

JUDICIARY: OBSERVER AND INSPECTOR OF GOOD GOVERNANCE

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ABSTRACT

Good governance is the foundation of a sound society. Every system aims to ensure good governance to win over the confidence of its people. This paper studies role of judiciary in ensuring good governance in a system by itself observing its elements and by looking after that other organs of the State, viz., the legislature and executive. It explores into the powers and characteristics of the judiciary pressed into service in securing good governance in the system of Judiciary.

INTRODUCTION

Importance of ensuring good governance in the working of any system is never exaggerated. Judiciary as a part of the State machinery, is also not untouched by this divine responsibility. It is endowed with the duty not only to ensure observance of good governance on its part but also enforce its practice by other parts of State mechanism. This paper is made to understand basics of good governance and how it is applied and ensured by the judicial system of a country. The author has primarily relied on secondary sources of information for this research. Facts and cases referred for the study pertains mainly to those of India.

WHAT IS GOOD GOVERNANCE?

Y. K. Sabharwal³⁸ has very aptly defined “governance” as “the process of decision making and the process by which decisions are implemented”. He believes that quality of governance depends on people’s participation to a large extent. Good governance is something idealised by every State, by every form of government, by every rational citizen. However, meaning and attributes of good governance are abstract and metaphysical and cannot be put forward in concrete form. It is something which can be perceived and interpreted as widely as desired by

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³⁸ Y.K. Sabharwal, Role of Judiciary in Good Governance, available at https://highcourtchd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/goodgovernance.pdf (last visited August 23,2020).

a person or system. This can be a virtue as well as a failing during its implementation. The author points out that good governance implies a situation of political, social, economic, legal and cultural harmony, minimization of risk of tyranny and maximization of public confidence in State offices in the nation. This can be attained by crowning rule of law through separation of powers, provisions for effective dispute settlement system, better response to economic and income issues, and prompt decision-making and implementation processes. Good governance is perceived by people by reference to its characteristics than its meaning or definition. Main hallmarks of good governance have been enlisted by United Nations Commission on Human Rights and United Nations Economic and Social Commission for Asia and the Pacific. United Nations Commission on Human Rights identified the following as the key attributes of good governance:

- transparency
- responsibility
- accountability
- participation
- Responsiveness (to the needs of the people).³⁹

According to United Nations Economic and Social Commission for Asia and the Pacific, good governance has 8 major characteristics which are as follows:

- participatory,
- consensus oriented,
- accountable,
- transparent,
- responsive,
- effective and efficient,
- equitable and inclusive and
- follows the rule of law.⁴⁰

³⁹ Human Rights Council resolution 2000/64, The role of good governance in the promotion of human rights, E/CN.4/RES/2000/64 (27 April, 2000), available from https://ap.ohchr.org/documents/e/hrc/resolutions/a_hrc_res_7_11.pdf (last visited August 7, 2020).

⁴⁰ United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?*, 2009, available at <https://www.unescap.org/resources/what-good-governance> (last visited April 16, 2020).

Good governance is observed by all the organs of State, viz., legislature making laws keeping in mind the interest and welfare of its people, executive implementing laws fairly and taking prompt decision in cases of emergencies and contingencies, judiciary adjudicating according to lex loci and principles of equity, justice and good conscience.

JUDICIARY: THE BACK OF GOOD GOVERNANCE

Judiciary plays a pivotal role in securing and promoting good governance. It ensures good governance by not only observation of its attributes while adjudication and interpretation of laws, but also by checking its observance by other organs of the State. Thus, judiciary is the protagonist of the good governance theory. It discharges its duty through various means, such as principles of natural justice, judicial review, judicial activism, effective supervision over working of tribunals, guaranteeing rule of law and separation of powers.

CONSTITUTION: THE SUBSTRATUM OF GOOD GOVERNANCE

The Constitution of India guarantees a plethora of rights to its citizens. It also details substantive amount rights to non-citizens.⁴¹ The rights that the Constitution provides can be classified as fundamental rights and legal rights. Fundamental rights are interpreted by courts very widely. The courts have included, for instance, right to privacy⁴², right to know antecedents of candidates standing in elections⁴³, right of enjoyment of pollution free water and air⁴⁴, under fundamental rights.

Mr B. Das⁴⁵ explained the fundamental principles of governance as “Dharma of the Government--the path of duty of the Government.” He further said that though there was no need to “lay down in the Constitution Act what the Government should do and what are the responsibilities of Government to the citizens and the people of India” but the government has the responsibility to legislate for betterment of the citizens, to listen to its people.

While the Constituent Assembly was discussing over justiciability of Fundamental Rights and non-enforceability of Directive Principles of State Policy, he was critical of such

⁴¹ Fundamental rights provided under Articles 14, 20, 21, 21A, 22, 23, 25, 26, 27 and 28 are available to all persons whether citizens or foreigners.

⁴² K. S. Puttaswamy (Retd) v. Union of India, (2017) 10 SCC 1.

⁴³ Union of India v. Assn. for Democratic Reforms, AIR 2002 SC 2112; Peoples Union for Civil Liberties v. Union of India, AIR 2003 SC 2363.

⁴⁴ Subhash Kumar v. State of Bihar, (1991) 1 SCC 598; AIR 1991 SC 420.

⁴⁵ Constitutional Assembly Debates on August 30, 1947 available at <http://loksabhaph.nic.in/Debates/cadebatefiles/C30081947.html> (last visited April 16, 2020).

classification of functions of government. He said, “I am not satisfied with the opinion of the legal servants and great authorities on law in this House who interpret the functions of Government as justiciable and non-justiciable. They have said that we cannot include in the Union Constitution of India what the Government has to do for the people. I think it is the primary duty of Government to remove hunger and render social justice to every citizen and to secure social security.” Mr. B. Das wanted performance of primary duties and obligations of government like securing people “social justice”, ensure them “minimum standard of living” and “minimum standard of public health” to be made mandatory. But he did not favour in putting the clauses of obligations in the main Constitution Act. He wanted to place them in Appendix and give them the force of law. He believed it to be a corresponding duty of the government toward its people “to govern them properly, to look after their social welfare and their general well-being”. He, in fact, advocated that mandatory nature of duties of government will be beneficial to establish a stable government, more apt in Indian conditions and considered it to be in line with Gandhian and Socialist ideology. He said, “We should draw up a democratic Constitution whereby the State serves the people and the people, the State. Let our Constitution bear the Stamp of the culture and civilisation of India.”⁴⁶

ENSURING GOOD GOVERNANCE IN THE ADMINISTRATION OF JUSTICE

Administration of justice is the indispensable duty of the State. It is the key to lock public confidence and prevent anarchy, chaos and lawlessness. Salmond has defined administration of justice as the “maintenance of right within a political community by means of the physical force of the state”.⁴⁷ It was observed by the Supreme Court, “The concept of social justice is the yardstick to the justice administration system or the legal justice and as Roscoe Pound pointed out the greatest virtue of law is in its adaptability and flexibility and thus it would be otherwise an obligation for the law courts also to apply the law depending upon the situation since the law is made for the society and whatever is beneficial for the society, the endeavour of the law court would be to administer justice having due regard in that direction.”⁴⁸ Good governance is not a new concept in the realm of administration of justice. The idea was perceived by Kautilya and was discussed by him very comprehensively in his most popular

⁴⁶ *Id.*

⁴⁷ B. N. M. Tripathi, *Jurisprudence (Legal Theory)* 169 (19th ed. 2018).

⁴⁸ *Balbir Kaur and Anr. v. Steel Authority of India Ltd. and Ors.*, (2000) 6 SCC 493.

work Arthashastra. He placed public interests and welfare at a higher footing than liking and disliking of the king.⁴⁹ He believed to good governance vital for establishing stability in the empire.⁵⁰ Kautilya discussed about administration of justice in the chapter “*Dandaniti*” or science of government.⁵¹ According to him, effective administration of justice assists sustainable development and eliminates corruption. He studied governance in connection of corruption. He elucidated how to properly organise, regulate and direct administration for achievement of State’s purpose and goals as to him governance is good when state is able to fulfil its purposes and attain its goals. He advised to strike balance and avoid extremes while taking decisions for good governance.⁵² He is praised worldwide for impressive and efficacious codes and theories of civil and criminal laws those have not lost their relevance even today. India was a British colony for about three centuries. The aim of the British was to use resources of its colony for development of their own country. Their policies for India were designed so as to realize that objective. They completely ignored the welfare of Indian citizens. Indian system had to bear, for instance, the consequence of inequality created due to land revenue system with zamindars introduced by Lord Cornwallis for years after independence. Thus, the British policy in India during the colonial period can be correctly described antithesis of good governance. In the twenty-first century, the transformation of ‘Police state’ to ‘Welfare state’. I. P. Massey⁵³ aptly describes that the role performed by the government has transmuted “from laissez faire to paternalism and from paternalism to maternalism”. With the increased government role, there arises a greater probability of State coming in conflict with its subjects. Public faith can be ensured when people are assured good governance in the administration of the justice, since ‘justice should not only be done but seen to have been done’. The author humbly submits that with unfaltering and resolute public confidence in the State machinery, the citizens will become more productive and thereby, ease attainment of State objectives to a great extent. No jurist so far has ever been criticized for overemphasising the role of judiciary in ensuring good governance through effective administration of the justice. Judiciary ensures that rights of people are given full

⁴⁹ Dr. Ritu Sharma, Kautilya Views on Governance and Corruption, 7 IJRESS 80, 81 (2017), available at <http://euroasiapub.org/wp-content/uploads/2017/07/9ESSJune-5053P-1.pdf> (last visited August 23, 2020).

⁵⁰ *Id.*

⁵¹ Kautilya, The Arthashastra 774 (L. N. Rangarajan, 2010), available at <https://www.pdfdrive.com/the-arthashastra-e34336354.html> (last visited April 17, 2020).

⁵² *Id.*

⁵³ I. P. Massey, Administrative Law 10 (9th ed. 2018).

effect. Administration of justice has two components – civil and criminal. Criminal law is administered more stringently by the courts than civil law, since the former involves offences committed against state and public at large. The laws are said to be efficient for a system when they are rigorous enough so as to deter the offender and potential offenders from committing an offence, but not disproportionate to the nature, facts and circumstances of the offence. Such effective administration of justice is an evidence of good governance in the State.

ENSURING GOOD GOVERNANCE ON THE WHOLE

Some developments in Indian judicial system to ensure good governance in the system are listed below:

- **Principles of Natural Justice:** Principles of natural justice are integral to good governance.⁵⁴ They help to establish that proper procedure has been followed while adjudicating a case. Reasoned decision is one of the most applauded characteristic of modern adjudication system. The principles of natural justice are those judge-made rules that are required to be observed by courts, tribunals and administrative agencies. “Natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication to make fairness a creed of life”.⁵⁵
- **Judicial Review:** The courts endeavour to strike a balance between executive efficiency and protection of rights of people from abuse of discretion by the authorities.⁵⁶ They are vested with the power of Judicial Review. They must ensure that legislature and executive do not transgress their limits, abuse their power or encroach upon Fundamental Rights of citizens.
- **Judicial Activism:** A new trend of more active participation of judges has been witnessed in recent times. Judges actively take part in law-framing policies by not only applying constitutional provisions but also by putting forward their policy preferences. In India they have started to give Directive Principles of State Policy their due consideration. Fundamental Rights are of binding nature, whereas Directive Principles of State Policy are of guiding character while deciding upon issues of Public Interest Litigations.

⁵⁴ I. P. Massey, Administrative Law 241 (9th ed. 2018).

⁵⁵ I. P. Massey, Administrative Law 190 (9th ed. 2018).

⁵⁶ Thakker, C. K., Lectures on Administrative Law 291 (6th ed. 2018).

- **Transparency:** Good governance requires transparency in working of all departments of the State while maintaining confidentiality of sensitive information.
- Chief Justice of India is a “public authority” under the Right to Information Act, 2005.⁵⁷ When the issue of right to information of citizens about the declaration of assets of judge came before the Apex Court, the court was entrusted with the task of harmonising the conflict between fundamental right to information of citizens under Article 19(1)(a) and fundamental right to privacy of judges under Article 21 of their personal information. Dr. D. Y. Chandrachud, J. observed⁵⁸, “*Free flow of information to citizens is necessary, particularly in matters which form part of public administration for ensuring good governance and transparency.* The fundamental right of free speech and expression includes every citizen’s right to know about assets, criminal antecedents and educational backgrounds of candidates contesting for public office. To cover public acts with a veil of secrecy is not in the interest of the public and may lead to oppression and abuse by, and distrust of, public functionaries. The lack of transparency, accountability and objectivity in the collegium system does not enhance the credibility of the institution. Disclosure of the information sought, on the other hand, would promote transparency and prevent undue influence over the judiciary;” (emphasis supplied)
- **Independent judiciary:** Good governance is realisable only when there is an independent and impartial judiciary. In India, judiciary has the power to interpret the fundamental law of a country and declare any law or administrative action if it finds it to be in contravention of the fundamental law. The centre and states respect the decisions of the court and act accordingly if they are passed in respect of their matters.⁵⁹ Judges should be free from fear of any consequence against themselves while passing a judgement.⁶⁰
- **Ombudsman:** Ombudsman acts as “watchdog of the administration” by adjudicating disputes between citizens and administrative agencies. It is a convoluted institution

⁵⁷ Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, 2019 SCC OnLine SC 1459.

⁵⁸ *Id.*

⁵⁹ V. N. Shukla, Constitutional Law A-50 (13th ed. M. P. Singh 2017).

⁶⁰ *Id.*

which should be laid in such a way that it does not become super legislature, executive or judiciary. In India, jurisdiction of ombudsman is advisory.

CONCLUSION

Good governance has no concretely defined elements; so the concept, its hallmarks are individual to every person or authority. None of them is right, none wrong. But the elements of good governance which are common in almost all the perceptions are transparency, responsibility, accountability, public-centric and equitable. Good governance is achieved through democratic working of all organs of government within constitutional limits. Good governance is maintained by judiciary in administration of justice by inflicting proportionate consequences to those who violate law or infringe any rights of other people through effective civil and criminal laws. Moreover, good governance is warranted when judiciary checks the powers and actions of legislature, executive and administrative agencies through judicial review, judicial activism, writs, etc. The essential ingredients for the judiciary to actually be able to observe and inspect good governance are its independence, impartiality, transparency and vigour with which it renders its responsibilities. It lies in its quest to maintain constitutionalism in the nation. Recent developments, such as bringing the authority of judges within the ambit of right to information, have enhanced the transparency in working of the system which indicates good health of Indian State machinery. Good governance is a component as well as product of effective administration of justice.