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An Analysis on the Contribution of Judiciary System in the Rise of the Good Governance

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Abstract – This paper makes an effort to provide a framework for good governance in India by identifying its essential features and shortcomings in its working and emphasizes need for innovative approaches. No theory of governance could be intelligible unless it is seen in the context of its time. India's democratic experience of the past six decades has clearly established that good governance must aim at expansion of social opportunities and removal of poverty. Good governance, according to the author, means securing justice, empowerment, employment and efficient delivery of services.

In recent years, courts have risen in power across the world, and the Indian Supreme Court has rightly been pointed to as an example of this global trend. In many ways the Indian Court has become a court of good governance that sits in judgment over the rest of the Indian government. This Article argues that the Court has expanded its mandate as a result of the shortcomings (real, perceived, or feared) of India's representative institutions. The Indian Supreme Court's institutional structure has also aided its rise and helps explain why the Court has gained more influence than most other judiciaries.

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INTRODUCTION

It has been nearly six decades that we inherited a well-entrenched system of judicial administration besides elaborate and codified, substantive and procedural laws from Britishers. These laws had generally stood the test of time. Therefore, we adopted them with suitable corrections wherever required. Over the years, we have fine-tuned the judicial administration so as to meet the needs of changing times and aspirations of the modern India.

The concept of governance is as old as human civilization. What is "Governance"? It simply means the process of decision making and the process by which decisions are implemented. The quality of governance depends, in a large measure, upon the indulgence shown by subjects.

Speaking on basis of experiences of medieval period and the times of colonial rule, in particular in the continents of Africa and Asia, some political scientists would use sarcasm in describing the system of governance one such scientist¹ said: "the marvel of all history is the patience with which men and women submit to burdens unnecessarily laid upon them by their governments". Yet others² would not mince words in describing the business of governance thus: "So they [the government] go on in strange paradox, decided only to be undecided, resolved to be

irresolute, adamant for drift, solid for fluidity, all-powerful to be impotent".

Good governance signifies the way an administration improves the standard of living of the members of its society by creating and making available the basic amenities of life; providing its people security and the opportunity to better their lot; instill hope in their heart for a promising future; providing, on an equal & equitable basis, access to opportunities for personal growth; affording participation and capacity to influence, in the decision-making in public affairs; sustaining a responsive judicial system which dispenses justice on merits in a fair, unbiased and meaningful manner; and maintaining accountability and honesty in each wing or functionary of the Government.

In nutshell, Good Governance entails effective participation in public policy-making, the prevalence of the rule of law and an independent judiciary, besides a system of institutional checks & balances through horizontal and vertical separation of powers, and effective oversight agencies.

Democracy, liberty and the rule of law together represent the troika that is universally accepted now as the index of a civil society. Democracy signifies a government of, by and for the people. The protection of individual liberties follows the notion of democracy

as a natural corollary. This entails the espousal of a methodical configuration of laws by which society might be regulated and different conflicting interests can be harmonized to the fullest extent. This is why “the rule of law” is indispensable. It envisages the pre-eminence of law as opposed to anarchy or capricious dictates. It involves equal accountability of all before the law irrespective of high or low status.

Democracy has been evolved through centuries of experience amongst the people, who care for human person, dignity & rights as the best and most acceptable form of good governance. It is a concept that occasions the idea that all citizens have a right to participate in the decision-making processes that lead to adoption of policies that are applicable to the societies³. It also means that there are some limits on majority decision-making and, hence the inevitability of certain basic rights being protected. It rests on maintaining a necessary equilibrium between the numerous competing interests, demands, constraints and compulsions that exist in any civic society eager for development.

India incorporated a number of basic human rights as guaranteed fundamental rights, elaborated in every possible manner, in Part III of the Constitution. These fundamental rights go much beyond the American Bill of Rights. They did draw upon the Universal Declaration of Human Rights issued by the United Nations in 1948 but went ahead of them by incorporating alongside, in Part IV of the Constitution, certain ‘Directive Principles of State Policy’ which are principles that would be fundamental for “good governance” of this country.

Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and thus insulates all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. but borrowing the words of one of the founding fathers of the American Constitution, James Madison, I would say that the Judiciary in India is “truly the only defensive armour of the country and its constitution and laws”. If this armour were to be stripped of its onerous functions it would mean, “the door is wide open for nullification, anarchy and convulsion”.

The judicial system has an important role to play ultimately in ensuring better public governance. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. There is no area where the judgments of

Supreme Court have not played a significant contribution in the governance – good governance – whether it be – environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution.

Judiciary has, thus, played a crucial role in development and evolution of society in general and in ensuring good governance by those holding reins of power in particular. Perhaps, there can be no two views about the significance of the role expected of judiciary, viza-viz, the goal and good governance in a free society. I believe that judiciary has played its role well.

GOOD GOVERNANCE

Citizens all the world over look up to the nation-state and its organs for high quality performance. When good governance is guaranteed, citizens go about their personal business and pursuits with enhanced expectations. On the other side of the spectrum, bad or indifferent governance not only restricts opportunities of success but it can even degenerate into sectarian conflicts and civil wars. In such an atmosphere personal accomplishments as well as social achievements get severely restricted.

Good governance helps create an environment in which sustained economic growth becomes achievable. Conditions of good governance allow citizens to maximize their returns on investment.

Good governance does not occur by chance. It must be demanded by citizens and nourished explicitly and consciously by the nation state. It is, therefore, necessary that the citizens are allowed to participate freely, openly and fully in the political process. The citizens must have the right to compete for office, form political party and enjoy fundamental rights and civil liberty. Good governance is accordingly associated with accountable political leadership, enlightened policy-making and a civil service imbued with a professional ethos. The presence of a strong civil society including a free press and independent judiciary are pre-conditions for good governance.

What is ‘good’ governance in the Indian context? The central challenge before good governance relates to social development. In his famous ‘tryst with destiny’ speech on 14 August 1947, Jawaharlal Nehru articulated this challenge as ‘the ending of poverty and ignorance and disease and inequality of opportunities’. Good governance must aim at expansion in social opportunities and removal of poverty. In short, good governance, as I perceive it, means securing justice, empowerment, employment and efficient delivery of services.

RULE OF LAW

The concept of good governance is undoubtedly linked with the citizens’ right of life, liberty and pursuit of happiness. This could be secured in a democracy only through the rule of law.

The rule of law is expressed through the axiom that no one is above the law. One has to clearly understand that the rule ‘of’ law is different from the rule ‘by’ law.

Under the rule 'by' law, law is an instrument of the government and the government is above the law while under the rule 'of' law no one is above the law not even the government. It is under this framework that rule of law not only guarantees the liberty of the citizens but it also limits the arbitrariness of the government and thereby it makes government more articulate in decision-making. The rule of law as Dicey postulated is equality before law. This is secured through formal and procedural justice which makes independent judiciary a very vital instrument of governance. It is widely appreciated that human factors i.e. the quality of political leadership, the executive and judicial officials play important roles not only in upholding supremacy of rule of law and in efficient delivery of service but also in shaping traditions, customs and institutional cultures that are integral part of the liberal democratic machinery.

In our constitutional system, every person is entitled to equality before law and equal protection under the law. No person can be deprived of his life or personal liberty except according to the procedure established by law. Thus the state is bound to protect the life and liberty of every human being. In the majority opinion in *Keshvananda Bharti vs State of Kerala* that "rule of law" and "democracy" were declared as the basic structures of the Indian constitution not amenable to the amendment process under article 368 of the constitution.⁵ It flows therefrom that the courts have the final authority to test any administrative action on the standard of legality. The administrative or executive action that does not meet the standard of legality will be set aside if the aggrieved person brings an appropriate petition in the competent court.

A necessary corollary of this phenomenon is called 'judicial activism'. A large number of Public Interest Litigations (PILs) are filed in High Courts and the Supreme Court against the apathy of the executive. This has served us admirably but it has also highlighted the need for circumspection and self-restraint on the part of the judges in performance of this task. It's being increasingly felt that PIL is being misused by people agitating private grievances in the garb of public interest, in settling political scores and seeking publicity than espousing public causes and defending the deprived.

EMPOWERMENT

An empowering approach to poverty reduction needs to be based on the conviction that poor people have to be both the object of development programmes and principal agency for development.

Our experience shows that when poor people are associated with public programmes, they have consistently demonstrated their intelligence and competence in using public funds wisely and

effectively. The involvement of poor women in micro-financing institutions of SEWA in Gujarat or in self-help groups in Andhra Pradesh and Tamil Nadu has clearly established that they not only understand financial systems but also repay their loans on time. In short, the poor women have demonstrated that they can outperform all other customers in profitability.

Our Constitution is committed to two different set of principles that have a decisive bearing on equality. First, is the principle of equal opportunities to all and the second, the principle of redress of educational and social backwardness? The social and political climate has radically changed in the country from what it was in 1950 or 2000. However, notwithstanding, an increasing role of the market and the NGOs as institutions of modernization and progress in the country, the State continues to have a leading say in transformation of society to make it just and equal. The question is, not only of the extent to what reservation in Government employment can really change things for the better, but how it could, in order to benefit the socially, educationally and economically backward ones.

Today India has 3.3 million elected representatives in Panchayats in nearly half a million villages out of whom over one million are women. Assuming that for every elected office in the village Panchayat system there are 3 contenders, we have over 10 million stakeholders of democracy – an arrangement that secures democratic continuation in India. Direct elections have also brought into the village national life and consciousness about strengths of democracy and the need for democratic behaviour in terms of the Constitution of India. The print and electronic media in particular have strengthened this process.

ROLE OF THE JUDICIARY IN GOVERNANCE

The national constitutions of the countries of the region recognize the significance of the judiciary and its supervening influence on the polity. The importance of judicial independence for the effective discharge of its role has also been duly accepted. A brief reference to the salient features of the 'Beijing Statement of Principles of the Independence of the Judiciary', 1997 (for short 'Beijing Principles') is apposite.

The evolution of the Beijing Principles commenced in 1985 in the Conference of the Chief Justices of the Asia Pacific region in conjunction with the LAWASIA, and culminated in the adoption of the revised principles at Manila in 1997. Its Preamble refers to the UN Charter, UDHR, ICCPR and ICESCR and states the primary object: "To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region". Each of them relate to qualitative

improvement of governance. It states that “The judiciary is an institution of the highest value in every society” (Article 1). A few important provisions in it are indicated.

The power of judicial review under the national Constitution and the provisions in the Beijing Principles and the Bangalore Principles confer the right coupled with the duty in the judiciary to work for improving the quality of governance bearing the principles of judicial accountability in mind.

Recognition of corruption as an egregious form of human rights violation has empowered the judiciary in India to enforce probity in public life and accountability of public men indulging in corruption. The above Hawala case developed the judicial process of ‘continuing mandamus’ to monitor investigation into such offences alleged against the high and mighty when the premier investigating agency was dragging its feet to subvert the rule of law. Since then, this process has become a precedent for its use in the later similar situations, such as, 2G spectrum and CWG cases.

The Indian judiciary led by the Supreme Court has been proactive in ensuring good governance when issues of corruption in high places or misgovernance have been brought to it in the form of Public Interest Litigation (PIL). To enable any bonafide social activist to initiate such an action, the Supreme Court liberalized the locus standi rule. A vast range of issues affecting the lives of the people relating to human rights of prisoners, under trials, inhabitants of mental and protection homes, bonded and child labour, environment, electoral malpractices affecting free and fair elections, probity in public life, combating corruption etc. have been the subject of judicial intervention to ensure good governance. Appointment of amicus curiae in the PILs by the court is made to ensure objectivity in the proceedings. These judicial interventions to improve governance were occasioned by the failure or inaction of the executive to discharge their constitutional or statutory obligations.

The judicial creativity in developing the reach of the judicial process has not only filled the vacuum of executive inaction, but has also moved the executive towards good governance. It is significant that the judiciaries of other countries in the region are acting likewise and emulating the positive steps taken elsewhere.

HAS THE GOOD GOVERNANCE COURT GONE GLOBAL?

The story of the rise of a good governance judiciary in India is certainly unique. The shortcomings of India’s representative institutions, the Supreme Court’s institutional structure, the development of the basic structure doctrine, and the Court’s right to life jurisprudence have all combined to create a distinct jurisprudential history. Yet, in other ways, the Indian

Supreme Court and the circumstances of its rise are not so special. In other countries, we see many of the elements that have fostered such extensive review powers in India. Indeed, in a broader global trend, we find analogous forms of judicial review developing elsewhere.

Justice Albie Sachs of the South African Constitutional Court has argued that in the nineteenth century, the executive achieved control over society, in the twentieth century parliament gained control over the executive, and in the twenty-first century the judiciary will establish principles and norms to control both parliament and the executive.

Clearly, India could be pointed to as an example of this proposed historical narrative. As Justice Sachs suggests, there are others as well. This section examines judicial corollaries similar to the Supreme Court’s expanded right to life jurisprudence and basic structure doctrine that have surfaced beyond India’s borders.

It is outside the scope of this Article to examine how these doctrines arose in other countries. Instead, this section merely attempts to show that courts outside India are taking on similarly expanded mandates that further a broad platform of good governance. The Indian experience may also suggest a useful framework to understand why these other courts have gained power; more useful, at least, than the U.S. experience. In India, the Court’s expansive doctrines were largely judge-made, and certainly were not constitutional inevitabilities. In other countries, though, these doctrines are often clearly embodied in constitutions. Whether included in constitutions or judge-made, the repeated appearance of these doctrines, or versions of them, suggests that judicial review is transforming in countries outside of the United States. This change may be driven by political forces similar to those present in India (such as widespread poverty, an overriding desire for stability, or perceived shortcomings in representative institutions) that are not as ubiquitous in the United States. Critics of expanded review powers for judiciaries, whether in India or elsewhere, should grapple with why these courts have adapted such a role in the first place, before making any blind call to curtail their powers.

The Indian Supreme Court’s expanded interpretation of the right to life arguably falls under the rubric of social and economic rights jurisprudence. This conflation may not be precisely correct, however, because the Court’s interpretation of the right to life extends outside of what many, including the United Nations, consider classic social and economic rights (for example, its orders concerning the enforcement of traffic regulations or zoning). Some of these issues of comparison, though, likely arise out of the relative youth of social and economic rights jurisprudence.

In India, the basic structure doctrine serves a purpose similar to unamendable provisions or principles in a constitution. After World War II, several constitutions were created with un-amendable provisions. Germany is the most prominent example, 328 but there are others as well. These countries adopted varying approaches. The constitutions of Greece and Portugal provide a relatively long list of un-amendable provisions. Others protect only one or two key principles. The Constitutions of Italy and France, for example, simply safeguard their republican form of government against amendment.

ELEMENTS OF GOOD GOVERNANCE IN JUSTICE DELIVERY SYSTEM

The prosperity and development imbibed in the good governance can be traced into a robust Justice Delivery System of a country. It depicts that the democratic values are not superficial and are deeply rooted. It is only through 'Securing justice' that the basic human rights of the people are effectively protected. There are several inter-related aspects of securing justice; the most important public good is the ensuring the security of life and property. This needs determination towards relentless support extended to the instruments of democracy.

Access to Justice is based on the basic principle that the general public know and rely upon the proper application of law. Some citizens are not aware of their rights and some are though aware, but are completely deprived of them. Methodical and systematized solutions are, therefore, needed to fortify access to justice. The provisions under the Constitution under Article 22, Code of Criminal Procedure 303, 304 support this cause.

There has been creation of SALSA (State Legal Services Authority) at State Level and DLSA (District Legal Services Authority) at District Level in every State. These bodies ensure free legal aid to those who cannot avail them or cannot afford them. They provide the deprived, an opportunity to make a legal representation before Court of Law, thus fostering equality before law, in a substantial way.

The concept of good governance is associated with the citizen's right to life, liberty and pursuit of happiness, for example, in Bhutan the development and prosperity is measured in terms of a National Happiness India is the world's largest democracy. In this age of technology and IT revolution there are a number of serious problems that need to be met in the years ahead like: divisive tendencies, extremism, unemployment, regionalism, illiteracy, corruption and nepotism. To combat them there is need for empowerment of people and participative development. Good governance is the foundation of participatory development. Social inclusion through

Panchayati Raj Institutions, Local Urban Bodies, labor centric decentralized participatory planning, compulsory education laws, work site facilities, employment generation for poor (eg. MNREGA, National Livelihood Mission) and above all accountability and control through social audits, civil societies and right to information are unique and unprecedented efforts in strengthening the pillars of democracy and grass root development ensuring good governance.

Good governance requires fair legal frameworks that are enforced impartially. It also requires complete protection of human rights, particularly those of who are marginalized or belong to the category of minorities. An impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force as, the establishment of law and order is crucial, but its maintenance is critical.

CONCLUSION

The judiciary as the custodian of the rule of law is the vanguard of all the national institutions to ensure good governance by overseeing the functioning of all public authorities; and by compelling the performance of the public duties by them. The oversight of judicial review is meant to serve this purpose. The pro-active judiciary must justify that status by maintaining its independence with accountability, confining itself within the limits delineated by the national Constitution.

One should not mistake the rise of the good governance judiciary in India as the rise of judicial rule. Instead, it marks a new form of coexistence between democratic and good governance principles in ruling; one in which, as we have seen, the judiciary must face considerable enforcement and legitimacy concerns. This coexistence is likely to evolve substantially in the coming years, creating lessons for other courts with similar good governance roles.

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