011). The proposed Amendment Act is restricting the scope of the original Act as it has omitted the words “Notwithstanding anything contained in the provisions of the Official Secrets Act, 1923.”<sup>40</sup> Thus after the passing of the Act, if any disclosure is made, it has to be seen that whether the disclosure is in conformity with the provisions of the Official Secrets Act.<sup>41</sup> Further, the Act has introduced too many exceptions, thus limiting the scope of public interest disclosure. It restricts the list of subjects on which these disclosures can be filed before a Competent Authority.<sup>42</sup> The Bill prohibits reporting of corruption related disclosure if it falls under any ten categories of information, including information related to economic, scientific interests, security of India, cabinet proceedings, intellectual property and that received in a fiduciary capacity.<sup>43</sup> Further the proposed Bill has created a dubious situation for the people and public servants who have a piece of information but cannot disclose them due to restrictions mentioned in section 4(1) of the Bill. The Bill in its essence means that even though a person has vital information regarding a serious issue affecting the public, he or she will be ineligible for protection, if the protection falls within the restrictions mentioned in section 4(1) of the Bill. This makes whistleblowers highly vulnerable since they cannot publicly disclose that information

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<sup>38</sup> More than fifteen whistleblowers have been murdered in India in since the passing of the Act in 2014. Ram Thakur, Nandi Singh and Amit Jethwa were some examples of whistleblowers who were murdered.

<sup>39</sup> Anjali Bhardwaj and Amrita Johri, “Don’t shoot the messenger”, *The Hindu*, August 1, 2017, *available at*: <http://www.thehindu.com/todays-paper/tp-opinion/dont-shoot-the-messenger/article19398998.ece>.

<sup>40</sup> The Whistle Blowers Protection (Amendment) Bill, 2015, section 4(1).

<sup>41</sup> Rupesh Aggarwal, “Critically Analysing the Whistleblowers Protection (Amendment) Bill 2015: Is the Change a Step Towards Regression?”, 1, *NLUALR*, 86, July -December 2015, *available at*: <http://www.nluassam.ac.in/docs/pub/NLUA%20Law%20Review%20Issue%201%20No%20I.pdf>.

<sup>42</sup> *Ibid*.

<sup>43</sup> Stormy debate likely on Whistleblowers Protection (Amendment) Bill in RS, 16-07-2017, *available at*: <http://www.dailyexcelsior.com/stormy-debate-likely-on-whistleblowers-protection-amendment-bill-in-rs/>.

through the Competent Authority. Many of the whistleblowers are primarily internal whistleblowers, who have vital information concerning their organisation or department and if the Bill is brought into effect, it will make it difficult for them to maintain their anonymity, thus diminishing the effectiveness of the Whistle Blowers Protection Act.<sup>44</sup>

## 6. Conclusion:-

After knowing that there is an urgent need to give protection to potential whistleblower, the Government of India has enacted the Whistle Blowers Protection Act, 2011 in order to provide the protection to those who disclose corruption. Indian Whistle Blowers Protection Act, 2011 is unique in the world as it recognises any individual or Non-Governmental Organisation (NGO) as a whistleblower. This means that RTI activists, anti-corruption crusaders and human rights defenders can be potential whistleblowers. Enabling whistleblowers to make disclosures of wrongdoing and protecting them from victimisation are the stated purposes of the Act. However, these purposes can't be realised unless the shortcomings of the Act are removed and a much stronger law is made to protect the whistleblowers.<sup>45</sup> Further, the Whistle Blowers (Amendment) Bill, 2015, has come under heavy criticism from RTI activists and anti corruption crusaders. They say that the bill has created a huge area of exceptions and due to this, the State authorities would be out of reach of whistleblowers. It is also said that if the amendments to the Whistle Blowers Protection Act, 2011, is passed, there may be no one left to protect. These amendments will lead to insecurity amongst the whistleblowers as their life will be endangered due to certain changes in the Act. These amendments are totally against the spirit of the Act and may cause the dilution of the purpose of the Act.

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<sup>44</sup> *Supra note 43.*

<sup>45</sup> *Available at:* [http://www.rtifoundationofindia.com/salient-features-quick-analysis-whistleblowers-pro#.WgR\\_BnZLfhk](http://www.rtifoundationofindia.com/salient-features-quick-analysis-whistleblowers-pro#.WgR_BnZLfhk).