

Right to Information and Good Governance

Professor. Doctor. Sairam Bhat

Department of Law

National Law School of India University

Lecture No. 69

Whistle blowers Protection Act and Right to Information

(Refer Slide Time: 00:14)



Critique of the Whistle Blowers Protection Act, 2014

- Private sector not covered
- Competent Authority in the State in the absence of State Vigilance Commission
- Victimisation not defined under the Act
- No penalty for public servant victimizing complainant
- Competent Authority has no authority to penalize
- No compensation for the complainant who has been victimised for making a public interest disclosure



The Whistle Blower Protection Act as it stands today is a far cry from the first bill on whistle blowers protection which was drafted by the law commission in December, 2001. Now, several changes have been made to the original draft to remove the loopholes that became apparent over the years, but unfortunately the present Act also has certain drawbacks which cannot be overlooked. Now, I would be discussing some of the significant flaws of the Act.

The first flaw is that the private sector is not covered under the Act. Now, the second administrative reforms commission had actually recommended that the private sector should be brought within the ambit of the Whistle Blower Protection Act, so that any person who is making a public interest disclosure against an official or against a person who works in the private sector is also not retaliated against and some action is taken. But unfortunately, the recommendation of the second administrative reforms committee was not accepted.

Secondly, the competent authority in the state in the absence of a state vigilance commission is another question that needs to be looked into. Because there are several states that do not have a state vigilance commissions. What will happen in such circumstances? The Act mandates that any officer of the state government or any other authority as the state government may stipulate may act as the competent authority to address the grievances of the whistle blowers. But it does not seem to be a very fool proof arrangement, especially in cases when the complaints are made against the government functionaries working under the state government.

So, the question of bias arises and doubts on the fairness of the officer or the authority of the state government receiving the complaint or public interest disclosure may very well be entertained. So, any person may just guess and be very sure there will be questions of bias that will come up in such cases. Now, very important problem with the Act is that victimization has not been defined. The Act seeks to protect persons making public interest disclosures and those who assist in any such inquiry under the Act against any form of victimization, but unfortunately the Act does not define what acts amount to victimization.

In the absence of a concrete definition of victimization or at least the absence of certain guidelines which may be given to the competent authority to understand what victimization is, a lot has been left to the subjectivity and would be difficult for the whistle blower to address if they are retaliated against or victimized. Now, no penalty for the public servant has been given who is victimizing a particular complainant.

Now, the Act directs that the public servant against whom a complaint has been made or the public authority under which the public servant is serving should ensure that the interest of the whistle blower who is being victimized is safeguarded or further victimization of the whistle blower is stopped. But it does not prescribe any penalty for the public servant who has already victimized the whistle blower. So, they have just been asked to stop victimization, but they have not been given any kind of penalty for the victimization that they have caused.

Now, the competent authority also has no authority to penalize. So, it is very unfortunate that the competent authority can only make recommendations to the public authorities under which the

public servant against whom a public interest disclosure has been made is serving. Now, the recommendations can only be with regard to the action that may be taken in relation to the public servants who have been found to indulge in acts which are prohibited under the Act, but the competent authority does not have any right to impose or any authority to impose penalties on them.

If the public authority under whom the public servant is serving does not agree to the recommendation made by the competent authority, it has to only record its reason in writing. Now, lastly no compensation has been provided for the complainant who is being victimized or who has been victimized for making a public interest disclosure. So, any kind of harm or detriment that may have been suffered by the whistle blower will just be as it is and no compensation has in provided it.

The competent authority may just give directions to reinstate the whistle blower if he has been removed from office and that too if the whistle blower or the complainant it is a public servant. But as we have already seen that the Act also allows complainants like general public and a person who is working with a non-governmental organization to Act as a complainant or to a make a public interest disclosure.

So, if a circumstance arises that person who works in a non-governmental organization has been removed from office for making a complaint about a public servant the Act does not say anything about the competent authority having the right to reinstate such an official or such a person working with a non-governmental organization and this is actually quite unfortunate.

(Refer Slide Time: 05:57)

International Convention on whistle blower protection

- United Nation's Convention Against Corruption
- Only legally binding universal anti-corruption instrument
- Signatories - 140 countries
- Formally ratified, accepted, approved, or acceded - 187 nations (as of 6 February 2020)
- India ratified it in May, 2011
- Article 32 and 33



Now, we have looked at our domestic law that gives protections to whistle blowers. Now, let us look at the international law for the protection of whistle blowers. Now, whistle blowers protection is a recognized part of international law and how has that happened? In 2003, the United Nations adopted the Convention against Corruption. It is the UNCAC, it is the only legally binding universal anti-corruption instrument and this convention has been signed by 140 nations and it has been formally ratified, accepted and approved by 187 nations as of sixth February 2020, including India, which ratified it in May, 2011.

Now, Articles 32 and 33 of the UN Convention endorse protection for whistle blowers. What does Article 32 state? It stipulates that each state party shall take appropriate measures in accordance with their domestic legal system and within the party's means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning any kind of offense, which is recognized under the convention.

And Article 33 again requires the state parties to incorporate into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities within the jurisdiction of the state any fact concerning offences of corruption. Now, the article encourages states to provide protection against any unjustified treatment to whistle blowers.

According to the legislative guide of the UNCAC measures of protection may include psychological support the institutional recognition of reporting and transferring of whistle blowers within the same organization or relocating them to a different one. The same legislative guide also mentions that provision of confidential in-house advice to whistle blowers can also be a part of the effective protective system.

Now, it is very noteworthy that the technical guide to the UNCAC mentions that compensation and civil damages as protective measures may also be provided, but unfortunately the domestic law in our country does not make any provision for compensation or award of civil damages.

(Refer Slide Time: 08:43)

Whistle Blowers Protection Act and the Right to Information Act



- Retaliation against RTI Activists - Satish Shetty, Lalit Mehta and others
- In 2018 alone, 18 people were killed for blowing the whistle on corruption on the basis of information accessed under the RTI Act - NCRB does not specifically report crimes done against whistleblowers.
- Whistle Blowers Protection (Amendment) Bill, 2015 incorporated the following:
 - Section 4(1-A) - no complaint of any public interest disclosure shall be entertained if it affects sovereignty, security, integrity of Indianon-disclosure clauses is same as section 8(1) of RTI act.
 - competent authority on receipt of such disclosure refers to an authority authorized by Central or State government which will certify whether disclosure falls under section 4(1-A)
 - disclosure of information relating to commercial confidence, trade secrets or intellectual property that would harm competitive position of a third party is forbidden.
 - prohibited disclosure of information, which would impede the process of investigation or apprehension or prosecution of offenders



Let us, look at the Whistle Blower Protection Act on the right to information act and see how are they related. The RTI Act as we are aware entitles public to request and receive information that pertains to public bodies and their conduct information that is publicly available because it is intrinsically related to public interest and entirely separate but equally critical way in which public is kept informed is through whistle blowing. So, the RTI Act in a way has empowered common man to have access to information from public authorities making every citizen a potential whistle blower.

The RTI Act and the Whistle Blowing Protection Act are means by which the government is held accountable to the public if they violate the law or public trust. Unfortunately, the RTI Act does not provide protection to whistle blowers, although officials who act in good faith are afforded protection under the Act, many RTI activists including policemen have unfortunately been harass and murder for seeking information to promote transparency and accountability in the working of public authorities, media reports of more than 300 instances of attacks or harassment on citizens for seeking information under the RTI Act.

Now, I have looked at a few cases where RTI activists were retaliated against and some of them rather all the cases that I will discuss had seen the worst that is were murdered. One such case is from Rajkot, that is Nanji-bhai Saundarya, who was a 35 year old man who was clubbed to death

by 6 people in March, 2018. He had filed an RTI application demanding transparency about the funds spent on construction work in his village. Nanji-bhai had complained about the misappropriation of village funds. He later realized that money was being siphoned off from some scheme. So, he filed an RTI to get details of the various schemes and on the basis of the information receipt he filed a misappropriation of public funds case in the court.

The other case that I talked about is from West Bengal. Here Mohammed Taheruddin was murdered in 2016 for exposing MGNREGA scam in the Gram Panchayat of Uttar Dinajpur. He had disseminated information to job card holders whose bank accounts were used for withdrawing money in the name of fake projects. So, he was working with this organization called Packed org as a volunteer which was working in the field of transparency and anti-corruption.

Another case from Maharashtra is from Satish Shetty. He was a social activist who used the Right to Information Act for inquiry and he ultimately became a whistle blower by lodging a complaint against Mumbai based IRB land developer and real estate firm. What IRB had done was it had grabbed huge land that was set aside by the government for the Mumbai Pune highway. After two and a half months of lodging a complaint Satish was killed outside his house in 2010.

Another person from Jharkhand Lalit Mehta who was an RTI activist. He worked for the National Rural Employment Guarantee Program and he was murdered in 2008 after he came across the social audit of NREGA projects. He found that the authorities were given huge sum for implementation and employment of rural people under the scheme. The master roll on the other hand showed that rules which were created had more number of workers than who are actually employed, forged signatures of villagers were taken and job cards were issued in the name of person who had already died.

So, in all the above cases what we see is persons who were working in corporations or government projects and some who are outsiders by using the RTI Act drew light to scams which were taking place. Now, although the Whistle Blowers Protection Act was notified in May 2014,

the centre told the Parliament that the act needs amendments to safeguard against disclosures that may have national security implications.

So, what did the centre do to this end the centre brought in the Whistle Blowers Protection Amendment Bill that was passed by the Lok Sabha in May 2015, but not by the Rajya Sabha. Because ultimately the dissolution of the Lok Sabha have been before the general elections. So, after this the government also told that you know, the existing framework, which is there is adequate for the safety and security of all citizens including RTI activists.

So, they must wait for the bill to be passed. Otherwise, the Whistle Blowers Protection Act of 2014 cannot yet be operationalized because of the very reasons why the bill was passed and the government also said that maintenance of law and order providing safety and security to citizens is a matter of the state government and the existing laws which are already there that is the Indian Penal Code, the CrPc they are adequate to provide safety and security to all citizens including the RTI activists.

Now, unfortunately instead of operationalizing the Whistle Blower Protection Act, the amendment bill severely diluted key provisions of the law. Now, what did the amendment bill do? It sought to remove immunity to whistle blowers from prosecution under the Official Secrets Act, for disclosures which are made under the Whistle Blower Protection Law. Now, offenses under the Official Secrets Act are punishable with imprisonment of up to 14 years. Now, threat of such stringent penalties would deter even the genuine whistle blowers.

The basic purpose of enacting the Whistle Blower Protection Act is to encourage people to report wrongdoing and if whistle blowers are prosecuted for disclosing information as part of their complaint and if they are not granted immunity from the Official Secrets Act then the very purpose of the law would be defeated. Moreover, what the bill did was to bring the Whistle Blowers Protection Act in line with the RTI act the bill sought to say that complains which are made by whistle blowers containing information, which may prejudicially affect the sovereignty, integrity, security of the state will not be inquired into.

In addition, certain categories of information cannot form part of disclosures, which are made by a whistle blower unless the information has been obtained under the RTI Act this also includes information that relates to commercial confidence, trade secrets which would harm the competitive position of a third party or information which is held in fiduciary capacity. Now, these exceptions have been model on Section 8(1) of the RTI Act, which least information which cannot be disclosed to citizens.

Now, combining the two laws is not a good idea and it would actually stop genuine whistle blowers in several scenarios. For instance, if we look at the example of a government official who comes across evidence of wrongdoing in the normal course of his work and he does not need the RTI Act to access such information, but as per the Whistle Blower Protection Amendment Bill of 2015, if the information relates to some kind of trade secret or commercial confidence or which can harm the competitive position of a third party it cannot be revealed until and unless the information has been obtained from a RTI application.

Now, a report of the preliminary findings of assessment of orders of the central information commission shows that 60 percent of RTI applications are denied stating that the information is of the nature specified in Section 8(1). So, this is one of the reasons why RTI activists have turned into whistle blowers. Because they sense that some unprofessional conduct is happening, they inquire into it and the inquiry is actually not permitted by the central information commissioner's and then they take it upon themselves to find out the misappropriation and expose them.

The national crime records bureau does not specifically report of crimes as crimes which are done against whistle blowers. So, any kind of offense committed against whistle blower be it murder, death threats, harassment are not reported as a offencs of any specific nature. So, this is actually a major blow to the RTI activists as well as the applicability of the Whistle Blower Protection Act.

Now, other amendments which have been suggested by the bill is that if any receipt of disclosure is made which is subject to clause 4 1-A that is clause which says that some information is going

to be qualified, then the information has to be first sent by the competent authority to an authority which is authorized by the central or the state government which will actually give a certificate that such disclosure actually falls under Section 4 1-A that is disqualified information and no enquiry can be done on such information and then that decision of this authority will be binding on the competent authority.

So, this also undermines the very purpose of the Whistle Blowers Protection Act. Another interesting amendment, which has been suggested by the amendment bill is that it prohibits disclosure of information which would impede the process of investigation, apprehension or prosecution of offenders, with the increasing instances of custodial violence in our country and detention of all offenders under political pressure this seems nothing but a way of safeguarding police officials and political parties by discouraging any such kind of disclosure.

(Refer Slide Time: 20:20)



Conclusion

- Purpose of the RTI Act differs from the Whistle Blowers Protection Act
- Need of the hour - A law which protects the interests of RTI activists and anti-corruption crusaders.
- Implementing the 2014 Act by plugging the loopholes.



Now, if we conclude it can be said that the purpose of the RTI Act and the Whistle Blowers Protection Act those similar under certain circumstances or those similar on some fronts are a little different from one another. For instant, the purpose of the RTI Act is to make information with public authorities accessible to all citizens in order to promote transparency and accountability, there may be circumstances where it may not be desirable for public institutions

to reveal all types of information to citizens and in such circumstances information would be denied.

In contrast the Whistle Blowers Protection Act provides for corruption related information to be given by an individual to a competent authority. In all cases the competent authority is a high-level constitutional or statutory authority. The information is not made public and the inquiry into the allegation is required to be discreet with the identity of the complainant or the public servant and related documents or witnesses being kept confidential.

But when we see that these two acts are very different the purposes that they serve are different, there does not seem to be a reason to align the two and to bring about this amendment. Fortunately, the Whistle Blowers Protection Amendment Bill of 2015 was not passed but there is every likelihood that it would be considered again. So, the need of the hour is to ensure that there is a law in place which protects the interest of RTI activists and anti-corruption procedures. It is the moral obligation of the government to immediately promulgate rules and implement the Whistle Blower Protection Act to protect those who at great peril expose wrongdoing.

One of the ways could be by plugging the loopholes which have come to the notice of which have come to the surface in the Whistle Blower Protection Act of 2018 and implementing the Act and also ensuring that rules are framed and made operational as soon as possible.