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WHISTLE BLOWER PROTECTIONACT, 2011–A CRITIQUE

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Introduction –Corruption in any society is an anathema to the democratic principles of that nation. Out of various grave problems that governments and state are suffering from, corruption happens to be one of the gravest problems. There are various researcher, theorists and social scientists trying to evolve a solution for curbing the problem of corruption. In India various measures have be adopted by the legislative and judicial authorities to tackle the problem of corruption. In presence of those measures also the problem is reared and is flourishing. One of such measures is promoting the whistle blowing activities in India. Whistle Blowers ProtectionAct 2011, though the parliament has taken efforts to introduce the Act, the Act suffers from certain problems.

The Whistle Blowers Protection Act 2011[1], recently passed by the legislature is the landmark step towards the fulfilment of the dire need for safeguarding the interest of the people who stand for what is right in the face of a government which is plague-ridden with the vice of corruption.

The preamble of the Act enumerates the purpose of the Act as;

"*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 and to provide adequate safeguards against victimization of the person making such complaint and for matters connected therewith and incidental thereto*."

The present paper aims at presenting the critique of the said enactment, and finally suggests the alterations needed to be made to it, in light of comparative study of various existing international norms pertaining to Whistle Blowers Protection, they are as under.[2]

Composition of the Competent Authority

The authorities who can assume the post of the Competent Authority is also limited and under the normal course, already overburdened. It can be suggested that more authorities or bodies, who in essence shall not be affiliated with the legislature, be given the position of the Competent Authority. It should be noted that Section 3 states that in cases of complaint in

[1]February 22, 2014, available at http://www.prsindia.org/uploads/media/Public%20Disclosure/whistle%20blower%20as%20passed%20by%20LS.pdf accesses on February 25, 2014at 10.30 am

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relation to a Member of the Union Council of Ministers, the term Competent Authority shall mean the Prime Minister. The obvious question that arises is 'what in cases where the complaint is regarding the Prime Minister himself?' With this thought, one questions whether the Prime Minister is the appropriate authority to assume the position of the Competent Authority. The Prime Minister is likely to bear a bias towards his own ministers, which is a fact not only in theory but actuality as well.

Limited coverage of reportable actions:

The list of circumstances under whichpublic interest disclosures can be made under the Indian Act is woefully inadequate whencompared with international best practice standards. Only corruption and unlawful loss to theGovernment or unlawful gain to a public servant are recognised as reportable under this Act. Thelist of improper actions covered in other whistle blower laws is much more comprehensive and notlimited to pecuniary loss or gain to Government.

For instance the *Public Interest Disclosure Act*[3] of UK includes the commission or the likelihood of the commission of a criminal offence, failure to comply with any legal obligation, occurrence of miscarriage of justice, damage to the environment and instances which endanger the health or safety of an individual, under its ambit.

The identity of whistle blowers:

Section 4(5)and clause 13 permits the CVC and similar Competent Authorities to reveal the identity of the whistle blower while seeking comments or explanations in the course of an inquiry. This defeats the very purpose of section 4 (6). The central philosophy of whistle blower legislation is to protect the identity of the person making the public interest disclosure so that he/she may not be targeted by the Head of the Department or any colleague or any person who has a vested interest in keeping the lid on wrongdoing shut tight. This is not protection for whistle blowers. This is virtually a tailor-made death sentence for sincere and honest bureaucrats.

[3] 1998, Part IV of the Act, section 43B, available at http://www.legislation.gov.uk/ukpga/1998/23/section/1accessed on 23/02/2014 at 11.00 am

Whistle blowerAct does not apply to the private sector:

The Whistle blower Act does not extend to confidential disclosure about wrongdoing in private sector companies and firms. This is clearly in contravention of international best practices. Given the serious problems of wrongdoing in the extractive industries in India, the pollution caused by industrial effluents and emissions and economic offences committed by private corporations there is ample scope for whistle blowing by conscientious employees.

The Whistle blower Act does not provide any means for such employees to make confidential disclosures. In the era of privatisation and liberalisation, the coverage of the Whistle blower Act must be extended to the corporate sector as well.

Armed Forces have been left out:

The Whistle Blower Act does not allow members of the Indian armed forces to make public interest disclosure about wrongdoing in the armed forces. In the light of several instances which have exposed corruption even in the Armed Forces, it is but necessary to look to encourage and protect the members who make disclosures about corruption or pecuniary gain of a colleague, or about wrongdoing in the maintenance of public order committed by a member of the armed forces. This exclusion is also not in tune with international best practices. Whistle blowers in the armed forces are entitled to similar protection against reprisals as other whistle blowers. Since courts cannot constitutionally interfere with the working of the armed forces, it is advised that there is appointment of separate Competent Authority for them or the existing Competent Authority is empowered to obligatorily mandate the appropriate authority to cooperate and coordinate in the inquiry and decision.

Vexatious complainants will be imprisoned but no policy for rewarding whistle blowers:

Clause 17 of the Whistle blower Act stipulates a prison term of two years and a fine of INR 30,000for persons who make vexatious and frivolous complaints. However there is no reward for a whistleblower that makes a very genuine complaint leading to investigation of a wrongdoing and conviction of the errant officials. However public authorities may initiate only disciplinary action against employees making frivolous or vexatious complaints.

Criminalising whistle blowing in the manner of the Indian Whistle blower Act will only discourage potentialwhistle blowers from making disclosures about malpractices. The very purpose of the Act is defeated due to this penal provision.

No clarity on the kinds of protection that a whistle blower is entitled to receive:

Chapter Vdealing with the nature of protection that a whistle blower can expect is very vague whencompared to other whistle blower laws. It merely empowers the Central Government to ensurethat no proceedings are launched against the whistle blower merely on the ground of blowing thewhistle or rendering assistance to an inquiry procedure launched as a result of the whistle blowing. The CVC and similar bodies in the State may give directions to the relevantauthorities against victimisation including restoration of *status quo ante*. What these directions maybe is not clarified. However these directions are made binding on the public servant who hasbeen directed to protect the whistle blower. The CVC and similar bodies in the States may direct the police to provide protection to the victim. Even this is mentioned in parentheses - a rarity inenactments. There is no clear definition of what kinds of actions will be treated as occupationaldetriment suffered by the whistle blower at the hands of his/her employer.

Chapter V which lays down proposed rules for 'protection to the persons making disclosure' fails to mention about the duration of the protection granted to the whistle blower and his family members after the investigation or the proceedings against the public official come to an end.

Control on Appeal:

The Act, under Section 20 of Chapter VI, allows a "public servant" to go against the order of the Competent Authority by way of an appeal to the High Court. It should be borne in mind that the whistle blower takes this initiative of unmasking the corrupt activities. Therefore to further ensure that the court deals with the appeal with the best of its wisdom it is suggested that the appeal be considered by a *Full Bench.* The appeal requires deliberation of highest significance because in the corruption rampant functioning government, one of the several acts has been exposed where the guilty have been convicted and penalised by the *'Competent Authority'*. Also it should be kept in mind that under Section 3 in certain instances the High Court itself is to be regarded as a *Competent Authority* so when an appeal of such a kind surfaces it will be appropriate if the appeal is taken up by a *Full Bench.*

Need For an Independent Body:

There is a need for a systematic procedure for dispensing the cases pertaining to corruption and that is a more firm and strict hierarchy of the Competent Authority. In the preliminary level, there needs to be a Committee which would ascertain the veracity of the information. The case should be dropped if the facts and allegations are found to be frivolous. If not, then the matter should then, proceed to the Competent Authority as defined in Sec 3(b) of the Act. Alternatively, the Act should set up an independent body under the Competent Authority, rather than leaving the matter to be exercised by the public authority to create its own appropriate machinery. (Chapter IV, Sec 9(1))

There needs to be another subordinate wing which would specifically enquire into the cases of retaliation and would work in consultation with the Competent Authority. The creation of another specific wing would add more meaning to safeguard the complainant, rather than bestowing the same power on the Competent Authority. [Sec 11(2), Chapter V and Sec 12] It should handle issues pertaining to the necessity of revealing the identity of the complainant.

Need For extending safeguards to the family of the complainant:

India is a signatory to the UN Convention against Corruption since 2005. It ought to ratify the Convention, by incorporating its essential elements, which would include the duty of the state to facilitate reporting of corruption by the public officials and providing protection against retaliation for the witnesses and the experts.[4] Article 32 of the Convention provides for "Protections of witnesses, experts and victims", and their relatives from retaliation including limits on the disclosure of their identities. The broader ambit of protection should be included in the Act, by extending protection not only to the complainant, but also to its family and relatives, for effectuating its main purpose of providing adequate safeguards against the victimization of the complainant. Additionally, this would also be in consonance with Article 33 of the Convention, which provides for "Protection of reporting crimes". Moreover, this Act does not provide for witness protection program to protect witnesses during investigation and trial which was one of the key recommendations by The Law Commission.[5]

Conclusion –The enactment of Whistle blower Protection 2011 is yet another example of the brushing under the carpet various grave issues which lead to corrupt practices and non-transparent behaviour by the government officials and authorities. On the basis of the above

[4]UN Convention Against Corruption (see http://www.unodc.org/unodc/en/treaties/CAC/index.html).

[5] "*Witness Identity Protection and Witness Protection Programs*," 198th Report of Law Commission of India, 2006.

stated counts it could be concluded that the content of the legislation may not succeed in keeping the spirit of the preamble of the enactment, because the preamble specifically states about creation of a mechanism and it is implied that it intends to create a mechanism that will be functional and effective in curbing corrupt practices. But with the drawback of the enactment it is a question whether it in fact confers any protection to the whistle blowers and whether people will actually come out and blow whistle on the grave issues, on the basis of this law which itself has questionably not created a impartial and rational authority who could encourage whistle blowing.