International Journal of Advanced Research in Management and Social Sciences

ISSN: 2278-6236

CONSTITUTIONAL JUSTIFICATION OF WHISTLEBLOWER'S ACTIONS

Ruchica*

Abstract: *The strongest justification for allowing the use of whistle blowing is that the people of India have the right to impart and receive information. The right to impart and receive information is a species of the right to freedom of speech and expression guaranteed by Article 19(1) (a) of the constitution of India. A citizen has a Fundamental Right to use the best means of imparting and receiving information. The State is not only under an obligation to respect the Fundamental Rights of the citizens, but also equally under an obligation to ensure conditions under which the Right can be meaningfully and effectively be enjoyed by one and all.*

Keywords*: Whistleblowers, Constitution, Whistleblower's protection, Constitutional Rights*

*Research Scholar, Department of Law, Kurukshetra University

PROLOGUE:

There is a widespread acceptance that whistle blowing is an important tool in the fight against fraud and corruption. A whistleblower is effectively an individual who has witnessed or been part of an unethical or illegal process, often against their will as a condition of employment, and decides to submit the incriminating evidence to the proper authorities. Whistleblowers begin the indictment process in cases that are criminal[1]. The whistleblowers try to uncover the illegal activities of the corrupt people. The term "corruption" is a lexis derivative of "corrupt. Its Latin predecessor is "corruptus," which denotes a breaking into pieces. In contemporary society, the common meaning of "corruption" carries similar connotations of deterioration or breakdown. Corruption can be dichotomized into two basic designations: "Political" and "Corporate". As its title insinuates, political corruption implicates governmental involvement. Whether in local municipalities or federal bureaucracies, political corruption occurs when governmental power or authority is used for private gain.

The *Indian constitution* is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers, and duties of government institutions, and sets out fundamental rights, directive principles, and the duties of citizens .The Constitution of India provides means of whistle blowing in the form of PIL which means public interest litigation and in case of violation of fundamental rights it also provides for "public law remedy". The differentiation between these two remedies is quite difficult. In the former case the interests of the public is safeguarded by the act of whistle blowing and in latter case constitutional remedies are invoked to redress personal violation of Fundamental Rights . As justice Dwivedi commented that constitution is for common people and not for "legal quibbling" and it is the "poor, starved and mind less millions" that are actually in need of the protection of court for the enjoyment of Human Rights[2].

Various social reformers, lawyers, judges and social workers have also followed and welcomed these thoughts, even general public now knows that the court has constitutional power of intervention, and it can be invoked by the general public to help themselves in

[1] http://www.whistleblowingprotection.org/?q=node/16
[2] Kesavananda Bharati v State of Kerala, (1973) 4 SCC

finding the solution to their miseries arising from repression, governmental lawlessness and administrative deviance[3]. The socio-justice tool through which these aspirations of the Constitution and people of India are achieved is known as "Public Interest Litigation" (PIL). Lexically the expression PIL means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights and liabilities are affected[4].

EVOLUTION OF THE PIL:

The PIL evolved in a very slow process. The Supreme Court's initial position on constitutional amendments was that no part of the Constitution was unamendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368. The "basic features" principle was first expounded in 1953, by Justice J.R. Mudholkar in his dissent, in the case of *Sajjan Singh v. State of Rajasthan*[5]. Sowing the seeds for basic structure He wrote, "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?" In 1967, the Supreme Court reversed its earlier decisions in Golaknath v. State of Punjab[6]. A bench of eleven judges (the largest ever at the time) of the Supreme Court deliberated as to whether any part of the Fundamental Rights provisions of the constitution could be revoked or limited by amendment of the constitution. The Supreme Court delivered its ruling, by a majority of 6-5 on 27 February 1967. The Court held that an amendment of the Constitution is a legislative process, and that an amendment under article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. Six years later in 1973, the largest ever Constitutional Bench of 13 Judges, heard arguments in *Kesavananda Bharati v. State of Kerala*. The Supreme Court reviewed the decision in Golaknath v. State of Punjab,

[3] Upendra Bakshi; "Taking suffering seriously: Social Action Litigation in the Supreme Court of India" Law and Poverty (ed) Upendra Bakshi, pages 387-415 (1988)
[4] S.R.Pandian. J in Janta Dal v H.S.Chowdhary, AIR 1993 SC 892.
[5] 1965 AIR 845, 1965 SCR (1) 933
[6] 1967 AIR 1643, 1967 SCR (2) 762

and considered the validity of the 24th, 25th, 26th and 29th Amendments. The Court held, by a margin of 7-6, that although no part of the constitution, including fundamental rights, was beyond the amending power of Parliament (thus overruling the 1967 case), the "basic structure of the Constitution could not be abrogated even by a constitutional amendment". The process though was a slow one still in this famous case of Kesavananda Bharati v State of Kerala[7], the Supreme Court ultimately put a brake on the arbitrary and unreasonable power of legislature to destroy the "Basic features" of the Constitution. By formulating the "Doctrine of Basic Structure" and incorporating in it justness and fairness the seeds of PIL were sowed. Justice Krishna Iyer in Mumbai Kamgar Sabha v Abdulbhai Faizullabhai[8] used the expression PIL and "epistolary jurisdiction" in Fertilizer Corporation Kamgar Union v U.O.I[9] hence giving a new term i.e PIL. In between, the Supreme Court also interpreted the expression "procedure established by law" as a procedure which must be just, fair and reasonable in the year 1978[10] in Maneka Gandhi vs. UOI case. This led to the testing of any "law" on the touchstone of Articles 14, 19 and 21 collectively and thus brought justness and fairness in the State's dealing with the general public. The Supreme Court in case Supreme Court Advocate on Record vs. U.O.I declared "independence of judiciary" a "basic feature" and acquired autonomy in the selection and appointment of judges[11]. This made the judges more free and impartial to render justice without any interference of "Executive". In Kihoto vs Zachilhu, the Supreme Court held that judicial review U/A 32 and 226 is a basic feature of the Constitution, and hence cannot be amended[12.] Thus, the discretion to entertain a dispute or petition was reserved exclusively with the judiciary. This was a landmark judgment since all the PILs are either filed U/A 226 or U/A 32. This means that the discretion to entertain a PIL itself can be considered to be a part of basic feature and the only limitation could be the self-imposed restriction by the court itself. To supplement all this, the collective powers of Articles 32, 136, 141 and 142 made the Indian Supreme Court one of the most powerful court of the world. whereby it was at the courts discretion and the court could even take a simple letter as a PIL. Thus, volunteer social activists are allowed

[7] (1973) 4 SCC 225
[8] (1976) 3 SCC 832.
[9] AIR 1982 SC 344.
[10] Maneka Gandhi v U.O.I, AIR 1978 SC 597.
[11] Supreme Court Advocate on record v U.O.I, (1993) 4 SCC 441.
[12] Kihoto v Zachilhu, AIR 1993 SC 412.

standing; a simple letter can be accepted as a writ petition, the court itself will shoulder much of the burden of establishing the facts through the commissions, and whenever possible the case will move swiftly to the issue of remedy, by-passing the time-consuming and costly process[13].

The instrument of PIL has been used in India as effective and most frequently used mode of whistle blowing. The same is used for the enforcement of "public law remedies" for the purpose of enforcement of the Fundamental Rights. For instance, in Chairman, Railway Board v Chandrima Das[14] the Supreme Court observed in a writ petition filled by the victim against government for compensation as the accused was railway employee and the crime was committed in a building which was railway's property would be maintainable and it cannot be said that she should have approached a civil court for damages and the matter should not have been considered in a writ petition U/A 226 of the constitution. Where public functionaries are involved and the matter relates to the violation of the fundamental rights or the enforcement of public duties, the remedy would still be available under the "public law" notwithstanding that a suit could be filed for damages under the "private law". It was more so when it was not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which was involved as the petitioner was a victim of rape which is violative of the fundamental right of a person as guaranteed U/A 21 of the Constitution". Thus, the collective force of PIL and "public law remedies" provides us the medium and makes whistle blowing constitutional.

The whistle blowers usually gain information upon others criminal acts and bring them in knowledge of others. Gaining of information is a constitutional right. The right to impart and receive information is a species of the right to freedom of speech and expression guaranteed by Article 19(1) (a) of the constitution of India. A citizen has a Fundamental Right to use the best means of imparting and receiving information. The State is not only under an obligation to respect the Fundamental Rights of the citizens, but also equally under an obligation to ensure conditions under which the Right can be meaningfully and effectively be enjoyed by one and all. Freedom of speech and expression is basic to and indivisible from a democratic polity. A true democracy cannot exist unless all citizens have a

[13] Praveen Dalal, " Sociology of PIL in India"
[14] AIR 2000 SC 988.

right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. Incomplete information, wrong information and no-information all equally results in to uninformed citizens, which further makes democracy a farce. Hence right to be informed adequately and truthfully is a part of the right of the citizens under Article 19(1) (a).

The strongest justification for allowing the use of whistle blowing is that the people of India have the right to impart and receive information. The right to impart and receive information is a species of the right to freedom of speech and expression guaranteed by Article 19(1) (a) of the constitution of India. A citizen has a Fundamental Right to use the best means of imparting and receiving information. The State is not only under an obligation to respect the Fundamental Rights of the citizens, but also equally under an obligation to ensure conditions under which the Right can be meaningfully and effectively be enjoyed by one and all.

Freedom of speech and expression is basic to and indivisible from a democratic polity. The right U/A 19 (1) (a) is, however, available only to the citizens of India and non-citizens can claim only right to know U/A 21 of the Constitution of India. Thus, the whistle blowing gets its legitimacy under the following:

FREEDOM OF INFORMATION UNDER ARTICLE-19(1) (A):

Article 19 (1) (a) of the constitution guarantees to all citizens freedom of speech and expression. And, Article 19(2) permits the State to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence. Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a) Recently, the Supreme Court has traced the origins of the community's 'right to know' from his right to freedom of speech and expression. State of U.P. v. Raj Narain[15], Mathew, J. eloquently expressed this proposition in the following words:" The people of this country have a right to know every public act, everything that is

[15] , (1975) 4 SCC 428

done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption." In Dinesh Trivedi vs. Union of India[16], the court observed that in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which ,having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. To ensure that the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof. The Court was dealing with the Vohra Committee Report and stated that though it was not advisable to make public the basis on which certain conclusions were arrived at in that Report, the conclusion reached in that Report should be examined by a new body or institution or a special committee to be appointed by the President of India on the advice of the Prime Minister and after consideration with the Speaker of the Lok Sabha. It is therefore clear that the Supreme Court has accepted that the right to know is part of the fundamental right of freedom of speech and expression guaranteed under Art. 19 (1) (a). Of course, it will be subject to the reasonable restrictions, as may be imposed by law under article 19 (2). It is now recognized that while a public servant may be subject to a duty of confidentiality, this duty does not extend to remaining silent regarding corruption of other public servants. Society is entitled to know and public interest is better served more if corruption or maladministration is exposed. The Whistleblower laws are based upon this principle. In the light of the above judgment of the American and English Courts and our Supreme Court, on the question as to the scope of 'free speech', the Commission is of the view that a statute enabling complaints to be made by public servants, or persons or NGOs against other public servants and the grant of protection to such complainants is perfectly valid and will not offend the right to

[16] (1997 (4) SCC 306)

privacy emanating from sub-clause (a) of clause (1) of Art. 19. The right to privacy has to be adequately balanced against the right to know. Both these rights emanate from same sub-clause in Art. 19. It must, however, be noted that freedoms under Article 19, including Article 19(1) (a), are available only to citizens of India. An alien or foreigner has no rights under this Article because he is not a citizen of India. Thus to confer protection upon non-citizens one has to depend upon and apply Article 21 which is available to all persons, whether citizen or non-citizen. .

RIGHT TO KNOW UNDER ARTICLE 21:

Article 21 enshrines right to life and personal liberty. The expressions "right to life and personal liberty" are compendious terms, which include within themselves variety of rights and attributes. Some of them are also found in Article 19 and thus have two sources at the same time. In R.P.Limited v Indian Express Newspapers[17] the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression "liberty" must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know which include a right to receive information. The ambit and scope of Article 21 is much wider as compared to Article 19(1) (a).

Thus, the courts are required to expand its scope by way of judicial activism. In P.U.C.L v U.O.I[18] the Supreme Court observed that Fundamental Rights themselves have no fixed contents, most of them are empty vessels into which each generation must pour its contents in the light of its experience. The attempt of the court should be to expand the reach and ambit of the Fundamental Rights by process of judicial interpretation. There cannot be any distinction between the Fundamental Rights mentioned in Chapter-III of the

[17] AIR 1989 SC 190.
[18] JT 2003 (2) SC 528

constitution and the declaration of such rights on the basis of the judgments rendered by the Supreme Court. Thus the Supreme Court judgments have strengthened the justification ingrained in our constitution for the activities of the and the whistleblowers.

CONCLUSIONS:

After discussing all the provisions given in the constitution one can safely justify the actions of the whistleblowers. As the constitution itself provides that there is freedom of speech and expression and the democracy also also provides that laws are “for the people”, their well being, their growth and also their protection .Since our constitution justifies the action of the whistleblowers, there should be enough laws to protect their action. Our legislators must provide the people of India a law which protects those whose conscience does not allow others wrongful activities. Article 19 and article 20 justifies the act of the whistleblowers and PIL may become the means but it cannot be said to be a safe procedure hence the method whereby a whistleblower may uncover the corrupt activities of the others must be channelized and hence protect him/her from being victimized, which is mostly eminent in such cases.

In the end of the paper it can be concluded that our constitution provides justification for the action of the whistleblowers and the absence of the laws covering the protection as well as the process of whistle blowing is quite intriguing.

REFERENCES

1. H M Seervai, 'Constitutional Law of India'
2. "Indian Constitution: Sixty years of our faith". *The Indian Express* 2010-02-02. Retrieved 2013-12-01.
3. "The basic features" The Hindu. 2004-09-26. Retrieved 2013-011-09.
4. Upendra Bakshi; “Taking suffering seriously: Social Action Litigation in the Supreme Court of India” Law and Poverty (ed)
5. V.N. Shukla 'Constitution of India' 10th edition.
6. Wikipedia ,the free encyclopedia source