WHISTLE BLOWING: A HOBSON'S CHOICE?

CHERRY-PICKING BETWEEN STATE AUTHORITIES AND THIRD-PARTY INTERNET PLATFORMS[†]

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'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.'

James Madison[1]

I. Introduction

The Hon'ble Supreme Court of India has consistently held that disclosure of information in the functioning of the Government must be the rule, and secrecy, an exception.[2] A good whistle blowers' protection mechanism encourages transparency, accountability and responsibility. However, it appears that the State has given scant regard to the milieu of whistle blowers in India and the steps taken for their protection too, have been subpar.

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† This article reflects the position of law as on 24 February 2019.

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1 James Madison, 'To WT Barry' in Gaillard Hunt (ed), *The Writings of James Madison* (1st edn GP Putnam's Sons New York 1900) vol. 9, 1910, para 2, *available at* http://oll.libertyfund.org/titles/1940 (last visited 24 February 2019).

2 *SP Gupta* v. *Union of India* AIR 1982 SC 149, para 66.
See State of Uttar Pradesh v. *Raj Narain* AIR 1975 SC 865, para 74; *Dinesh Trivedi* v. *Union of India* (1997) 4 SCC 306; and *Vineet Narain* v. *Union of India* AIR 1998 SC 889.

Despite three reports by National Commissions,[3] the passing of a resolution by the Government of India[4] as well as recurrent directions from the Supreme Court,[5] the law establishing a mechanism to receive whistle blower disclosures, to inquire into such disclosures and to safeguard against the victimisation of whistle blowers[6] is yet to be implemented. *The Whistle Blowers Protection Act, 2014* (WBP Act) received the presidential assent on 9 May 2014, but has not yet come into force.

Before the legislation could test the waters, The Whistle Blowers Protection (Amendment) Bill, 2015 (Amendment Bill) was passed by the Lok Sabha and it is currently pending consideration before the Rajya Sabha. The Amendment Bill portends darker times for whistle blowers as it results in not only diluting the provisions of the WBP Act, but also undermines the overriding power of *The Right to Information Act, 2005* (RTI Act) as regards public interest. It would not be a happy development if the message that this Amendment Bill gives is that the WBP Act–enacted to promote public interest, transparency and accountability, and to provide protection to whistle blowers–is quite ironically also susceptible to being used for watering down the campaign against corruption.

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3 *See* National Commission to Review the Working of the Constitution, 'Probity in Governance' (21 August 2001), clause 3.D, *available at* http://legalaffairs.gov.in/volume-2-book-1 (last visited 24 February 2019); Law Commission of India, 'The Public Interest Disclosure and Protection of Informers' (One Hundred and Seventy Ninth Report December 2001), *available at* http://lawcommissionofindia.nic.in/reports.htm (last visited 24 February 2019); and Second Administrative Reforms Commission, 'Ethics in Governance' (Fourth Report January 2007), clause 3.6, *available at* https://darpg.gov.in/arc-reports (last visited 24 February 2019).

4 The Government of India had issued Resolution No. 89 dated 21 April 2004 authorising the Central Vigilance Commission as the designated agency to receive written complaints from whistle blowers. The Resolution also, *inter alia*, provides for the protection of whistle blowers from harassment and keeping the identity of whistle blowers concealed.

5 *Parivartan & Ors.* v. *Union of India & Ors*. Writ Petition (Civil) No. 93 of 2004 (Unreported 29 September 2006, 30 August 2013, 12 February 2015, 08 April 2015, 05 November 2015 and 13 January 2016), *available at* https://www.sci.gov.in/ (last visited 24 February 2019).

6 *See The Whistle Blowers Protection Act, 2014,* Statement of Objects and Reasons.

Meanwhile, the Internet today provides a plethora of transnational third-party whistle blowing platforms such as WikiLeaks, that not only ease the process of whistle blowing but are also gag-proof and provide better anonymity protections than our national legislation.[7] While a cursory glance may make this an attractive alternative to the State mechanism, the devil lies in the details while considering the consequences of such global disclosures on a State's security, public interest and individual privacy.

This article investigates the drawbacks of the WBP Act and examines why a whistle blower would be inclined to choose a third-party internet platform over an existing, legitimate State mechanism. Since the online whistle blowing route also comes with a critical catch for national security, the article contends that domestic legislation ought to inevitably be strengthened to raise the levels of legitimacy and trust in the State. The provisions of the WBP Act must provide for a healthy and safe atmosphere for whistle blowers to fearlessly report wrongdoing.

To this effect, Part II delves into the highly critiqued sections of the WBP Act and the amendments proposed to these sections in the Amendment Bill and explores why there is a permeating lack of confidence in State authorities today. Part III then weighs the incentives against the risks of whistle blowing to a third-party internet platform and ascertains how this alternative can potentially do more harm than good. Lastly, Part IV makes recommendations based on international best practices to strengthen our whistle blower protection legislation and to establish a fine balance between the conflicting interests of Government transparency and national security.

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7 Case in point: In 2009, when Barclay's Bank obtained a gag-order from the Court mandating *The Guardian* to remove leaked memos exposing a tax-avoidance scam, WikiLeaks broadcasted the leaked information instantly thereafter, thus rendering the order futile.
See David Leigh and Luke Harding, *WikiLeaks: Inside Julian Assange's War on Secrecy* (1st edn Guardian Books London 2011) 63.

II. Whistle Blowers Protection in India: a Safe Alternative to Silence?

For want of a strong whistle blower protection law, whistle blowers in India continue to face major persecution for exposing corruption. For instance, *Ramon Magsaysay* awardee Sanjiv Chaturvedi has faced severe harassment for uncovering the Haryana Forestry and the All India Institute of Medical Sciences (AIIMS) scams.[8] Others, such as Satyendra Dubey, Shanmugam Manjunath, Amit Jethwa and Shehla Masood were allegedly murdered for exposing corruption, once their identity became public. Reprehensibly, the 'Hall of Shame' statistics maintained by the Commonwealth Human Rights Initiative record a total of 431 attacks on RTI applicants from April 2006 till February 2019.[9]

The Supreme Court of India had been the only bastion of whistle blowers' rights till 2017. In 2004, in response to the petition filed after Satyendra Dubey's murder (*Parivartan & Ors.* v. *Union of India & Ors.*), the Apex Court directed that suitable machinery be put in place for acting on whistle blowers' complaints till specific laws on the matter were enacted. In 2016, with the WBP Act still pending in Parliament and in the absence of any executive set-up, the then Bench said that an 'absolute vacuum' could not be allowed to go on and directed the Centre to put in place an administrative mechanism for whistle blower protection. However, post the enactment of the WBP Act, in January 2017, the new Bench disposed of the 12-year old petition, dubbing the issue 'premature', and granted liberty to the petitioner to come back to Court after the Centre submitted that when the WBP Act was

8 *See* Gaurav Bhatnagar, 'RTI Reveals Modi Called Health Minister to Discuss Removal of AIIMS Whistleblower Sanjiv Chaturvedi' (2018) *The Wire, at* https://thewire.in/government/rti-reveals-modi-called-health-minister-discuss-removal-aiims-whistleblower-sanjiv-chaturvedi (last visited 24 February 2019).

9 Commonwealth Human Rights Initiative, 'Hall of Shame: Mapping Attacks on RTI users' (2019) *Commonwealth Human Rights Initiative, at* http://attacksonrtiusers.org/ (last visited 24 February 2019).

examined by the Government it found certain deficiencies and conflict between the provisions of the WBP Act and those of the RTI Act.[10]

The WBP Act by itself is far from perfect. For instance, it does not explicitly clarify what constitutes a valid 'public interest disclosure' nor does it make allowance for anonymous disclosures. No provision has been made for appeals to challenge an impugned order from a designated Competent Authority. The safeguards provided against victimisation are also feeble.

The Amendment Bill of 2015 was passed by the Lok Sabha *sans* public consultation and is currently pending in the Rajya Sabha. The Amendment Bill does nothing to remedy the shortcomings of the WBP Act. Instead, it further impairs the fight for transparency by requiring a finer sieve for public interest disclosures to pass through. In 2015, an RTI application revealed a Cabinet Note on the proposed amendments to the WBP Act stating that the present law gives an 'absolute right to whistleblower to make a complaint' and that 'people cannot have the absolute right to blow a whistle if they see wrong-doing', as reported by *The Times of India.*[11]

The proposed amendments have been modelled on sub-section (1) of section 8 of the RTI Act which enumerates ten exemptions from disclosure of information. The justification given for this move was to strengthen the safeguards against disclosures which may prejudicially affect the sovereignty and integrity of the country, security of the State, friendly relations with foreign States, or lead to incitement of an offence.[12] In this respect, the Amendment Bill amends sections 4, 5 and 8 of the WBP Act by importing the ten exemptions from the RTI Act.

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10 *Parivartan & Ors.* v. *Union of India & Ors.* Writ Petition (Civil) No. 93 of 2004 (Unreported 29 September 2006, 30 August 2013, 12 February 2015, 08 April 2015, 05 November 2015, 13 January 2016 and 12 January 2017) *available at* https://www.sci.gov.in/ (last visited 24 February 2019).

11 Himanshi Dhawan, 'Centre Tries to Dilute Bill on Whistleblowers' (2015) *The Times of India, at* http://timesofindia.indiatimes.com/india/Centre-tries-to-dilute-bill-on-whistleblowers/articleshow/48353499.cms (last visited 24 February 2019).

12 The Whistle Blowers Protection (Amendment) Bill, 2015, Statement of Objects and Reasons, paras 1, 2(a) and 2(b).

In light of these developments that do little to inspire confidence in a potential whistle blower, it is interesting to see the intention of the the WBP Act and its proposed Amendment Bill in sections 4, 5 and 8.

A. Section 4: Public Interest Disclosure

1. The Parent Act

Section 4 lays down the requirements of public interest disclosure. The non-obstante clause under sub-section (1)[13] overrides the provisions of the *Official Secrets Act, 1923* (OS Act) and declares that any public servant or any person including any non-governmental organisation may make a public interest disclosure before the Competent Authority.[14]

The WBP Act does not define 'public interest', but merely affirms that 'any disclosure made under the Act shall be treated as public interest disclosure'. The complaint must be made before the Competent Authority. Such disclosure of information must be made in good faith, and the whistle blower shall make a personal declaration of his reasonable belief that the information disclosed and allegation contained therein are substantially true.[15]

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13 Section 4(1) of *The Whistle Blowers Protection Act, 2014*, provides:
'Notwithstanding anything contained in the provisions of the *Official Secrets Act, 1923* (19 of 1923), any public servant or any other person including any non-governmental organisation, may make a public interest disclosure before the Competent Authority.'

14 Section 3(b) of *The Whistle Blowers Protection Act, 2014*, designates the following Competent Authorities with regards to their respective jurisdictions: the Prime Minister, the Chairman of the Council of States or the Speaker of the House of the People, the Chief Minister, the Chairman of the Legislative Council or the Speaker of the Legislative Assembly, the High Court, the Central Vigilance Commission, the State Vigilance Commission, or any other authority having jurisdiction in respect thereof.

15 Sub-sections (2) and (3) of section 4 of *The Whistle Blowers Protection Act, 2014*, provide:
'(2) Any disclosure made under this Act shall be treated as public interest disclosure for the purposes of this Act and shall be made before the Competent Authority and the complaint making the disclosure shall, on behalf of the Competent Authority, be received by such authority as may be specified by regulations made by the Competent Authority.
(3) Every disclosure shall be made in good faith and the person making disclosure shall make a personal declaration stating that he reasonably believes that the information disclosed by him and allegation contained therein is substantially true.'

The WBP Act mandates that on failure to disclose the identity of the whistle blower, or if such identity is found to be false, no action will be taken by the Competent Authority on the public interest disclosure so made.[16] Thus, anonymous disclosures are not entertained even if they are meritorious and in public interest. This comes after the Supreme Court legitimised anonymous whistle blowing in 2014 in *Centre for PIL & Ors.* v. *Union of India & Ors.*, also known as the 'CBI 2G Scam Diarygate' scandal.[17]

2. The Proposed Amendment

The Amendment Bill substitutes the existing section 4(1)[18] with a truncated version wherein the original non-obstante clause stands deleted. It reverses the overriding authority and supremacy of the WBP Act over the OS Act and renders the whistle blower at the risk of being prosecuted under the latter.[19]

Further, it also proposes to insert section 4(1A) curtailing the freedom of the whistle blower to report anything of public interest, by importing the ten exemptions to public interest disclosures from

16 Section 4(6) of *The Whistle Blowers Protection Act, 2014*, provides:
'No action shall be taken on public interest disclosure by the Competent Authority if the disclosure does not indicate the identity of the complainant or public servant making public interest disclosure or the identity of the complainant or public servant is found incorrect or false.'

17 *Centre for PIL & Ors.* v. *Union of India & Ors*. Interim Applications Nos. 73 and 76 in Civil Appeal No. 10660 of 2010 (Decided on 20 November 2014) *available at* https://www.sci.gov.in/ (last visited 24 February 2019).

18 *Supra* n. 13.

19 The Whistle Blowers Protection (Amendment) Bill, 2015, proposes that in the parent Act, in section 4, for sub-section (1), the following sub-section shall be substituted—
'Any public servant or any other person including a non-Governmental organisation may make public interest disclosure before the Competent Authority.'

section 8(1) of the RTI Act as is.[20] These exemptions are under the broad categories of matters relating to the economic, scientific interests and the security of India and its relation with foreign States; information which would constitute contempt of court, or a breach of the privilege of the legislature or Cabinet proceedings; confidential commercial information such as trade secret or intellectual property; information available to a person in his fiduciary relationship, or that which would endanger the life or personal safety of any person, or impede the process of investigation or apprehension or prosecution of offenders; and personal information which has no relationship to any public activity or interest or which would cause invasion of the privacy of an individual.

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20 Section 4(1A) of The Whistle Blowers Protection (Amendment) Bill, 2015, provides: 'Notwithstanding anything contained in sub-section (1), no public interest disclosure shall be made by any public servant or any other person including a non-Governmental organisation under this Act, if such disclosure contains—

(a) information, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security of the State, the strategic, scientific or economic interests of the State, friendly relations with foreign States or lead to incitement to an offence;
(b) information, which has been expressly forbidden to be published by any court of law or tribunal, or the disclosure of which may constitute contempt of court;
(c) information, the disclosure of which would cause a breach of privilege of Parliament or State Legislature;
(d) information relating to commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005;
(e) information which is available to a person in his fiduciary capacity or relationship, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005;
(f) information received in confidence from a foreign Government;
(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
(h) information, which would impede the process of investigation or apprehension or prosecution of offenders;
(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers, except as otherwise provided under the Right to Information Act, 2005;
(j) personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005.'

Of these, six categories that are described in clauses (a), (b), (c), (f), (g) and (h) of the section possess absolute immunity from being disclosed. The WBP Act magnanimously allows disclosures of only those documents that the whistle blower may have already obtained through the RTI Act, such as cabinet papers and matters relating to personal or private information, found in clauses (d), (e), (i) and (j). This renders the premise of whistle blowing redundant since information disclosed under the RTI Act is by its very nature deemed to be in the public domain. It can be surmised that information leaked by a whistle blower is much more than what is available to an RTI applicant.

While both the RTI Act and the WBP Act seek to promote transparency and accountability through public interest disclosures, the ambit of both differ–in that, the former covers 'public' disclosures which provide information to the people at large, whereas the latter covers 'protected' disclosures made in confidence to a Competent Authority. A blanket import of the exemptions that apply in the first scenario into the second is an anomaly because it does not further the purpose of making provisions for 'protected' disclosures. Thus, while in a consistent legislative move it may appear rational to have the same exemptions in both, the RTI Act and the WBP Act, in the context of the latter such a broad sphere of exemptions amounts to cherry-picking of what information the Government is comfortable with being disclosed in 'public interest'.

Moreover, while importing the ten exemptions under section 8(1) of the RTI Act, the Amendment Bill completely discounts the non-obstante clauses in the RTI Act which uphold public interest. Sub-section (2) of section 8[21] read with section 22[22] of the RTI Act provides that a public authority may allow the disclosure of the

21 Section 8(2) of *The Right to Information Act*, *2005*, provides:
'Notwithstanding anything in the *Official Secrets Act, 1923* (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1) of this Act, a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.'

22 Section 22 of *The Right to Information Act*, *2005*, provides:
'The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the *Official Secrets Act, 1923* (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.'

information if the public interest in such disclosure outweighs the harm to the protected interests–notwithstanding anything inconsistent therewith contained in any of the ten exemptions of section 8(1) of the RTI Act, or in the OS Act or in any other law for the time being in force. This grants discretionary power to the public authority to direct, in pursuance of public interest, disclosure of files classified as 'confidential' under the OS Act, or of such information which possesses immunity under any of the ten exemptions under section 8(1) of the RTI Act.[23] Thus, the legal effect of not including this overriding safeguard provided under sections 8(2)[24] and 22[25] of the RTI Act is that the Amendment Bill virtually makes the WBP Act subservient to the OS Act. Far from encouraging whistle blowers to expose corruption, it muzzles them under the garb of 'protecting public interest'.

B. Section 5: Powers and Functions of Competent Authority

1. The Parent Act

Section 5 requires the Competent Authority to ascertain and conceal the identity of the whistle blower, unless the whistle blower himself has revealed it to any other authority while making the disclosure.[26] The Competent Authority is not to reveal the whistle blower's identity while seeking any comments, explanations or report from the authority in question. If the Competent Authority deems it necessary to reveal the identity in confidence to the Head of the Department (HoD) under inquiry, it may do so, provided that the whistle blower consents to it in writing. The Competent Authority must also direct the HoD to not reveal the whistle blower's identity.

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23 *See* Dr JN Barowalia, *Commentary on the Right to Information Act* (4th edn Universal Law Publishing Delhi 2017) 436.

24 *Supra* n. 21.

25 *Supra* n. 22.

26 Section 5(1) of *The Whistle Blowers Protection Act, 2014*, provides:
'Subject to the provisions of this Act, the Competent Authority shall, on receipt of a public interest disclosure under section 4,—
(a) ascertain from the complainant or the public servant whether he was the person or the public servant who made the disclosure or not;
(b) conceal the identity of the complainant unless the complainant himself has revealed his identity to any other office or authority while making public interest disclosure or in his complaint or otherwise.'

If the whistle blower does not agree to his name being revealed to the HoD, he is required to make available all documentary evidence in support of his complaint to the Competent Authority.[27] This provision negates the very purpose of the law. The central philosophy of any whistle blower protection legislation is to keep the identity of the person making the public interest disclosure confidential in order to protect him from any consequent reprisals. Asking for every possible evidence there is, places excessive onus on and is discouraging for a whistle blower who has ample at stake with his initial disclosure of confidential information itself. A fresh pursuit of more information could also lead to inadvertently disclosing his identity.

In consonance with section 5 is section 13 of the WBP Act, which also mandates the Competent Authority to conceal the identity of the whistle blower and his disclosure, unless decided otherwise by the Competent Authority, or if it has become necessary to reveal it by virtue of the order of the court.[28]

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27 Section 5(4) of *The Whistle Blowers Protection Act*, *2014*, provides:
'While seeking comments or explanations or report referred to in sub-section (3), the Competent Authority shall not reveal the identity of the complainant or the public servant and direct the Head of the Department of the organisation concerned or office concerned not to reveal the identity of the complainant or public servant:
Provided that if the Competent Authority is of the opinion that it has, for the purpose of seeking comments or explanation or report from them under sub-section (3) on the public disclosure, become necessary to reveal the identity of the complainant or public servant to the Head of the Department of the organisation or authority, board or corporation concerned or office concerned, the Competent Authority may, with the prior written consent of the complainant or public servant, reveal the identity of the complainant or public servant to such Head of the Department of the organisation or authority, board or corporation concerned or office concerned for the said purpose:
Provided further that in case the complainant or public servant does not agree to his name being revealed to the Head of the Department, in that case, the complainant or public servant, as the case may be, shall provide all documentary evidence in support of his complaint to the Competent Authority.'

28 Section 13 of *The Whistle Blowers Protection Act*, *2014*, provides:
'The Competent Authority shall, notwithstanding any law for the time being in force, conceal, as required under this Act, the identity of the complainant and the documents or information furnished by him, for the purposes of enquiry under this Act, unless so decided otherwise by the Competent Authority itself or it became necessary to reveal or produce the same by virtue of the order of the court.'

2. The Proposed Amendment

While the Amendment Bill does not reduce the burden of the Competent Authority upon receipt of a disclosure, it inserts section 5(1A)[29] constraining the powers of the Competent Authority. This sub-section puts an absolute bar on inquiry into disclosures falling under the previously mentioned ten exemptions of section 4(1A).[30] As a result, the Competent Authority's discretion to determine what constitutes a valid public interest disclosure under the WBP Act is severely curtailed.

This new provision also comes with a rider that once a disclosure is received, the Competent Authority must first refer the disclosure to an authority sanctioned by the Central or State Government under section 8(1)[31] of the WBP Act. Such authority must ascertain whether the disclosure contains any information of the nature specified under the previously mentioned ten exemptions, and the certificate given in this regard by such authority is binding on the Competent Authority.

Thus, in the event of a disclosure against the Government, a body authorised by the Government itself will certify whether the disclosure warrants any investigation. Such certification being conclusive and binding on the Competent Authority, any prospective investigation into the same is thence effectively scuttled. This bridles the administrative powers of the Central and State Vigilance Commissions and derogates them to being token bodies set up for whistle blower protection in the country.

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29 Section 5(1A) of The Whistle Blowers Protection (Amendment) Bill, 2015, provides: 'The Competent Authority shall not inquire into any public interest disclosure which involves information of the nature specified in sub-section (1A) of section 4:
Provided that the Competent Authority shall, on receipt of any such public interest disclosure, refer such disclosure to an authority authorised under sub-section (1) of section 8 to ascertain whether the disclosure contains any information of the nature specified in sub-section (1A) of section 4, and the certificate given in this regard by such authority shall be binding on the Competent Authority.'

30 *Supra* n. 20.

31 *Infra* n. 35.

C. Section 8: Matters Exempt from Disclosure

1. The Parent Act

Section 8 deals with certain matters that are exempt from disclosure and protects the authorities under inquiry. Sub-section (1) exempts such authorities from furnishing any information or document, or rendering any assistance involving any disclosure of the proceedings of the Cabinet of the Union or State Government, if such inquiry is likely to fall under the reasonable restrictions of article 19(2) of the *Constitution of India*.[32] Sub-section (2) puts a bar on any person on giving of any evidence or producing of any document which he could not be compelled to give or produce in proceedings before a court.[33] These constitute the only exemptions to disclosure provided under the WBP Act.

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32 Section 8(1) of *The Whistle Blowers Protection Act*, *2014*, provides:
'No person shall be required or be authorised by virtue of provisions contained in this Act to furnish any such information or answer any such question or produce any document or information or render any other assistance in the inquiry under this Act if such question or document or information 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, decency or morality or in relation to contempt of court, defamation or incitement to an offence,—
(a) as might involve the disclosure of proceedings of the Cabinet of the Union Government or any Committee of the Cabinet;
(b) as might involve the disclosure of proceedings of the Cabinet of the State Government or any Committee of that Cabinet,
and for the purpose of this sub-section, a certificate issued by the Secretary to the Government of India or the Secretary to the State Government, as the case may be, or, any authority so authorised by the Central or State Government certifying that any information, answer or portion of a document is of the nature specified in clause (a) or clause (b), shall be binding and conclusive.'

33 Section 8(2) of *The Whistle Blowers Protection Act*, *2014*, provides:
'Subject to the provisions of sub-section (1), no person shall be compelled for the purposes of inquiry under this Act to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before a court.'

2. The Proposed Amendment

The Amendment Bill seeks to substitute the original section 8(1)[34] and diminishes the scope of successfully making public interest disclosures to a pinhole. The amended section 8(1)[35] reinvigorates the blanket ban under the ten exemptions,[36] and further fortifies their grip over public interest disclosures made under the WBP Act by granting it overriding power.

It provides that no person is required under the WBP Act or under any other law in force, to furnish any information or document, or render any other assistance in any inquiry, if such information is in the nature of any of the ten exemptions specified in section 4(1A).[37] It is clarified that this is pursuant to the certificate issued by an authority authorised by the State or Central Government under the previously mentioned section 5(1A).[38]

This amended sub-section, thus, undermines all other laws in force, including the RTI Act and its protection of public interest. It is in direct conflict with the contradictory overriding sections 8(2)[39] and 22[40] of the RTI Act which mandate disclosure of information if the

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34 *Supra* n. 32.

35 Section 8(1) of The Whistle Blowers Protection (Amendment) Bill, 2015, provides: 'No person shall be required or authorised under this Act, or under any other law for the time being in force, to furnish any information or answer any question or produce any document or render any other assistance in an inquiry under this Act, if furnishing of such information, or answering of question or the production of the document or the rendering of assistance is likely to result in the disclosure of any information of the nature specified in sub-section (1A) of section 4, and for this purpose, a certificate issued by an authority, authorised in this behalf by the Central Government or the State Government, as the case may be, certifying that such information, answer, document or assistance is of the nature specified in sub-section (1A) of section 4, shall be binding.'

36 *Supra* n. 20.

37 *Supra* n. 20.

38 *Supra* n. 29.

39 *Supra* n. 21.

40 *Supra* n. 22.

public interest in its disclosure outweighs the potential harm to the protected interests. It also grants the authority under inquiry complete exemption from providing the information that is sought, upon the issuance of a binding and conclusive certificate to this effect by another authority sanctioned by the Government.

Thus, in a nutshell, the proposed Amendment Bill does away with the much needed safeguard against the provisions of the OS Act,[41] and heavily shields the ten exemptions under section 4(1A).[42] It upholds 'protected interests' but makes no allowance for a balancing 'public interest' to be considered in the equation. As a result, it leaves very little room for blowing the whistle, let alone being a safe alternative to silence for a whistle blower acting in public interest.

As the above analysis reveals, currently, deficient procedural justice characterises this key legislation that governs the public's right to disclose Government information in public interest, as well as the protection of such individuals who choose to blow the whistle.

III. Internet Whistle Blowing Platforms: Saviours or Threats?

The procedural shortcomings of the WBP Act and its Amendment Bill illustrated in Part II could persuade a potential whistle blower to resort to gag-proof third-party internet whistle blowing platforms, as demonstrated by the current worldwide trend of online national security leaks such as those of Julian Assange, Chelsea Manning and Edward Snowden. According to Professor Margaret Kwoka of Denver Sturm College of Law, these leaks differ in significant ways from traditional whistle blower leaks, and represent a new type of leak that she terms 'deluge leaks'.[43] Kwoka reasons that unlike whistle

41 *Supra* n. 19.

42 *Supra* n. 20.

43 Margaret Kwoka, 'Leaking and Legitimacy' (2010) 48(4) *UC Davis Law Review* 1387, 1391, *available at* https://lawreview.law.ucdavis.edu/issues/48/4/ (last visited 24 February 2019).

blower leaks which expose targeted Government policies about which a knowledgeable leaker is concerned, 'deluge leaks' are characterised by lower-level Government officials[44] without policy-making authority, leaking massive quantities of information on a wide range of subject matter,[45] largely out of a belief that the Government keeps too many secrets.[46]

The worldwide reaction to such 'deluge leaks' has been extreme–the leakers have been hailed as 'transparency advocates' by one segment while being written off as 'traitors' by the other. Thus, this Part examines the viability of the online route over the State mechanism set up by the WBP Act.

A. The Internet: A Whistle Blower's First Choice?

Advancements in technology have cleared considerable obstacles in leaking confidential information. Whistle blowers no longer need to spend time photocopying confidential records. Hard copies have been digitised to easily saved, copied and shared soft copies stored

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44 Chelsea Manning was a US Army Soldier ranking Private First Class. Edward Snowden worked as a systems administrator for a National Security Agency (NSA) contractor. Therefore, both occupied comparatively junior or lower-level ranks. *See* —, 'Chelsea Manning: Wikileaks Source and Her Turbulent Life' (2017) *British Broadcasting Corporation*, *at* http://www.bbc.com/news/world-us-canada-11874276 (last visited 24 February 2019) and John Broder and Scott Shane, 'For Snowden, a Life of Ambition, Despite the Drifting' (2013) *The New York Times*, *at* http://www.nytimes.com/2013/06/16/us/for-snowden-a-life-of-ambition-despite-the-drifting.html (last visited 24 February 2019).

45 Over a very short period of time, Chelsea Manning, through Julian Assange and WikiLeaks, released the Collateral Murder video, over 77,000 documents about the war in Afghanistan, over 390,000 documents about the Iraq war, over 250,000 diplomatic cables between the U.S. State Department and U.S. embassies around the world, and over 700 documents about individuals held at Guantanamo Bay. Meanwhile, the full extent of Edward Snowden's disclosures remains unclear, but the NSA chief at one point estimated that he leaked up to 200,000 secret records. In a subsequent hearing before Congress, intelligence officials reported that Snowden accessed roughly 1.7 million files: Margaret Kwoka *supra* n. 43, 1400.

46 *Ibid*, 1394.

on the cloud. With rising digitisation and integration of Government databanks, more low-level Government personnel and contractors can log on to broad swaths of Government information,[47] including national security-related records. These digital records are also simple to hack into and steal, even by individuals unrelated to the organisation, if the website where they are stored uses substandard security measures and is not encrypted, as was revealed in the *Aadhaar* data theft case of August 2017.[48]

Keeping this in mind, the following aspect are where the Internet easily topples the State mechanism as a more enticing prospect:

1. Cryptographic Anonymity

Tracing whistle blower leaks to their source has become near impossible with stronger and easily accessible anonymity tools for submission of information. This has made whistle blowing without reprisals a reality. For anonymous submissions, WikiLeaks currently offers sophisticated anonymity tools such as Tor, an encrypted anonymising network that is touted to be vastly more secure than any banking network;[49] and Tails, an operating system launched from

47 For example, the grid Chelsea Manning accessed is reportedly accessible to approximately 2.5 million military and civilian employees. As for Edward Snowden, while there are no precise estimates as to the number of employees who could access the network database, 'details about virtually all of the NSA's surveillance programs were accessible to anyone, employee or contractor, private or general, who had top-secret NSA clearance and access to an NSA computer'.
See — 'Siprnet: Where the Leaked Cables Came From' (2010) *British Broadcasting Corporation*, *at* http://www.bbc.com/news/world-us-canada-11863618 (last visited 24 February 2019) and James Bamford, 'Edward Snowden: The Untold Story' (2014) *Wired, at* https://www.wired.com/2014/08/edward-snowden/ (last visited 24 February 2019).

48 *See* Rajiv Kalkodi, 'Absence of HTTPS from URL Helped Aadhaar Hacker' (2017) *The Times of India*, *at* http://timesofindia.indiatimes.com/city/bengaluru/absence-of-https-from-url-helped-hacker/articleshow/59935428.cms (last visited 24 February 2019).

49 Rita Zajacz, 'WikiLeaks and the Problem of Anonymity: A Network Control Perspective' (2013) 35(4) *Media, Culture and Society* 487, 497, *available at* https://doi.org/10.1177/0163443713483793 (last visited 24 February 2019).

a USB stick or a DVD, that leaves no traces when the computer is shut down and automatically routes the internet traffic through Tor.[50] 'We keep no records as to where you uploaded from, your time zone, browser or even as to when your submission was made,' claims WikiLeaks on their Submissions webpage.[51]

2. Absence of Formalities

As seen in Part II, the WBP Act does not entertain anonymous disclosures[52] but operates through legally mandated confidentiality between the whistle blower and the Competent Authority with the former's identity being kept secret at the discretion of the latter.[53] In stark contrast, third-party internet whistle blowing platforms that make possible untraceable anonymity, operate on the principle: 'The best way to keep a secret is not to have it'.[54] Again, while the WBP Act requires extensive formalities to be followed by the whistle blower while making the disclosure[55] and by the Competent Authority upon receipt of such disclosure,[56] these online platforms have no such requirement–a mere submission of questionable confidential documents is sufficient to blow the whistle.

These factors make the online platforms a more attractive and practicable option for a potential whistle blower.

50 *See* WikiLeaks, 'Submit Documents to Wikileaks', *WikiLeaks*, *at* https://wikileaks.org/#submit (last visited 24 February 2019) and WikiLeaks, 'What is Tor?', *WikiLeaks*, *at* https://wikileaks.org/#submit_help_tor (last visited 24 February 2019).

51 WikiLeaks, 'WikiLeaks: Submissions', *WikiLeaks, at* https://wikileaks.org/wiki/WikiLeaks:Submissions (last visited 24 February 2019).

52 *Supra* n. 16.

53 *Supra* nn. 26–28.

54 Marcela Gaviria and Martin Smith, 'Julian Assange Interview Transcript', *PBS Frontline, at* http://www.pbs.org/wgbh/pages/frontline/wikileaks/etc/transcript.html (last visited 24 February 2019).

55 *Supra* nn. 13, 15–16.

56 *Supra* nn. 26–28.

B. The Internet: A Responsible Citizen's Choice?

While the incentives offered to whistle blowers by these platforms outweigh those offered by the WBP Act, the question now is whether the precariousness of these platforms also favour the viability of this alternative. From all the disclosures that have been made online till date, the following three areas are brightest blips on the risk radar of publishing on these platforms, subject to the nature of the contents of the information that is leaked. These risks inherently make it harder for whistle blowers to minimise the harms and maximise the benefits of their disclosures considering larger public interest. While most of the observations below pertain mainly to WikiLeaks, they apply to all third-party internet whistle blowing platforms *mutatis mutandis*. For the purpose of this article, it is assumed that whistle blowers do not intend extortion but are blowing the whistle only in public interest.

1. Threat to National Security

Protection of national security interests is a legitimate justification for secrecy. For example, the reasonable restrictions to our fundamental rights enumerated under article 19(2) of the *Constitution of India* are vindicated because they are deemed to be in the larger public interest. Publication of leaks containing information under those heads on internet platforms that are accessible globally would have serious repercussions on national security and diminish any benefit to the public in its pursuit to increase Government accountability and transparency.

This is not to eclipse the benefits of these online platforms that have been accrued so far. For example, in the case of WikiLeaks, the revelation of the Iraq and Afghanistan war logs pertaining to the mistreatment of prisoners[57] and thousands of unreported civilian

57 *See* Nick Davies, 'Iraq War Logs: Secret Order That Let US Ignore Abuse' (2010) *The Guardian*, *at* https://www.theguardian.com/world/2010/oct/22/iraq-detainee-abuse-torture-saddam (last visited 24 February 2019).

deaths,[58] and its contribution to the Arab Spring[59] have been of great public importance. On the other hand, regarding individual privacy and the role of the National Security Agency in the USA,[60] Edward Snowden's revelations led to the State surveillance being put under the scanner by then President Obama.[61]

However, since these platforms leak documents in bulk, there have also been gaffes wherein the data leaked has included sensitive and private information of ordinary citizens–the leaks of which do not have an iota of 'public interest', but are a danger to individual privacy and national security.[62] Take for example, the 30,000 'Erdogan emails' leak and the 19,252 emails in the 'Hillary Leaks'. WikiLeaks, along with these copious amounts of data also released databases that contained private information of millions of ordinary people, including a database of almost all adult women in Turkey in the case of the former leak.[63] In the case of the latter, apart from leaking personal information of donors of the Democratic Party of the USA, such as

58 *See* David Leigh, 'Iraq War Logs Reveal 15,000 Previously Unlisted Civilian Deaths' (2010) *The Guardian*, *at* https://www.theguardian.com/world/2010/oct/22/true-civilian-body-count-iraq (last visited 24 February 2019).

59 *See* Sami Ben Hassine, 'Tunisia's Youth Finally Has Revolution on Its Mind', *The Guardian* (13 January 2011), *at* https://www.theguardian.com/commentisfree/2011/jan/13/tunisia-youth-revolution (last visited 24 February 2019).

60 *See* The Editorial Board, 'Edward Snowden, Whistle-Blower' (2014) *The New York Times*, *at* https://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html (last visited 24 February 2019).

61 *See* David Sanger and Charlie Savage, 'Obama Is Urged to Sharply Curb N.S.A. Data Mining' (2013) *The New York Times*, *at* http://www.nytimes.com/2013/12/19/us/politics/report-on-nsa-surveillance-tactics.html (last visited 24 February 2019).

62 *See* Karl Vick, 'WikiLeaks Is Getting Scarier Than the NSA' (2016) *Time*, *at* http://time.com/4450282/wikileaks-julian-assange-dnc-hack-criticism/ (last visited 24 February 2019).

63 *See* Zeynep Tufekci, 'WikiLeaks Put Women in Turkey in Danger, for No Reason (Update)' (2016) *The Huffington Post*, *at* http://www.huffingtonpost.com/zeynep-tufekci/wikileaks-erdogan-emails_b_11158792.html (last visited 24 February 2019).

credit card, passport and social security numbers,[64] the ill-timed leak also had ramifications for the 2016 presidential elections.[65]

2. Questionable Public Interest

Such reckless leaks have cast a doubt on whether WikiLeaks is crossing the line between Government transparency and violation of privacy of ordinary citizens. According to sociologist Zeynep Tufekci, the problem lies in the fact that instead of curated whistle blower leaks that take public interest into account, the leaks of 2016 have demonstrated that mass-hacked emails are being dumped without any consideration for the privacy of the people.[66] As ideal as it would be for these platforms to have a vetting process and publish only those disclosures or parts thereof that are in public interest, it becomes difficult, if not impossible, to do so when they involve such liberal amounts of data. Moreover, WikiLeaks does not seem to be too keen to redact in the future either, as they declared in a tweet dated 27 July 2016: 'Our accuracy policy. We do not tamper with the evidentiary value of important historical archives.'[67]

3. Unscrambling the Egg

Such rash leaking of confidential data that is against public interest must definitely not go unpunished, but punishment after a leak has occurred does not undo the damage caused by the leak–one cannot unscramble an egg.

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64 Andrea Peterson, 'Wikileaks posts nearly 20,000 hacked DNC emails online' (2016) *The Washington Post*, *at* http://wapo.st/29U8y4Y (last visited 24 February 2019).

65 Mark Hosenball, 'WikiLeaks Faces U.S. Probes into its 2016 Election Role and CIA Leaks: Sources' (2017) *Reuters*, *at* https://www.reuters.com/article/us-usa-trump-russia-wikileaks/wikileaks-faces-u-s-probes-into-its-2016-election-role-and-cia-leaks-sources-idUSKBN1E12J2 (last visited 24 February 2019).

66 Scott Simon, 'WikiLeaks Dump Method: Sociologist Says Not All Leaked Passes Public Interest Test' (2016) *NPR*, *at* http://www.npr.org/2016/10/22/498954190/wikileaks-dump-method-destroys-privacy-sociologist-says-not-all-leaked-pass-publ (last visited 24 February 2019).

67 @wikileaks, 'Our accuracy policy. We do not tamper with the evidentiary value of important historical archives.', 28 July 2016, *at* https://twitter.com/wikileaks/status/758463256113676289 (last visited 24 February 2019).

While it has certainly become impossible to trace the source of a leak and nab the negligent whistle blower, the whistle blower is not the only participant in the perpetuation of a reckless leak. Unlike the mechanism set up by the WBP Act, wherein only the whistle blower, the Competent Authority, and in certain cases the authority under inquiry have access to the disclosed information,[68] online platforms involve three players in any disclosure and its subsequent distribution: the leaker, the platform, and the media. When a whistle blower leaks confidential files to an online platform, the online platform publishes the information globally. This information is then reported nationally or internationally by the media. Without such a wide range of publication, such information, whose revelation would be against public interest and national security, would pose little threat because the chances of unwanted readers encountering the information would be slim. Therefore, the media ends up playing an even greater role than the leaker in the dissemination of the reckless leak. It was a similar situation and a threat to our national security, when the broadsheet, *The Australian*, published the story of 22,400 pages of leaked secret documents marked 'Restricted Scorpène India' revealing threadbare details of the Scorpène-class submarine project consisting of technical literature, manuals and other operational details.[69] As a result, the existing batch of the French-designed submarines became vulnerable even before they came into service, and India had to shelve its plans to enlarge the order with the naval contractor.[70]

The common thread between the abovementioned risks is that they are all associated with making the disclosure public on an easily accessible global platform, in contrast to whistle blowing confidentially

68 *Supra* nn. 13, 15–16, 26–27.

69 Express News Service, 'Scorpene Submarine Leak: Huge Setback for India as 22,000 Pages of Secret Data Leaked' (2016) *The Indian Express*, *at* http://indianexpress.com/article/india/india-news-india/scorpene-submarine-leak-huge-setback-india-as-22000-pages-of-secret-data-leaked/ (last visited 24 February 2019).

70 Reuters, 'Scorpene Leak: India Shelves Plan to Expand French Submarine Order after Data Breach' (2016) *The Indian Express*, *at* https://indianexpress.com/article/india/india-news-india/india-shelves-plan-to-expand-french-submarine-order-after-data-breach-3010839/ (last visited 24 February 2019).

to a State authority[71] and preventing unwanted eyes from scrutinising the exposé. The negative impact of online whistle blowing can be mitigated only if the domestic mechanism is strengthened to overcome its lacunae, become more whistle blower friendly, and regain faith in its legitimacy.

IV. Saving the Canary in the Coalmine: Recommendations and Concluding Remarks

Whistle blowing is an essential facet of a healthy democracy. But where there are serious repercussions on national security, secrecy can legitimately be claimed as it would then be in the larger public interest that such matters are not disclosed or disseminated.[72] A fine balance must be struck between the two conflicting interests of Government transparency and national security. The purpose of whistle blower protection legislation is to provide whistle blowers with a safe alternative to silence, a security against reprisals, and to ensure that the larger public interest prevails under all circumstances.

Not all is critiqued in the WBP Act and its Amendment Bill. For one, what is remarkable is that while the term 'whistle blower', conventionally and in most legislations,[73] refers to an employee operating within the Government or a corporation who exposes

71 *Supra* nn. 26–28.

72 It has been held in *SP Gupta* v. *Union of India* (AIR 1982 SC 149) by a seven-judge Bench of the Supreme Court that the Court would allow an objection to disclosure of document if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to the affairs of the State or the public interest does not compel its non-disclosure or that the public interest in the administration of justice in a particular case overrides all other aspects of public interest, it will overrule the objection and order the disclosure of the document. In balancing the competing interests, it is the duty of the Court to see that there is public interest that harm shall not be done to the nation or public service by disclosure of the document and there is a public interest that the administration of justice shall not be frustrated by withholding the document which must be produced if justice is to be done.

73 *See* for example, *Kōeki Tsūhōsha Hogohō* [Whistleblower Protection Act] (Law No. 122 of 2004) article 2, para 1 (Japan) and *Public Interest Disclosure Act, 1998* c 23, section 43A (UK).

corruption or wrongdoings therein, the WBP Act broadens the scope of this term to incorporate any public servant or any other person including any non-governmental organisation to blow the whistle or file a complaint against any public servant.[74] Furthermore, whistle blowers Satyendra Dubey's and Sanjiv Chaturvedi's prayers for secrecy and protection after having made their respective disclosures[75] would have had legal sanction[76] had the WBP Act been in force as was recommended by the National Commission to Review the Working of the Constitution in 2001.[77] The whistle blowers or their families would then have had the option of enforcing their legally mandated protections through courts, instead of being solitary crusaders in their lonely fights against corruption.

Nonetheless, the WBP Act has several chinks in its armour which make it less reinforcing and a more dispiriting legislation. Several provisions including, *inter alia*, those pertaining to public interest disclosures, victimisation, and appeals are not at par with international standards. The Amendment Bill worsens the situation and offsets whatever little progress is sought to be attained by the WBP Act with greater setbacks.

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74 *Supra* nn. 13, 19.

75 *See* Amitav Ranjan, 'Whistleblower Said Don't Name Me. Govt Did. He Was Shot Dead' (2003) *The Indian Express*, *at* http://archive.indianexpress.com/oldStory/36329 (last visited 24 February 2019) and Gaurav Bhatnagar *supra* n. 8.

76 *Supra* nn. 26–28.
Section 12 of *The Whistle Blowers Protection Act, 2014*, provides:
'If the Competent Authority either on the application of the complainant, or witnesses, or on the basis of information gathered, is of the opinion that either the complainant or public servant or the witnesses or any person rendering assistance for inquiry under this Act need protection, the Competent Authority shall issue appropriate directions to the concerned Government authorities (including police) which shall take necessary steps, through its agencies, to protect such complainant or public servant or persons concerned.'
Section 16 of *The Whistle Blowers Protection Act, 2014*, provides:
'Any person, who negligently or *mala fidely* reveals the identity of a complainant shall, without prejudice to the other provisions of this Act, be punishable with imprisonment for a term which may extend up to three years and also to fine which may extend up to fifty thousand rupees.'

77 National Commission to Review the Working of the Constitution *supra* n. 3.

If the Amendment Bill were to be passed as is, the WBP Act would stand emasculated further before it can even come into force. Provisions of the WBP Act affording secrecy and protection to the whistle blower would remain a far-fetched dream given that the Amendment Bill is riddled with preconditions to be met for a public interest disclosure to be considered valid under the WBP Act, acted upon, and investigated into.[78] Thus, while some provisions of the WBP Act might appease a potential whistle blower, disclosing to a State authority is still not an encouraging alternative.

It is therefore necessary for the State to accelerate the transition of the WBP Act to a more effective and less symbolic legislation. To this effect, the author has the following recommendations for the WBP Act based on international best practices.

A. Recommendations

1. To insert the same non-obstante clause as is in the RTI Act.

As explained under Part II, the proposed Amendment Bill not only makes the WBP Act subservient to the OS Act,[79] but also undermines the overriding authority of the RTI Act that advocates public interest.[80]

It is thus recommended that the non-obstante clause under the original section 4(1) of the WBP Act that overrode the provisions of the OS Act be retained.[81] The *Protected Disclosures Act 2000* (New Zealand) similarly provides immunity from civil and criminal proceedings where a person has made a protected disclosure. This protection applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath or practice.[82] It thus overrides any other law in the country that deals with official secrets.

78 *Supra* nn. 13, 15–16, 26–28.
79 *Supra* n. 20.
80 *Supra* n. 35.
81 *Supra* n. 13.
82 *Protected Disclosures Act 2000*, section 18 (New Zealand).

It is also recommended that sections 8(2)[83] and 22[84] of the RTI Act be held supreme, as they uphold public interest and override all exemptions to disclosures in force. Therefore, along with importing the ten exemptions of section 8(1)[85] from the RTI Act, the provisions of section 8(2)[86] of the RTI Act must also be imported. Additionally, the proposed revision of section 8(1)[87] in the Amendment Bill must be disregarded, since it conflicts with the overriding power of section 22[88] of the RTI Act.

2. To outline a 'public interest test'.

As observed by the Supreme Court in May 2015, a whistle blower cannot be penalised for disclosing confidential documents if he has acted in 'public interest'.[89] Currently, the WBP Act only defines 'disclosure'[90] and declares that any disclosure made thereunder shall be treated as 'public interest disclosure'.[91]

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83 *Supra* n. 21.

84 *Supra* n. 22.

85 *Supra* n. 20.

86 *Supra* n. 21.

87 *Supra* n. 35.

88 *Supra* n. 22.

89 *Common Cause and Ors.* v. *Union of India and Ors.* Interim Application No. 13 of 2014 and Criminal Miscellaneous Petition No. 387 of 2015 in Writ Petition (Civil) No. 463 of 2012 (Decided on 14 May 2015), para 42, *available at* https://www.sci.gov.in/ (last visited 24 February 2019).

90 Section 3(d) of *The Whistle Blowers Protection Act, 2014*, provides:

''disclosure' means a complaint relating to–

(i) an attempt to commit or commission of an offence under the *Prevention of Corruption Act, 1988* (49 of 1988);

(ii) wilful misuse of power or wilful 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 sub-section (2) of section 4.'

91 *Supra* n. 15.

Legislation in India is silent on the definition of 'public interest'.[92] A public interest test is necessary to ensure consistency in its implementation and to avoid conflicting, subjective interpretations thereof. The closest we have come to evolving a public interest test are the factors and considerations laid down by the Supreme Court in 1993[93] and the Gujarat High Court in 2007–2008.[94] In contrast, the

92 The Supreme Court in *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi & Another* [(2012) 13 SCC 61, para 23] held: 'In its common parlance, the expression 'public interest', like 'public purpose', is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs. [*State of Bihar* v. *Kameshwar Singh* (AIR 1952 SC 252)]. It also means the general welfare of the public that warrants recommendation and protection; something in which the public as a whole has a stake [Black's Law Dictionary (Eighth Edition)].'

93 The Supreme Court in *RK Jain* v. *Union of India and Ors.* (AIR 1993 SC 1769, para 55) held: 'The factors to decide the public interest immunity would include: (a) where the contents of the documents are relied upon, the interests affected by their disclosure; (b) where the class of documents is invoked, whether the public interest immunity for the class is said to protect; (c) the extent to which the interests referred to have become attenuated by the passage of time or the occurrence of intervening events since the matters contained in the documents themselves came into existence; (d) the seriousness of the issues in relation to which production is sought; (e) the likelihood that production of the documents will affect the outcome of the case; (f) the likelihood of injustice if the documents are not produced.'

94 The Gujarat High Court has answered the question of what is 'larger public interest' in the light of the RTI Act. According to the bench, in considering whether the public interest in disclosure outweighs in importance any possible harm or injury to the interest of such third party, the Public Information Officer will have to consider the following: (i) the objections raised by the third party by claiming confidentiality in respect of the information sought for; (ii) whether the information is being sought by the applicant in larger public interest or to wreak vendetta against the third party and in deciding that, the profile of the person seeking the information and his credentials will have to be looked into and if the profile of the person seeking information, in the light of other attending circumstances, leads to the construction that under the pretext of serving public interest, such person is aiming to settle personal score against the third party, it cannot be said that public interest warrants disclosure of the information solicited; and (iii) the Public Information Officer, while dealing with the information relating to or supplied by the third party, has to constantly bear in mind that the Act does not become a tool in the hands of a busy body to settle a personal score.
See Reliance Industries Limited v. *Gujarat State Information Commission* AIR 2007 Guj 203 and *High Court of Gujarat* v. *State Chief Information Commission* AIR 2008 Guj 37.

Government Information (Public Access) Act, 2009 (GIPA Act) (Australia)[95] and the Ministry of Local Government and Community Development, Jamaica[96] have formulated comprehensive tests.

Keeping in mind the tests evolved by our courts and finding a common ground between both the detailed tests of Australia and Jamaica, a corresponding comprehensive test could be evolved for India. Such a test could take into account the following considerations in favour of, or against the disclosure, to aid in deciding whether public interest in the disclosure outweighs the harm to the protected interests:

- whether the disclosure informs the public about the operations of agencies;
- whether the disclosure promotes and contributes to an open discussion and an informed debate on public affairs and issues of public importance;
- whether the disclosure enhances the scrutiny of the decision-making process and contributes to greater Government accountability and transparency;
- whether the disclosure contributes to the administration of justice and enforcement of law or would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether the disclosure affects the economic interests of India and ensures effective oversight of the expenditure of public funds;
- whether the disclosure reveals any danger to public health, safety or to the environment, or substantiates that an agency or a member of an agency has engaged in misconduct or negligent, improper or unlawful conduct;

95 *Government Information (Public Access) Act 2009* (New South Wales), sections 12 and 14 (Australia).

96 Ministry of Local Government and Community Development, 'Public Interest', *Government of Jamaica, at* http://www.localgovjamaica.gov.jm/ati.aspx?c=pi (last visited 24 February 2019).

- whether the disclosure would prejudice the protection of an individual's right to privacy;
- whether the disclosure might cause substantial risk to public interest and national security;
- whether the disclosure might cause embarrassment to, or loss of confidence in, the Government or the agency;
- whether the disclosure carries the risk of misinterpretation by any person.

Furthermore, the UK public interest test also upholds that a disclosure concerned with an essentially personal complaint–whether individual or collective–may also be believed to be in the public interest because of some wider implications, or because addressing or exposing wrongdoing may be believed to further the public interest.[97]

The considerations provided above, though not exhaustive, must be utilised to weigh the competing interests and determine whether the scale swings in favour of or against the disclosure. The Competent Authority can then proceed with investigations into the disclosure if that is where the larger public interest lies. Conversely, the Competent Authority must also provide its reasons in writing if it declines to go ahead with any investigation or inquiry.

3. To make allowance and provisions for nameless complaints.

The WBP Act excludes anonymous whistle blower disclosures and provides that they will not be acted upon.[98] Anonymity is not ideally desired because it could make the whistle blower unaccountable and attract querulents and vexatious complaints. But for a whistle blower to reveal his identity while making the disclosure, the Competent

97 *See Chesterton Global Ltd.* v. *Nurmohamed* [2015] ICR 920 (EAT) and Jeremy Lewis *et al*, *Whistleblowing Law and Practice* (4th edn Reprint Oxford University Press New York USA), 4.93.

98 *Supra* n. 16.

Authority must possess integrity and dependability in the eyes of the people. Recommending a different Competent Authority is not the panacea, since even blowing the whistle to the highest authority in the country has proved that there could be many a slip between the cup and the lip.

Thus, an absolute bar on anonymous disclosures would veer a whistle blower to make the disclosure to an internet platform because of the surety of the anonymity protection offered. The catch, however, is that this would go against public interest if such disclosure contains sensitive information potentially threatening to national security. While it is very rare that legislation allows for and protects anonymous disclosures, the *Sarbanes-Oxley Act of 2002* (USA)[99] and certain state statutes of Australia do make provisions for the same.[100]

An ideal channel of communication for such anonymous disclosures could be either taking a leaf out of WikiLeaks' book and utilising a network like Tor; or establishing hotlines, a practice that has been followed in a number of G20 nations. Indonesia's Corruption Eradication Commission, for example, has established a designated whistle blowing website.[101] South Korea's Anti-Corruption and Civil Rights Commission has established a telephone hotline to receive whistle blower reports.[102] In certain states, Germany has implemented an anonymous hotline which allows interactions with the whistle blower while keeping the exchange anonymous.[103]

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99 *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107–204, § 301, 2002 USCCAN (116 Stat) 745 (USA).

100 *Whistleblowers Protection Act 1994* (Queensland) section 27(1) (Australia); *Public Interest Disclosures Act 2002* (Tasmania), section 8 (Australia); and *Whistleblowers Protection Act 2001* (Victoria) section 7 (Australia).

101 Corruption Eradication Commission of Indonesia, Whistleblower System, *at* http://www.kpk.go.id/ (last visited 24 February 2019).

102 The Organisation for Economic Cooperation and Development, 'G20 Anti-Corruption Action Plan: Protection of Whistleblowers' (2011), 12, *at* https://www.oecd.org/g20/topics/anti-corruption/ (last visited 24 February 2019).

103 *Ibid*, 21.

4. To make provision for appeals.

Currently, the WBP Act makes provision for appeals in relation to the imposition of penalties under sections 14, 15, or 16 to the High Court within a period of 60 days from the order appealed against.[104] But in the event that the Competent Authority declines to cause inquiry and the whistle blower is not satisfied with the reasons cited by the said Authority, the WBP Act does not provide for an independent, quasi-judicial appellate body for such review. It is recommended that a body for such purpose be constituted or designated. The GIPA Act (Australia) offers the right to review such decision through either an internal or an external review by the Information Commissioner or the New South Wales Civil and Administrative Tribunal.[105]

5. To extend protection to the whistle blower acting in good faith.

The WBP Act offers protection for actions taken in good faith only to the Competent Authority and not to the whistle blower.[106] It is recommended that such protection be extended to the whistle blower, and his *bona fide* intentions should be established by the application of a 'reasonable belief test'. This test, as evolved in the UK, is a corollary to the public interest test. It considers whether the whistle blower held the view of 'good faith' and 'public interest', and whether it was a view which could be reasonably held.[107] However, motive may be irrelevant when the information sought to be disclosed is

104 Section 20 of *The Whistle Blowers Protection Act, 2014*, provides:
'Any person aggrieved by any order of the Competent Authority relating to imposition of penalty under section 14 or section 15 or section 16 may prefer an appeal to the High Court within a period of sixty days from the date of the order appealed against: Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.'

105 *Government Information (Public Access) Act 2009* (New South Wales), part 5 (Australia).

106 Section 24 of *The Whistle Blowers Protection Act, 2014*, provides:
'No suit, prosecution or other legal proceedings shall lie against the Competent Authority or against any officer, employees, agency or person acting on its behalf, in respect of anything which is in good faith done or intended to be done under this Act.'

107 *See* Jeremy Lewis *et al supra* n. 97.

self-evidently in public interest by reason of its subject matter. Thus, a reasonable belief test must be subservient to the public interest test.

6. To provide better safeguards against victimisation of the whistle blower.

As regards 'victimisation', the WBP Act provides a next-to-nought definition covering only 'initiation of any proceedings or otherwise' on the ground that a disclosure was made, or assistance was rendered under the WBP Act.[108] It also offers a generalised and vague protection of directing 'the concerned public servant or the public authority to protect' the victimised whistle blower[109] and restoring the whistle blower 'to the status *quo anté*'.[110]

In contrast, the *Protected Disclosures Act 2000* (South Africa) extensively enlists the possible circumstances that may be recognised as occupational detriment:

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108 Section 11(1) of *The Whistle Blowers Protection Act, 2014*, provides:
'The Central Government shall ensure that no person or a public servant who has made a disclosure under this Act is victimised by initiation of any proceedings or otherwise merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act.'

109 Section 11(2) of *The Whistle Blowers Protection Act, 2014*, provides:
'If any person is being victimised or likely to be victimised on the ground that he had filed a complaint or made disclosure or rendered assistance in inquiry under this Act, he may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimised or avoid his victimisation:
Provided that the Competent Authority shall, before giving any such direction to the public authority or public servant, give an opportunity of hearing to the complainant and the public authority or public servant, as the case may be:
Provided further that in any such hearing, the burden of proof that the alleged action on the part of the public authority is not victimisation, shall lie on the public authority.'

110 Section 11(4) of *The Whistle Blowers Protection Act, 2014*, provides:
'Notwithstanding anything contained in any other law for the time being in force, the power to give directions under sub-section (2), in relation to a public servant, shall include the power to direct the restoration of the public servant making the disclosure, to the status *quo ante*.'

> (a) being subjected to any disciplinary action;
>
> (b) being dismissed, suspended, demoted, harassed or intimidated;
>
> (c) being transferred against his or her will;
>
> (d) being refused transfer or promotion;
>
> (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
>
> (f) being refused a reference or being provided with an adverse reference from his or her employer;
>
> (g) being denied appointment to any employment, profession or office;
>
> (h) being threatened with any of the actions referred to paragraphs (a) to (g) above;
>
> (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.[111]

It is recommended that a similar comprehensive definition be included in the WBP Act and clarify the kind of victimisation that it offers protection against.

Additionally, various other international legislations include the following protections against victimisation, which could be provided for under the WBP Act as well:

111 *Protected Disclosures Act 26 of 2000* § 1 (South Africa).

- Entitlement to transfer or relocate or reversal of transfer, with terms and conditions not being less favourable than the previous post or position that was held;[112]
- Immunity from prosecution;[113]
- Legal assistance;[114]
- Police protection for the whistle blower and his family;[115]
- Compensation.[116]

These protections must be offered to the whistle blower only if he approaches the Competent Authority with the disclosure, and once his *bona fide* intention and reasonable belief in the veracity of the disclosure have been affirmed.

7. To make provision for incentives to whistle blowers.

Under section 17, the WBP Act provides for punishment in the case of false and frivolous disclosures.[117] Similarly, when the contents of a disclosure are proven and requisite action is taken, the whistle blower could be rewarded in the form of financial incentives.[118] Such rewards

112 *Public Interest Disclosure Act 1994* (Australian Capital Territory), sections 27 and 28 (Australia); *Whistleblowers Protection Act 1994* (Queensland), section 46 (Australia); *Protected Disclosures Act 26 of 2000* § 4(2)–(3) (South Africa); and *Whistleblower Act, 2006* (No. 720 of 2006), section 14(3) (Ghana). A proposal for this safeguard can also be found in the Law Commission of India's One Hundredth and Seventy Ninth Report of December 2001 on 'The Public Interest Disclosure and Protection of Informers' *supra* n. 3.

113 The Australian Competition and Consumer Commission adopts a policy of 'full amnesty' (immunity from prosecution) for the first person who blows the whistle on cartel activity such as price fixing and market sharing.

114 *Whistleblower Act 2006* (No. 720 of 2006), section 16 (Ghana).

115 *Whistleblower Act 2006* (No. 720 of 2006), section 17 (Ghana).

116 *Public Interest Disclosure Act, 1998* c 23, section 8 (UK).

117 Section 17 of *The Whistle Blower Protection Act, 2014*, provides:
'Any person who makes any disclosure mala fidely and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees.'

118 This was also proposed in the National Commission to Review the Working of the Constitution's consultation paper on 'Probity in Governance', *supra* n. 3.

could be similar to the *False Claims Act of 1863* in the USA which contains a *qui tam* provision providing the whistle blower between 25 to 30 per cent of the total recovery, the percentage depending on the extent to which the whistle blower took the action that enabled the recovery.[119] On similar lines, *The Whistleblower Act, 2006* (Ghana) establishes a full-fledged 'Whistleblower Reward Fund' and provides for a reward to the whistle blower if the disclosure leads to the arrest and conviction of the guilty.[120]

What should not be lost sight of is the possibility that these financial incentives may be liable to be abused by persons out of vindictiveness, or for claiming rewards. It must, however, be left to the Competent Authority to determine firstly, whether the disclosure is in the public interest, and secondly, if the informant is acting *bona fide* or is actuated by malice.

B. Concluding Remarks

As Lord Acton once said, 'Everything secret degenerates, even the administration of justice, nothing is safe that does not show how it can bear discussion and publicity.'[121]

For a democracy such as ours to continue functioning optimally, transparency and accountability are of utmost importance. In that, the whistle blower is much like a canary in a coalmine serving as a harbinger for toxic gases. He is not as much a threat to national security as he is a key resource to uncovering systemic risks and deficiencies. Turning a deaf ear and a blind eye to his disclosures or failing to protect him from reprisals would be counterproductive in a government of responsibility such as ours.

Academic research has highlighted that the plight of the whistle blower is often intense and there may be a psychological cost to

119 *False Claims Act* 31 USC § 3730(d) (1863) (USA).

120 *Whistleblower Act 2006* (No. 720 of 2006), sections 20-27 (Ghana).

121 Dr JN Barowalia *supra* n. 23, 409.

putting one's head above the parapet and blowing the whistle. Even the strongest-willed individuals may find the burden of standing out from the crowd unbearable over time.[122] Therefore, it is only when the whistle blower is reasonably satisfied that his fundamental right to life and liberty will be strenuously protected by the State, will he disclose to the State such information that would otherwise either never see the light of day or be clandestinely exposed globally on a third-party internet platform.

When it comes to disclosures on such online platforms, it is quite clear that a responsible whistle blower would not want to pick the ostensible incentives that they offer over the domestic State authority. Even if the whistle blower does make this choice, it would not be without compulsion or as a first preference.

Thus, a strong domestic legislation that inspires confidence in a whistle blower is essential. It must conform to and be ensconced by the stringent protection of article 21 of the *Constitution of India*. While there are certainly some gambles inherent in the legislative measures recommended in Part IV of this article, it is better to run these risks than to leave the whistle blower to approach a third-party internet platform that opens up a Pandora's box for national security.

A precondition for effective whistle blower and national security protection, therefore, is the rule of law. Whistle blowing should never be a Hobson's Choice–an in-house legislation ought to always prevail over the dark areas of the Internet.

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122 C Fred Alford, Professor of Government at the University of Maryland, discusses the issue in his seminal work '*Whistleblowers: Broken Lives and Organizational Power'* (Cornell University Press Ithaca 2001), concluding that seniority offers little protection, and that there is no difference whether concerns are raised within or outside an organisation. Kate Kenny of Queens University Belfast in her article 'Whistleblowing in the Finance Industry' (2013) says that she was surprised by 'the amount of work that goes into being a whistleblower, meaning the constant reading of documents, rebutting of arguments, exposing of lies and learning about the law, all while struggling to hold your personality together; in short by the fact that it's a full time job which, usually without warning, takes over your life': quoted and cited in Jeremy Lewis *et al supra* n. 97, 1.10.