

## **CAN THE INDIAN JUDICIARY ADVANCE AS A COURT OF GOOD GOVERNANCE?**

---

Kamiya Gupta, Jindal Global Law School, O.P. Jindal Global University

### **ABSTRACT**

Ever since the World Bank put “governance” on its agenda as a development model in 1989, the concept has gained much clout. However, it is imperative to understand that “*good governance*” was coveted ever since the interplay of mankind and polity spearheaded, by virtue of which, some forms of government were organically understood to be more citizen-centric; Triunity of democracy, rule of law, and liberty can be seen as a crucial index of the network between civil society and governance in this regard. It is a popular belief that democracies are the patrons of preservation of individual and civil liberties, thence “rule of law” has been accorded such pre-eminence in a civil society which reiterates the overarching authority of law. A qualm corresponding to this notion surfaces when the efficacy and power of such forms of governance are examined, which directs us at understanding the synergy between judiciary and governance. In order to define the scope of research, the focus will be laid on India as a developing nation which is still in the process of imbibing its good governance initiatives to ascertain the role and the leeway that can be given to Judiciary as the guardian of law and the ultimate defender of individual rights and liberty to counterbalance the power-play and ensure smooth functioning of a good governance model in the nation.

Of late, a new global trend has emerged wherein the courts have assumed a proactive role to safeguard citizens’ rights enlarging the scope of the Constitution, even if it seldom demanded intervening in the aegis of governance, blurring the lines of separation of powers. However, this booming popularity has also been offset because a developing democratic society is bound to encourage the growth of a plethora of different entities tasked with achieving the goals of good

governance, which will be critically evaluated throughout the paper. All in all, the establishment of India's good governance court provides a helpful prism through which to evaluate judicial power's recent global expansion, especially in developing countries, and to deduce whether and to what extent it is viable for the judiciary to pragmatically advance as the court of good governance.

## THE GLOBAL TRAJECTORY OF ‘GOVERNANCE’ TO ‘GOOD GOVERNANCE’:

It was in the year **1989** that the term “governance” was used for the first time by World Bank to describe the need for institutional reforms and a more efficient public sector in Sub-Saharan countries. It is imperative to note that the scope of governance back in the day was stifled to incorporate only the “*political powers to manage a nation’s affairs*”. This connotation attached to governance was expanded in the year **1992** in a World Bank publication, ‘Governance and Development’ defining it as “*The manner in which power is exercised in the management of a country’s economic and social resources for development.*” It is vital to understand the nuanced changes in defining “governance” recognised by the world bank progressively in the year **1994**, and the broadened scope holding more institutions accountable and entitling more actors with rights and duties in this regard. In a report on governance in the year **1998**, *The report- Governance in Asia: From crisis to opportunity* elaborated on 4 key requisites for good governance: transparency, accountability, predictability and participation.

It can be gauged that good governance serves as a parameter to assess the effective functioning of a nation. It enables putting forth imperative questions concerning a country’s governance to evaluate whether proper procedure is being followed. All in all, good governance can be associated with “the extent to which a government is perceived and accepted as legitimate, committed to improving the public welfare and responsive to the needs of its citizens”.<sup>1</sup>

The United Nations has recognised the concept of governance as an amorphous one because it is quite difficult to define the very index to measure effective governance. Owing to its multifarious applications across the globe differing from country to country, various models can be established to judge the magnitude of good governance but it is unlikely that they will ever be all encompassing.<sup>2</sup> However, as an attempt to find a common ground to rationalise the process and define its scale and scope, following are the crucial parameters to test good governance recognised by the United Nations:

---

<sup>1</sup> John Emmanuel Gyong, *Good Governance and Accountability in a Democracy*, 7 EUR. SCI. J. 71 (2014).

<sup>2</sup> Louis Meuleman, *what makes effective governance?* DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS - UNITED NATIONS, (May. 05, 2019), <https://www.un.org/development/desa/undesavoice/more-from-undesavoice/2019/05/44903.html>.



3

## HOW FAR HAS THE INDIAN JUDICIARY ADVANCED IN SERVING AS THE COURT OF GOOD GOVERNANCE?

In India, the concept of good governance wasn't alien even before it was formally instituted within the framework of administration. After Independence, various structural reforms were instituted in the 1950s and 60s with an aim to improve the administrative machinery. With an avalanche of reforms in the 1990s, an attempt was made to transform the nature of administration from bureaucratic-traditional to a more holistic, citizen-oriented, accountable and responsive administration with an eye on meeting the developmental goals. The Supreme Court has evolved into what amounts to a court of good governance over the rest of the government, reshaping India's political landscape, according to some.<sup>4</sup> It thus becomes pertinent to understand whether the Indian judiciary can be correctly cited as an example of this global pattern of judicial strengthening?

In India, the trend of coalition governments started in the latter half of the 90s and has sustained more often than not. Given the politically volatile climate, more focus is laid on the interplay between 'government' and 'politics' rather than effective governance. It was observed in the **SR Bommai**<sup>5</sup> case that President's Rule/State Emergency under Article 356(1)<sup>6</sup> would be open to judicial review to check the unflinching political misuse of power.

One of the smouldering issues that dominate the Indian political scene is the criminalisation of politics because it impacts the kind of government and in turn the effectiveness of governance

<sup>3</sup> Yap Kioe Sheng, *What is Good Governance?*, ECONOMIC AND SOCIAL COMMISSION FOR ASIA PACIFIC, <https://www.unescap.org/sites/default/files/good-governance.pdf>

<sup>4</sup> *Supra* note 2.

<sup>5</sup> *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1 (India).

<sup>6</sup> INDIA CONST. art. 356, cl. 1.

that would prevail in the society. A major electoral reform was introduced by the judiciary in the case of **Association for Democratic reforms**<sup>7</sup> wherein the court issued numerous orders requiring contesting candidates to disclose details about their personal profile, credentials, and antecedents during the election.

The judiciary has assumed a pre-emptive role in recent years to ensure a more inclusive and equitable society that is citizen-oriented, considerate, impartial, and progressive. One of the vigorously debated and vehemently criticised cases, the infamous **Sabrimala case**<sup>8</sup> aids the social integration doctrine by delving deeply into the sense of 'life and liberty' under Article 21<sup>9</sup> by allowing women of menstruating age to enter the temple. In the **NALSA**<sup>10</sup> judgment, the apex court recognised transgender as a valid “third gender” entitled to the very set of rights as other citizens guaranteed by the Constitution. In another strikingly bold judgment of **Navtej Singh Johar**<sup>11</sup>, the court decriminalized homosexuality that constituted a criminal offence under Section 377 of the Indian Penal Code<sup>12</sup>.

These are but a few instances where the judiciary has proved itself worthy of becoming a court of good governance especially in the context of India.

In a recent judgement in the case of **Kukkala Satyanarayana**<sup>13</sup>, Andhra Pradesh High Court observed that while implementing schemes for the benefit of the poor, the state has to be cognizant of good governance, which is indispensable in a democratic society.

In the wake of the COVID-19 pandemic that set off in the year 2020, the judiciary has shouldered a proactive role in directing the governments to mitigate the crisis at various instances. In the year 2020, the apex court took suo moto cognisance of the migrant crisis<sup>14</sup> that was triggered in the nation following a poorly planned nation-wide lockdown. It is pertinent to note that not just the topmost echelon but also the High Courts of various states (as many as 11) are taking various measures in dealing with the hard-struck second-wave of the COVID-19

---

<sup>7</sup> Union of India v. Association for Democratic Reforms and Anr. (2002) 5 S.C.C. 294 (India).

<sup>8</sup> Indian Young Lawyers Association vs. The State of Kerala, (2019) 11 S.C.C. 1 (India).

<sup>9</sup> INDIA CONST. art. 21.

<sup>10</sup> National Legal Services Authority v. Union of India, (2019) 11 S.C.C. 1 (India).

<sup>11</sup> Navtej Singh Johar v. Union of India, (2018) 1 S.C.C. 791 (India).

<sup>12</sup> Indian Penal Code, 1860, § 377.

<sup>13</sup> Kukkala Satyanarayana vs. The State of Andhra Pradesh, (2020) S.C.C. OnLine A.P. 1790 (India).

<sup>14</sup> In Re Problems and Miseries of Migrant Labours vs. Union of India, (2020) 7 S.C.C. 181 (India).

pandemic by demanding more responsiveness, accountability, and transparency from the governments.

The High Courts have been passing strongly-worded orders and have consequently emerged as guardians of justice and conscience. The Allahabad High Court observed that “It is a shame that while the government knew of the magnitude of the second wave, it never planned things in advance” while the Gujarat High Court held the state accountable for concealing the real figures and data related to the pandemic from the public in a suo moto PIL. These orders are prototypical of the vim and vigour exhibited by the High Courts of numerous states recently.<sup>15</sup> All these directions are imperative to mention because they indicate the driven and dynamic role taken on by the judiciary to ensure that the governments rise above their political agendas and to bound them to the numerous standards of good governance.

### **INDEPENDENCE OF JUDICIARY: A sine-qua-non of ‘good governance’**

For judiciary to become a court of good governance, there have to be ample institutional provisions to ensure that they can function effectively in that direction without fearing any political force or leverage<sup>16</sup>. A brief overview of the Constitution is indicative of the number of privileges that the Judiciary enjoys pertaining to its independence that makes it possible to intervene in the process of governance in order to further the ends of justice.

The foremost point in this regard shall be the ‘separation of powers’ doctrine.<sup>17</sup> It is imperative to mention that the existence of an independent judiciary free from the control and power of the executive and legislature is not the only comprehension of judicial independence. The overarching goal of the judiciary's independence means that judges must be able to settle a conflict of their own accord in consonance with the constitution. The Constitution categorically directs the state “to separate the judiciary from the executive in the public services of the State” under Article 50.<sup>18</sup>

---

<sup>15</sup> Akshita Saxena, *How Various High Courts Have Been Monitoring COVID19 Issues in Their Jurisdictions?* LIVELAW.IN (April 23, 2021, 09:37 AM), <https://www.livelaw.in/top-stories/how-various-high-courts-have-been-monitoring-covid19-issues-in-their-jurisdictions-172973>

<sup>16</sup> In 1973, just preceding the Emergency period, Justice A.N. Ray was appointed as the Chief Justice of India superseding the seniority of three judges. This supersession was seen as a head-on political attack on the independence of judiciary a

<sup>17</sup> While the doctrine of separation of powers protects liberty by preventing the concentration of power in one individual or entity, it also guarantees that the judicial branch may exercise its power without interference from the other two branches.

<sup>18</sup> INDIA CONST. art. 50.

In India, judiciary is an exclusive pyramidal structure with the Supreme Court at the top of the hierarchy, followed by the High Courts, and the lower or subordinate courts at the bottom. The subordinate courts are largely supervised by the High Courts,<sup>19</sup> the High Courts are subject to the Union's regulatory powers with some minimal interference of the concerned state,<sup>20</sup> and the Supreme Court remains solely under the authority of the Union.<sup>21</sup>

There are a number of constitutional provisions that ensure the independence of judiciary, like appointment, fixture of tenure, removal of judges, entitlement to salaries and allowances and those privileges specified in the Constitution for the Supreme Court<sup>22</sup>, High Courts<sup>23</sup>, and the subordinate courts<sup>24</sup>. Though the apex court has a number of other provisions favouring its independence, for the purpose of this paper, a noteworthy one is the independence that is conferred on the Supreme Court and High Court from the conduct of its judges being discussed in the Parliament or State Legislatures with respect to the discharge of their duties.<sup>25</sup>

It is pertinent to stress that the judiciary hasn't just "enjoyed" these privileges but has made headway to ensure that they have a hands-on approach in dealing with various intricate matters that can oftentimes obstruct the path to good governance. In this very essence, **Judicial activism** describes the situation in which the judiciary leaves its conventional position and becomes more involved in its work, establishing policies and programmes to ensure the security of people's rights and liberties, which would otherwise be left at the government's discretion. In several landmark judgements, Supreme Court of India has recognised access to justice as a fundamental right<sup>26</sup> and judiciary's activism and review powers are, in this sense, a crucial means to achieving the ends of justice.

Through the instrument of **Public Interest Litigation** (Hereinafter PIL), the exercise of writ jurisdiction, and the broad interpretation of fundamental rights guaranteed by the Constitution of India, the Supreme Court of India has emerged as the most powerful organ of state and

---

<sup>19</sup> INDIA CONST. art 233-35.

<sup>20</sup> INDIA CONST. art. 229.

<sup>21</sup> INDIA CONST. art. 146.

<sup>22</sup> INDIA CONST. art. 124-147.

<sup>23</sup> INDIA CONST. art. 214-232.

<sup>24</sup> INDIA CONST. art. 233-237.

<sup>25</sup> INDIA CONST. art. 121.

<sup>26</sup> Imtiyaz Ahmad v. State of Uttar Pradesh, A.I.R. 2012 S.C. 642 (India).

among the foremost constitutional courts in the world. The shift from *Locus Standi* to PIL is noteworthy that has made the judicial process more “participatory and democratic”.<sup>27</sup>

In the Indian political landscape, the genesis of PIL can be tracked back to the emergency period when Justices P.N. Bhagwati and V.R. Krishna Iyer initiated this new phenomenon within the judicial functioning to strengthen its role in the area of public administration and welfare. A number of wrongs have been set right by the judiciary with its “activism” like protection against inhuman treatment in incarceration<sup>28</sup>, furthering welfare of children<sup>29</sup>, checking the environmental pollution and preserving the ecology<sup>30</sup>, ensuring women’s safety and dignity in the workplace<sup>31</sup>, and so forth. While discussing judicial activism, ‘**Basic Structure**’ doctrine<sup>32</sup> enunciated by the Court through a barrage of cases<sup>33</sup> is a vital mention. An articulation of such a seminal doctrine which does not find an explicit mention anywhere in the Constitution, is a corroboration of judiciary venturing into good governance.

One of the crucial landmark cases in this regard is the **Hussainara Khatoon**<sup>34</sup> case, in which a writ petition was filed by an advocate seeking the court’s attention to the plight of undertrial prisoners in the state of Bihar. Consequently, the court took a step further and recognised the right to speedy trial as a fundamental one under Article 21<sup>35</sup> of the Constitution. The case of **S.P. Gupta**<sup>36</sup> is another striking illustration of PIL. In this case, the apex court acknowledged bar associations’ locus standi to file writs in public interest cases.

At present, an avalanche of PILs have been filed with regards to the mishandling of the COVID-19 pandemic that has walloped the nation, in the wake of which the courts have emerged as the

---

<sup>27</sup> Prof. Dr. Nishtha Jaiswal and Dr. Lakhwinder Singh, *Judicial Activism in India*, Bharati Law Review (2017), <http://docs.manupatra.in/newsline/articles/Upload/0BD8AAF5-4031-484F-AB92-2B84EFE0ABCA.pdf>

<sup>28</sup> Ramamurthy vs. State of Karnataka, A.I.R. 1980 S.C. 1739 (India).

<sup>29</sup> Lakshmi Kant Pandey v. Union of India, (1984) 2 S.C.C. 244 (India).

<sup>30</sup> M. C. Mehta v. Union of India, (1986) 2 S.C.C. 176 (India).

<sup>31</sup> Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India).

<sup>32</sup> Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., (1973) 4 S.C.C. 225 (India).

<sup>33</sup> Sri Shankari Prasad Singh Deo v. Union of India And State of Bihar, A.I.R. 1951 S.C. 458 (India); Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845 (India); I.C. Golaknath & Ors v State of Punjab & Anrs., A.I.R. 1967 S.C. 1643 (India); Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., (1973) 4 S.C.C. 225 (India); State of U.P. v. Raj Narain & Ors., A.I.R. 1975 S.C. 865 (India); Minerva Mills Ltd. & Ors. v. Union of India & Ors., A.I.R. 1980 S.C. 1789 (India); Waman Rao And Ors. v. Union of India (UoI) And Ors., (1981) 2 S.C.C. 362 (India); Indra Sawhney Etc. v. Union of India and Others, etc., A.I.R. 1993 S.C. 477 (India); S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1 (India).

<sup>34</sup> Hussainara Khatoon (I) v. State of Bihar, (1980) 1 S.C.C. 81 (India).

<sup>35</sup> *Supra* note 11.

<sup>36</sup> S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India).



crusaders of good conscience, humanity, and justice as has been previously discussed in the paper.

While these cases laid down the foundation of judiciary's activism and strengthened its position as the court of good governance, innumerable PILs have been filed left, right, and centre ever since its inception, and the ambit of these cases keep expanding proportional to the society's evolution.

### JUDICIAL INQUIRY INTO THE 'FUNDAMENTAL RIGHTS' JURISPRUDENCE:

The judiciary has elaborated the scope of its activism by interpreting the fundamental rights enshrined in the constitution in a liberal manner. This pro- "activist" interpretation has made it possible to attach a wider connotation to fundamental rights, the 'right to life and personal liberty'<sup>37</sup> in particular, transforming into a positive human rights system of sorts. The Indian judiciary is once again responsible for the human right to live in an environment that is safe and healthy<sup>38</sup>, for upholding the Precautionary and Polluter Principles as fundamental features of sustainable growth<sup>39</sup>, for applying the doctrine of public confidence for the conservation and preservation of natural resources<sup>40</sup>, and so on.

In the case of **Mohini Jain**<sup>41</sup> the court observed that right to education flows from 'Right to life' under Article 21<sup>42</sup>, and declared it a fundamental right as Article 21(A)<sup>43</sup> (86<sup>th</sup> Amendment Act<sup>44</sup>). In the **Faheema Shirin**<sup>45</sup> case, the court observed that right to access internet is a part of the right to life under Article 21<sup>46</sup>. It is additionally imperative to note that the 'Right to Know' was elucidated for the first time in the case of **Reliance Petro Chemicals**<sup>47</sup>. The court also observed in the case of **Anuradha Bhasin**<sup>48</sup> that right to profession of speech and expression over the internet was fundamental under Article 19(1)(a)(g).<sup>49</sup> In another landmark

---

<sup>37</sup> *Supra* note 11.

<sup>38</sup> *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.*, A.I.R. 1985 S.C. 652 (India).

<sup>39</sup> *Vellore Citizens Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715 (India).

<sup>40</sup> *M.C. Mehta v. Kamal Nath*, (1997) 1 S.C.C. 388 (India).

<sup>41</sup> *Mohini Jain v. State of Karnataka*, A.I.R. 1992 S.C. 1858 (India).

<sup>42</sup> *Supra* note 11.

<sup>43</sup> INDIA CONST. art. 21, cl. A.

<sup>44</sup> The Constitution (Eighty-sixth amendment) Act, 2002.

<sup>45</sup> *Faheema Shirin R.K v. State of Kerala*, A.I.R. 2020 Ker 35 (India).

<sup>46</sup> *Supra* note 11.

<sup>47</sup> *Reliance Petrochemicals Ltd v. Proprietors of Indian Express*, A.I.R. 1989 S.C. 190 (India).

<sup>48</sup> *Anuradha Bhasin v. Union of India*, (2019) S.C.C. OnLine S.C. 1725 (India).

<sup>49</sup> INDIA CONST. art. 19, cl. (a)(g).

**Puttaswamy**<sup>50</sup> or the **Aadhar judgment**, the apex court recognised that ‘Right to privacy’ was constitutionally protected and thus equivalent to other freedoms safeguarded by the Indian Constitution.

## CONCLUSION

While the judiciary has oftentimes demonstrated the impeccable ascendancy to uphold the welfare of the people, there have been times when the judiciary has failed to exercise its power in effective ways, which stands especially true for the Supreme Court. The judiciary is likely to face quite a few challenges in its path to advancing as a court of good governance. In this regard, the Courts might end up stifling their authority because of some outside pressure or their veracity might be thrown a challenge at by pronouncing unpopular decisions that seem antithetical to a progressive democratic environment. It is pertinent to understand that judges are also individuals who are likely to come with their own parochial interests and inherent biases. Though the popularity of dissenting opinions has raised in the past decade, there is no regulatory mechanism to ensure the synergy between judiciary and good governance to keep it in check and prevent it from turning corrupt, unaccountable, and arbitrary.

An advancing democratic society also favours the flourishing of a plethora of other bodies to achieve the ends of good governance in a society. In this sense, the judiciary can be seen as taking a backseat because these bodies are often seen bypassing judiciary’s vices. For instance, the popularity of Lok Adalats and informal courts has been advocated for by the Supreme Court itself to usually settle conflicts between indignant litigants, in order to mitigate the burgeoning backlog. Judiciary’s inability to oftentimes check abusive government policies has given rise to the notion that attaches pre-eminence to various tribunals, statutory, and quasi-judicial bodies, for instance, Child Rights Commission, National Commission for Women, National Human Rights Commission, etc. Though the authority has been vested in the Courts to keep an eye on these bodies, their mere proliferation can be seen by some as the depletion of judicial strength. All these bodies apart from the three distinct organs of the government, their evolution, powers, roles, and prerogatives are likely to have a massive bearing on the leeway and responsibility that can be shouldered on the judiciary to advance as the court of good governance, though it is unlikely that it might do so in seclusion of these bodies.

---

<sup>50</sup> Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors., (2017) 10 S.C.C. 1 (India).

An inquiry into judiciary's powers of activism and review without discussing judicial restraint is rather uninformed. One of the major encumbrances upon the courts is that while they are the interpreter of the Constitution which is the supreme law of the land, they must also tread lightly to not excessively overpower the legislature on the pretext of the interpretation. *"Judges must know their limits and not try to run the government. They must have modesty and humility and not behave like Emperors. There is broad separation of powers under the Constitution, and each of the organs of the state must have respect for the others and must not encroach into each other's domain."*<sup>51</sup>

To ascertain whether Indian judiciary is fit to advance as a court of good governance is a moot point. Focus must be laid to understand how far the judiciary is at present from achieving that end. Primarily, it is pertinent to establish an understanding of good governance that is not too elusive or nebulous, and to determine if the Court's good governance values are formed by elite prejudices, veiled class interests, transcendent rational imperatives, or other forces and if there is a robust mechanism in place to check that, because given India's rising significance as the world's largest democracy, how it blends representative and good governance logic in its political institutions is likely to have a significant effect on how democracy develops globally.

---

<sup>51</sup> Divisional Manager, Aravali Golf Course vs. Chander Haas (2008) 1 SCC 683 (India).