

Whistleblower Bill in India - A case of the right hand not knowing what the left hand has done

August 27, 2010

Dear all,

A short while ago I sent you an preliminary analysis of the *Public Interest Disclosure and Protection of Persons Making Disclosure Bill, 2010* (the Whistleblower Bill) has been tabled in the Lok Sabha (Lower House of India's Parliament) yesterday (26th August 2010). Here is an additional facet to the complex issue. The Department of Personnel which prepared this Bill has not lived up to the decision taken by its sister Department: the Department of Administrative Reforms and Public Grievances on the same issue. Please read on:

What the Second Administrative Reforms Commission said about Whistleblower legislation in 2007:

In January 2007 the Second Administrative Reforms Commission (SARC) headed by Dr. Veerappa Moily, presently the Minister for Law under the UPA Government submitted its 4th Report entitled: *Ethics in Governance*. (click here to access the complete report: <http://arc.gov.in/4threport.pdf>) Readers will recollect that SARC was constituted by the UPA Government during its first tenure to achieve a proactive, responsive, accountable, sustainable and efficient administration for the country at all levels of the government. In its 4th Report, SARC dealt with the issue of whistleblowers in the following paras:

"3.6 Protection to Whistleblowers

3.6.1 Whistleblowers play a crucial role in providing information about corruption. Public servants who work in a department/agency know the antecedents and activities of others in their organization. They are, however, often unwilling to share the information for fear of reprisal. There is a very close connection between the public servant's willingness to disclose corruption in his organization and the protection given to him and his/her identity. If adequate statutory protection is granted, there is every likelihood that the government would be able to get substantial information about corruption. The term "whistleblowing" itself is a relatively recent addition to our lexicon. In the United States, in the post-Watergate era, after the trials and tribulations of Daniel Ellsberg, the man who "blew the whistle" on the so called "Pentagon papers", whistleblowing has not only been protected by statute but is also encouraged as an ethical duty on the part of the citizens. Furthermore, after the spectacular collapse of Enron and WorldCom, the US Congress passed the Sarbanes-Oxley Act of 2002, granting sweeping protection to whistleblowers in publicly traded companies. Anyone retaliating against a corporate whistleblower can now be imprisoned for up to 10 years[46]. [Source: Raghu Dayal-"Whistleblowers need to be protected"-ET: 26-12-06]

3.6.2 Laws providing such protection exist in the UK, the USA, Australia and New Zealand. The UK Public Interest Disclosure Act, 1998, the Public Interest Disclosure Act, 1994 of Australia, the Protected Disclosure Act, 2000 of New Zealand, and the Whistle blowers Protection Act, 1984 of USA are legislations providing protection to whistleblowers. All these laws generally provide for preserving the anonymity of the whistleblower and safeguarding him/her against victimization within the organization.

3.6.3 The Law Commission in its 179th Report has proposed a Public Interest Disclosure (Protection of Informers) Bill, which provides protection to whistleblowers. The Bill has provisions for providing safeguards to the whistleblowers against victimization in the organization. It also has a provision that the whistleblower may himself seek transfer in case he apprehends any victimization in the current position. In order to ensure protection to whistleblowers, it is necessary that immediate legislation may be brought on the lines proposed by the Law Commission.

Box 3.1: The Whistleblowers

Manjunath Shanmugam working with Indian Oil Corporation (IOC) was a graduate of the Indian Institute of Management, Lucknow. He refused bribes and ignored threats to his life in his fight against adulteration by the petrol pump owners. He paid the price. He was shot dead on 19th November, 2005 allegedly at the behest of corrupt petrol pump owners.

Satyendra Dubey, working with the National Highways Authority of India (NHA), exposed the rampant corruption in construction of roads. He was also found dead on 27th November, 2003.

At the end of this section SARC made the following recommendations:

"3.6.4 Recommendation:

a. Legislation should be enacted immediately to provide protection to whistleblowers on the following lines proposed by the Law Commission:

- Whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment.
- The legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by willful acts of omission or commission.
- *Acts of harassment or victimization of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence."*

What the Department of Administrative Reforms and Public Grievances said about this recommendation:

In an undated document uploaded in recent months the Department of Administrative Reforms and Public Grievances (DARPG) has listed the decisions taken by the Government of India on the 5th Report of SARC. The aforementioned recommendation was accepted in toto. (click here to access the decisions-taken document: <http://darpg.nic.in/arpq-website/4tReport-EthicsinGov.pdf>)

A look at the Whistleblower Bill shows the hollowness of this decision. On the one hand the Government has accepted in principle that the whistleblower law must cover corporate whistleblowers also as recommended by the SARC. However the Whistleblower Bill introduced in the Lok Sabha does not cover the corporate sector at all.

Further, SARC's recommendation that the whistleblower law must guarantee anonymity to whistleblowers has also been ignored. As indicated in my preliminary analysis, clause 4(5) of the Whistleblower Bill requires the CVC or similar competent authorities in the States, investigating confidential disclosures, to keep the identity of the whistleblower secret. However a proviso to this sub-section permits the CVC and similar competent authorities to reveal the identity of the whistleblower to the Head of the Department while seeking comments or explanations in the course of an inquiry. The Head of the Department is barred from disclosing the identity of the whistleblower to anybody else. **This provision alone defeats the very purpose of the law. The central philosophy of whistleblower 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. The proviso to Section 4(5) negates the very purpose of the law. This is not protection for whistleblowers. This is virtually a tailor-made death sentence for sincere and honest bureaucrats.**

Clearly the Whistleblower Bill prepared by the DoPT does not pay attention to the decisions taken by the DARPG on the same topic. Both departments are part of the Ministry of Personnel headed by a common Minister under the overall charge of the Prime Minister. The Government of India has set up the mechanism of Inter-Ministerial Consultations to overcome such hiccups. Additionally the Committee of Secretaries examines all draft Bills before they are passed on to the Cabinet for approval. Did anybody at any of these stages of internal consultation point out to the incompatibility of the provisions of the Bill with the decisions taken by the Government on the 4th SARC Report? This entire law-making exercise has been conducted without consulting people or even most of the officers' associations. Perhaps widespread consultation would have helped sort out such confusion. Is somebody listening? Implementing Section 4(1)(c) of the RTI Act can help avoid such situations. This incident also raises questions of how seriously the recommendations of SARC are being implemented.

In order to access the complete text of the preliminary analysis and also our previous email alerts please click on:

http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&id=65&Itemid=84

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