

Measures for Fighting Corruption and Ensuring Better Governance  
Note for discussion on the Whistleblower Protection Lokpal (*Lokrakshak Kanoon*)

*This paper highlights the deficiencies of the Public interest Disclosure and Protection to Persons Making the Disclosure Bill 2010 and discusses some of the contentious issues related to protection of people who make public disclosures (whistleblowers). This paper is an element of the Collective and Concurrent Lokpal Measures for fighting corruption and ensuring better governance.*

**Definition of a whistleblower**

1. There are three major issues relating to this-
  - a. Whether people not working within an organisation would be considered whistleblowers if they expose wrongdoing in the organisation (or by individuals within the organisation)
  - b. Whether Right to Information Act users by virtue of their filing applications under the RTI Act, with the purpose of exposing or preventing wrongdoing, as defined in this act, would be considered whistleblowers
  - c. Whether employees of non government organisations (private sector companies, NGOs etc.) who expose wrongdoings within their organisations would be considered whistleblowers
2. Inclusion of each of these categories presents different problems-
  - a. Whereas traditionally, a whistleblower is usually a person who exposes intended or actual wrongdoing in her own organisation, there is obviously a need to give outsiders protection, both to encourage them to blow the whistle and to safeguard their interests.
  - b. The Whistleblower Protection Act should deal with only two aspects, namely, (1) where called upon, protecting the whistleblower's identity, and/or (2) ensuring that the whistleblower is not intimidated or otherwise harmed by the organisation she has exposed. However, as there are other laws that cover threats and violence, strictly speaking, whistleblower protection should be limited to those aspects that are not illegal and are within the discretionary administrative powers of the organisation (transfers, holding up promotions, holding back benefits and other types of discriminatory behaviour). Where the Whistleblower Protection Act also seeks to take cognisance of actions (or inactions) that are already covered under other laws, a justification for the same would have to be built up. Perhaps in some cases it could be argued that if we want to encourage people to blow the whistle, then they must be given protection that goes beyond normal levels.
  - c. If this is accepted, then one can also include under the definition of a whistleblower, individuals who do not work for the organisation they are seeking to expose, and therefore that organisation has no authority over them.
  - d. However, it would still be difficult to envisage the protection being extended to whistleblowers in the private sector. In other words, do we empower the government, through this law, to interfere with the internal functioning of a private sector company or an NGO and prohibit them from transferring, punishing, or even sacking one of their employees? Perhaps appropriate provisions could be made in company and labour laws.
  - e. In all this, safeguards need to be built to ensure that whistle blowing does not become a strategy to protect oneself from deserved admonishments or punishment, or unwanted actions. Of relevance here is Section 5(4) of the government bill which gives immunity to any bonafide action or discretion. This should be retained at the very least. Perhaps it should also be clarified that no action against a whistleblower, unless it is illegal, would be prohibited or questioned, under this act if it has been initiated prior to the whistle being blown, or can be demonstrated to be in keeping with generally followed rules or policy.
  - f. There is broad agreement that where an RTI application has been filed in order to expose some wrongdoing (as defined under this Act) and the applicant is attacked, resulting in grievous injury or death, then it would be the legal responsibility of the government to ensure that the information that was being sought, subject to section 8 of the RTI Act and other legal

restrictions, is speedily put into the public domain. This would ensure that any attack to prevent information from becoming public would be counter productive. There is disagreement on the suggestion that threats to RTI applicants or to other whistleblowers should get special scrutiny from the police, perhaps warrant police protection, and if any such threat is carried out, action should be taken against the concerned SHO/thanedar (irrespective of their provable culpability). There is also disagreement about whether investigation and prosecution of attacks against whistleblowers and RTI applicants should be given special status through fast track/ high level courts/ committees.

#### **Offences covered under the Act**

3. It is important to broaden the scope of whistleblowing to cover not just offences related to corruption, criminal actions and/or misuse of powers or discretion etc. {Section 2(d)} but to other actions which have an impact on society (for example environmental destruction, threats to public safety or health).
4. Considering the widening of the scope of offences covered under the Act, it is not enough to restrict whistle blowing to only wrongdoing by employees and/or organisations. It would have to include any individual who, is either in a position of power or otherwise wields political, institutional or financial powers, provided there is reasonable apprehension that this individual has the capacity to harm the whistleblower in one or more of the measures covered under this bill. However, safeguards would have to be built in to ensure that this act is not invoked every time any complaint is made about anyone who could be abusive or could collectively threaten you.

#### **Obligation to report wrongdoing**

5. Perhaps the bill, apart from spelling out the rights of whistleblowers should also make it obligatory for people, especially those working within organisations, to blow the whistle every time they became aware of a potential or actual wrongdoing. Perhaps the relevant laws could be amended to make those who knew of potential or actual wrongdoings culpable, perhaps as abettors, if they did not do what was required to prevent/expose the same.

#### **Protecting whistleblowers in armed forces and other organisations**

6. Protection must be accorded to whistleblowers from the armed forces and other organisations mentioned in Section 3 (1) (armed forces, forces charged with the maintenance of public order and organisation established by the State for purposes of intelligence or counter intelligence etc.). However, perhaps separate institutions need to be identified to provide the required anonymity/protection to such whistleblowers and safeguards need to be built in to prevent the compromise of national security.

#### **Protecting the identity of a whistleblower and protecting the whistleblower from victimization/harm**

7. Where a whistleblower seeks the protection of her identity, her name and other details would be removed from the complaint and an alias (like a roll number) could be given, with the identity of the whistleblower being kept secret from all, but one or two officers. This would not only help protect the identity of the whistleblower but would also make it easier to fix responsibility for any leaks.
8. Regarding the possibility of revealing the identity of a whistleblower {Section 4(4)}, as a part of the enquiry/investigative process, this should be only done:
  - a. when the competent authority is convinced that this is essential for a proper conduct of the enquiry/investigation;
  - b. when adequate advance notice is given to the whistleblower and she is given an opportunity to be heard before a final decision is taken;
  - c. where all measures to protect the whistleblower are put into position prior to revealing her identity, so as to minimise adverse consequences.

9. If the identity of a whistleblower is revealed (in violation of the Act) and it results in an attack on the whistleblower, then the person who revealed the identity shall be treated as an abettor/accessory to the attack/crime.
10. Protection should not be provided only to whistleblower who makes a complaint but also to those who provide additional information or become witnesses to the case. This might also require the setting up of a witness protection program.
11. What constitutes victimization of a whistleblower should be clearly defined in the Act.
12. In order to deter victimization of whistleblowers, through actions which might not be punishable under any other existing law, some penalty should be prescribed for such actions in this act. This penalty could be in the form of a fine and/or in the form of administrative action including dismissal from service.
13. Where there is a threat to a whistleblower, all possible and required action would be taken within an appropriate time frame to ensure that the threat does not actualize and where harm has already occurred, no further harm occurs. Perhaps an indicative frame work could be made to suggest the optimal timeframe within which various measures and actions must occur.

#### **Scope of the Whistleblower Protection Act**

14. The Whistleblower Act need not get into detailing the process of dealing with complaints, as these are already laid down under the other various relevant laws.

#### **Time limit beyond which cases can not be taken cognisance of**

15. There is no logic for prescribing the time limit of 5 years beyond which cases can not be taken cognisance of {Section 5(3)}.

#### **Transparency**

16. It would be the responsibility of the investigating agency to keep the whistleblower informed of the details and progress of action on the complaint, including reasons and grounds for closing the complaint, if this happens.
17. All provisions of RTI Act should apply to this Act.

#### **Competent Authority {Section 2(b)}**

18. As the scope of the Act is proposed to be expanded to cover areas other than corruption, clearly it would not be appropriate to designate only the anti-corruption agencies as competent authorities for receiving requests for anonymity and protection and complaints of threat from whistleblowers. Clearly, each concerned department/ministry authorised to receive complaints would have to have their own whistleblower protection mechanisms in position. However, where the whistle is being blown against top functionaries of an organisation, this might not be effective or adequate. Therefore, perhaps an independent committee needs to be created that is empowered to receive complaints against public servants above a certain level, or against organisations. This committee could protect the identity of the whistleblower and send the complaint onwards for investigation to the appropriate authority with an alias. Perhaps the chief information commissioner, the CVC or SVC, and chairperson of the lokpal/lokayukta could be members of this committee at the central/state level respectively.
19. Where there is apprehension or complaint of adverse consequences on the whistleblower, this committee could also be empowered to have an enquiry conducted and issue necessary directions under this law to prevent illegitimate administrative action. Where it is apprehended that protection might be required against a criminal act, this committee shall bring the matter to the notice of the relevant authorities.