

integrity and character were unimpeachable and unassailable; a highly refined, cultured and polished gentleman to the core; and most of all a genuine human being with a high sense of culture, courtesy and humanity with a passionate commitment to serve mankind. In him, I have lost irreparably one of my truest and dearest friends.

*Sardar's* funeral was attended by thousands of his admirers and I am reminded of the couplet of *Galib* which I have slightly modified as follows :

*“Is rang say uthayee kal oos nay Sardar kee naash  
Dushman bhee jiss ko dekh kay ghamnak ho  
gayey”*

I can only offer his immortal spirit a fitting poem written by the most lovable poet, *Sahir Ludhiani* :

*“Har cheez zamanay kee jahan par thee  
wahin hai*

*Ek thu hee nahi hai*

*Nazrain bhee wohi aur nazaray bhee  
wahi hai*

*Khamosh fazaun kay isharay bhee wahin  
hai*

*Kehnay ko tho sab kuch hai magar kuch  
bhee nahi hai*

*Har ashq main khoyee hui khusheun kee  
jhalak hai*

*Har sans main betee hui ghadeun kee  
kasak hai*

*Thu chahay khahin bhee ho, tera dard  
yehin hai*

*Hasarat nahin, armaan nahin, aas  
nahin hai*

*Yadaoun kay siva kuch bhee meray pass  
nahin hai*

*Yaden bhee rahin ya na rahin kiss ko  
yeqeen hain”*

May his soul rest in peace!

## ENSURING GOOD GOVERNANCE THROUGH JUDICIARY

By

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### Introduction

The issue of good governance has in recent times emerged at the forefront of the agenda of for sustainable human development. Empowering people for meaningful participation in this development process is one of the key interventions of the Government of India in its attempt to usher sustainable development.

Good governance implies utmost concern for people's welfare wherein the Government and its bureaucracy follow policies and discharge duties with a deep sense of

commitment respecting the rule of law in the manner which is transparent, ensuring human rights and dignity, probity and public accountability.

The Government of India, both at centre and the states, share the concern for ensuring responsive, accountable, transparent, and decentralized and people friendly administration at all levels. But there is considerable frustration and dissatisfaction amongst the people in the society about apathy, irresponsiveness and lack of accountability of public servants, even as the expenditure on staff continues to increase. There is increasing

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anxiety about growing instances of corruption and criminalization in public life and administration. The people are also greatly concerned with the law and order and the investigation of offences and social welfare.

The essence and basis of good governance, as per ancient Indian thinking depends on the triangle of those actions for governance which are undertaken for universal welfare (Sarva Loka Kalayanakari Karma), maintaining and protecting each and every one in the Creation (Sarva Loksangrahamevapi), and securing universal care for all and even one (Sarva Hitey Ratah). But that triangle has a center point, the common-most good which is denoted by the term “happiness for all” (Sarve Bhavantu Sukhinah). However, these prerequisites as enunciated in ancient times in India are sadly missing among the practitioners of the governance. There is need to operationalise this ancient wisdom through the rearrangement of socio-economic and political institutions.

Indian administrators would have to formulate a set of realistic indicators for achieving such a common good.

### Good Governance: Meaning, Concept

Max Weber, who in the early twentieth century, without necessarily using the term governance, outlined the functions of a bureaucracy that would facilitate development. He called for the strict observance of the rule of law and legal rationality and advised against admixture of private interests with the public responsibilities of the bureaucrat. Similarly, the Law and Development movement also made some contributions to the governance issue as the movement was concerned with the relationship between the legal systems and development.

Good governance has been a buzz word today as was in the 1990s when the World Bank and IMF vigorously pursued it as a prioritized policy choice while dealing with

the states. In fact, the World Bank began to use the term ‘governance’ in 1989 when its report on Sub-Saharan Africa and started to amplify what it meant by governance<sup>2</sup>. In the 1992 report the Bank viewed governance as having three aspects: (a) the form of political regime; (b) the process by which authority is exercised in the management of a country’s economic and social resources; and (c) the capacity of the Government to design, formulate and implement policies and discharge functions. Owing to its Article of Agreement the Bank considered the first to be beyond its mandate. It, therefore, linked governance to development economics. From here the Bank also began to add the adjective “good” to governance. The then World Bank President Mr. Lewis T. Preston said in the 1992 report:

*“Good Governance is an essential complement to sound economic policies. Efficient and transparent policy framework are critical to the efficiency of market and Governments, and hence to economic development. The World Bank’s increasing attention to the issues of governance is an important part of our efforts to promote equitable and sustainable development”*

As one gathers from the literature, good governance is emphasized in the context of low and middle income countries of Asia, Africa and Latin America that seek or rely upon donors’ assistance, and where participatory, transparent and accountable Government has been a goal much desired but barely achieved. For the malaise in governance, perhaps history and imperial legacy could be partly blamed. As one can see, for many centuries till the second half of 20th century, governance was taken to be a term largely associated with the power and functions of “Government” its forms and the methods it adopted to control people, protect them from foreign attack,

2. World Bank, Sub-Saharan Africa : From Crisis to Sustainable Growth : A Long-term Perspective Study, Washington DC, 1992

protect their life and property, maintain law and order or administer of justice. That was the reason perhaps why the State was considered as “*parens partae*” justified by Grotian jurisprudence of state power and later accentuated by the Austinian positivist jurisprudence in which coercive power of the state rather than the consent of the governed was the prime consideration. Energy, power and effectiveness were considered as prime assets of Government. Governance was an anti-thesis of anarchy.

Good governance entails a vast set of democratic processes and institutions at every level of society, from the local council to regional, national and international institutions, which allow the voices of the people to be heard, conflicting interests to be peacefully resolved, and a forging of consensus towards greater social progress.

### ***Good governance***

Good governance is central to the work of any Government. The United Nations has identified characteristics of good governance. They relate to the rule of law, democracy,

And the functioning and performance of the public service. In view of its statutory duties and

Mission, the Government emphatically focuses on the functioning and the performance of the public service. The universally accepted characteristics of good governance are transparency, public accountability, effectiveness/efficiency and responsiveness. The performance of Government is depends on these four characteristics of good governance. The strategy of good governance depends on two fundamental pillars. The first relates to the functioning of the public sector. It is focused on accountability and scrutiny. The main activity is the annual regularity audit and the approval of the national budget. The second pillar relates to the performance

of the public sector. It is focused on the connection between policy and implementation. The activities stemming from this pillar are concentrated on policy and on implementation in practice, in national Government and at affiliated bodies.

Good governance moves around citizens to improve quality of life, administrative system, and efficiency in delivering services and to establish greater efficiency, legitimacy, citizen-caring and responsive administration. It comprises activities of those manning the political system of a country having necessary authority and responsibility to govern, directed towards the maximum good of the maximum number<sup>3</sup>.

*Vivek Chopra* defines good governance as “unambiguously identifying the basic values of Society and pursuing these.”<sup>4</sup>

*Minocha* defines the criteria of good governance as “political accountability, availability of

Freedom, law abiding, bureaucratic accountability, information available transparently, being

Effective and efficient, and cooperation between Government and society”<sup>5</sup>.

Good governance may, thus, be defined as a function of installation of positive virtues of administration and elimination of vices of dysfunctionality. In short, it must have the attributes of an effective, credible and legitimate administrative system - citizen-friendly, value-caring and people-sharing<sup>6</sup>.

3. *Mishra, Yatish*, “Extra Governmental Organizations and Good Governance”, *Indian Journal of Public Administration*, Vol.44, July-Sept. 1998, p.609 at p.610.

4. *Kashyap, Subas C.* (ed.), *Crime, Corruption and Good Governance*, New Delhi, Uppal, 1997 P.113.

5. *Minocha, O.P.*, “Good Governance”, *Management in Government*, Vol.XXIX, No.3, 1997.

6. *Dey, Bata K.*, “Defining Good Governance”, *Indian Journal of Public Administration*, Vol.44, July-Sept. 1998, P.412 at P.414.

Good governance, therefore, may be said to be a system which is accepted as good.

### *The Concept of Good governance*

Good governance, as a concept, is applicable to all sections of society such as the Government, Legislature, judiciary, the media, the private sector, the corporate sector, the co-operatives, societies registered under the Societies Registration Act, duly registered trusts, organizations such as the trade unions and lastly the Non-Government Organizations (NGOs). Public accountability and transparency are as relevant for the one as for the other. It is only when all these and various other sections of society conduct their affairs in a socially responsible manner that the objective of achieving larger good of the largest number of people in society can be achieved.

It must be admitted that there is widespread disenchantment with the functioning of state Governments as also the central Government. In the perception of a common person, the Government is seen to be exploitative. From the viewpoint of the citizens, Government epitomizes corruption, inordinate delays, and long-winded procedures, lack of transparency, and extreme rudeness and insensitivity, often bordering on callousness.

As the term good governance implies, it assumes that there is a Government which would like to govern with a firm hand. Its writ must run and should be acknowledged and the people should not take the Government for granted. In practical terms, it would mean the Government taking all actions to retain its firm holds over people, their institutions and the situations arising from day to day. Looking around the country, not many Governments would pass this test.

The foremost test of good governance is the respect for rule of law. As the saying

goes, howsoever high a person may be, the law is above him and has to be considered supreme. The governance must be based on rule of law. Every lawfully established Government must govern according to the laws of the land. All its actions must uphold the rule of law and any effort to take the law in one's own hand or to undermine the law by anyone, howsoever high and mighty he may be, must be dealt with speedily, decisively and in an exemplary manner. It is unfortunate that even after fifty years of Independence, one cannot say with confidence that the governance in most states is based on rule of law.

In any discussion on good governance, attention must be focused on the primary responsibilities of the Government. These must include the maintenance of law and order, administration of justice, and welfare of economically and socially weaker sections of society in terms of provision of safety net for them. Here again it is seen that, in its anxiety to do thousand and one other things, these primary responsibilities have been neglected over the years. It can truly be said that he who governs the least governs the best! If this principle had been followed in governance all these years, India would not have presented a picture of such squalor, filth, illiteracy and poverty even fifty years after Independence.

There is a widespread disenchantment with the functioning of Governments all over the country, irrespective of which political party is in power. It is not, therefore, surprising to see the anti-incumbency factor in operation in practically all elections in the states as also the centre. People are clamoring for a clean, open, transparent, accountable, corruption free and sensitive administration.

Finally, it must be appreciated that the process of economic liberalization and globalization will not go far enough without adequate attention being bestowed on good governance. There has been a clamor of

demand from foreign investors for transparency in decision-making in the Government. Good governance can directly contribute to higher rate of economic growth. Civil service reforms have to be an important element of any programme for good governance.

### **Major culprits to the good governance:**

The major culprits are the politicians, plurality or multiplicity of laws and the “steel frame” distancing itself in the sphere of governance. The neglect of the basics of good governance is not a sudden phenomenon. It has been overtaking the polity right from the day “we the people of India” adopted a Constitution to govern ourselves. The gradual decline in the heritage of trust in the institutions of good governance commenced even before we got Independence.

What are the basics of good governance? It is judged by the results *i.e.*, providing “roti, kapda aur makan” (food, apparel and shelter). It requires peace and security on one side, enough resources on the other and strategies and policies to be laid out to achieve this and tools to implement the policies. The trinity that was enjoined by the Constitution to achieve the Legislature, the Executive and the Judiciary, are in fact the masons to lay the foundation. The services are only the tools in the hands of these.

The makers of the Constitution in their eagerness to provide a model edifice borrowed ideas from all over the world without assessing the suitability, acceptability and adaptability to the “*genius loci*.” Lord Balfour commented, “*Constitutions are easily copied, temperaments are not. It matters little what other gifts a people may possess, if they are wanting in those from this point of view are of most importance. If for example they have no capacity for grading their loyalties as well as being moved by them, if they have no natural inclination for liberty and no natural respect for law, if they lack good humour and tolerate foul play, if they know not how to compromise or when, if they have not that distrust*

*of extreme conclusions which is sometimes mis-described as want of logic, if corruption does not repel them, and if their divisions tend to be either too numerous or too profound, the successful working of British institutions may be difficult or impossible.*” Therein lies the seed of neglect of the basics. *Ambedkar was conscious of the drawbacks of the Indian psyche and said “Constitutional morality is not a natural instinct It has to be cultivated. Democracy in India is only a top dressing on the Indian soil” Thus the edifice was faultily designed by the masons and the country is facing “Goldilocks dilemma” even after half a century.*

### **Obstacles to the Good Governance**

Major obstacles to good governance are disruptive political practices and lack of social discipline, which are the legacies of freedom struggle. The reply of *Jawaharlal Nehru* in his book, *Indira Gandhi* when was asked about the impact of the strategies adopted during the freedom struggle on the governance of India: for “a country which for a whole generation practiced a certain technique of opposition to the Government it is not easy to shift over to make people think differently. It may be their own Government, but people still have the habit of opposing the Government. Secondly they are apt to adopt the technique, not rightly I think, but some variation of it, just to press on some complaint or something, which is sometime apt to be nuisance.” The strategies euphemistically called the “civil disobedience movement” termed by *Ambedkar* “the grammar of anarchy” were refined by successive generations of politicians and vested groups and have become, instead of nuisance, the wreckers of governance.

Harmony and well being of the body politic depends on the mutual trust and commonality of goals by the organs of the Government. Unfortunately we do not find it. The Legislature became the hand maiden of the Executive, when both of them came from the same political group and willingly placed in the IX Schedule a few hundred



laws to preclude judicial intervention and pronouncement thereby nullifying and voiding the checks and balances introduced by the Constitution makers through the Judiciary “to temper the extreme conclusions.” The Executive ignored the advice of *Sardar Patel* who said, “For every executive action, there must be legal sanction and judicial justification.” Later on judicial activism led to making laws, as they did not halt at interpreting laws only. Judicial pronouncements in cases such as *Royappa v. Tamil Nadu*, ‘*Maneka Gandhi v. Union of India*’ resulted in the emergence of many facts of law providing constraints on Governmental action.’ *Frankfurter*, a U.S. Judge, opined “Judicial power is not immune against human weaknesses and must be guarded against encroaching beyond its proper bounds; and it should be restrained by self-restraint” Thus in their eagerness to play their role, the governing trinity by their acts of omission and commission allowed the emergence of “neglect of the basics of good governance.”

### ***Role of Civil Services for providing Good Governance:***

The role of Civil Services in all these is also not edifying. The civil service — generalist, specialist, tax collectors and law enforcers, police — failed to maintain it a “steel frame.” Many in their commitment forgot the dictum of *Sardar Vallabhai Patel*, “to be clear about where politician begins and administrator ends.” The top echelons the uniformed variety or the uninformed failed to protect the lower echelons from vindictive political vendetta and intimidation and interference in their discharge of duties.

The common man is in contact at the lowest level of administration and if there is malfeasance at that level, the blame should be squarely placed at the top.

The pivot of Government is not the Secretariat but the district. The chief executive of the district (the Collector in Southern States and District Magistrate in other States)

has enough magisterial powers to deal with disruptions of law and order and social indiscipline. As a district head he coordinates all Governmental activity in his charge and has a say in the functioning of the police. The desk in the capital if functions only as a buffer and bulwark against political interference and vendetta, not only a semblance of good governance, but also increasing the confidence in the system could be achieved. He should be encouraged to be judicious in the use of police, enforcement of law with adequate intolerance of malfeasance of the officials and become the instrument of good governance. But in practice the district collector is acting in the hands of powerful political leaders and unable to concentrate on good administration. This leads to the crisis in the governance. Three main areas of concern in this conference were ensuring administrative accountability eliminating corruption in the civil services from within and making civil service more committed to the principles of constitution. After this conference the dignity of civil services further deteriorated.

### ***Role of Corruption in providing Good Governance :***

Corruption is all pervasive and no society is free from it. But the enormity of its size and the cavalier manner in which it is treated has accelerated the common man’s distrust in the system. As a developing economy becomes the fertile breeding ground for the vermin and caterpillars of the commonwealth, the services as the custodians of good governance have to act, coordinate, cooperate and evaluate the efficacy of the laws and performance. Simply advocating more stringent laws becomes in the words of *Bacon* “the snares we lay to entrap ourselves.” Prevention, if not elimination of corruption, is the hallmark of governance.

The objectives of the Preamble of the Constitution can only be achievable through good governance.

The words 'governance of the country' appears only in Article 37 of the Constitution in Part IV on Directive Principles of State Policy but good governance is writ large and implicit in several provisions of the Constitution. These directive principles of state policy are taken from the Irish constitution of 1937 what were called 'Directive Principles of Social policy'.

Article 37 of the Indian constitution provides that directives are "*fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws*".

So far as the '*end of the State*' is concerned, it is clearly that of a '*Welfare State*'<sup>7</sup> as distinguished from a mere '*Police State*' which aims at social welfare and the common good and to secure to all citizens 'justice, social and economic' as declared by very preamble to the constitution<sup>8</sup>.

Officially, the '*socialistic pattern of society*' was thus explained in the brochure on the Second Five Year Plan which seeks to establish such a society "Essentially this means that the basic criterion for determining the lines of advance must not be private profit but social gain, and that pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increases in national income and employment, but also in greater quality in incomes and wealth. Major decisions regarding production, consumption and investment—in fact all significant socio-economic relationships—must be made by agencies informed by social purpose. The benefits of economic developments must accrue more and more to the relatively less privileged classes of the society, and there should be a progressive reduction of the concentration on incomes, wealth and

economic power. The problem is to create a milieu in which the small man who has so far had little opportunity of perceiving and participating in the immense possibilities of growth through organized effort is enabled to put in his best in the increase of a higher standard of life for himself and increased prosperity for the country"<sup>9</sup>.

Since the word '*socialist*' has been inserted in the preamble, in 1976 (42nd Amendment). The expression "*socialist*" has been brought in the constitution to establish an egalitarian social order through rule of law as its basic structure<sup>10</sup>.

The Supreme Court declared that democratic socialism achieves socio-economic revolution to end poverty, ignorance, disease and inequality of opportunity<sup>11</sup>.

According to Article 36 of the Constitution "In this part, unless the context otherwise requires, "the state" has the same meaning as in Part III.

*The scope of Article 36* :—This article says the definition of 'state' in Article 12 shall apply throughout Part IV, wherever that word is used. This means that not only the Union and State authorities, but also local authorities shall have moral obligations to follow the Directives; eg, the promotion of cottage industries, prohibition of consumption of intoxicants or the slaughter of cows, and milk cattle, improvement of public health and of the level of nutrition of the people<sup>12</sup>.

The decisions of the Supreme Court from the 1970s onwards have emphasized the positive aspects of the Directive Principles.

9. Second Five Year Plan, p.22.

10. *Air India Statutory Corporation v. Union Labour Union*, AIR 1997 SC 645.

11. *D.S. Nakara v. Union of India*, AIR 1983 SC 130 : *G.B. Panth University of Agriculture and Technology v. State of U.P.*, AIR 2000 SC 2695; *Secretary, HSEB v. Suresh*, AIR 1999 SC 1160.

12. *Buddhu v. Allahabad Municipality*, AIR 1952 All 753; *Cf. Ratlam Municipality v. Vardichand*, AIR 1980 SC 1622.

7. *CF. Crown Aluminium Works v. Workmen*, AIR 1958 SC 30 (34), *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, *P.M. Ashwarthanarayana Setty v. State of Karnataka*, AIR 1989 SC 100.

8. *Ibid.*

These have been held to supplement Fundamental Rights for achieving the objective of a welfare state that there is no essential dichotomy between Rights and Duties or between the Fundamental Rights and the Directive principles. They complement and supplement each other. If the fundamental right represents the don'ts for the Government and Legislature, the Directive principles represent the Do's. There is no conflict.

The Supreme Court in many cases held that *"The State is on one hand, prohibited by the constitutional injunction in Article 13 from making any law or taking any executive action which would infringe any fundamental right and at the same time it is directed by the constitutional mandate in Article 37 to apply the directive Principles in the governance of the country and to make laws for giving effect to the directive Principles. Both are constitutional obligations of the state. When the State makes a Law for giving effect to a Directive Principles, it is carrying out a constitutional obligation under the Article 37 and if it were to be said that the State cannot make such a law because it comes into conflict with a Fundamental Right, it can only be on the basis that Fundamental Rights stand on a higher pedestal and have precedence over Directive Principles. But, it is not correct to say that under our constitutional scheme, Fundamental Rights are superior to the Directive Principles or that Directive Principles must yield to Fundamental Rights. Both are in fact equally fundamental. There is no conflict on the whole between them; they are complementary and supplementary to each other and aim at bringing about social change and a welfare state. The two together constitute the core or the conscience of the constitution. Harmony and balance between them is an essential feature of the basic structure of the constitution"*.<sup>13</sup>

The Supreme Court in *Kesavananda Bharati* case held that *"if any distinction between Fundamental Rights and the Directive Principles on the basis*

*of a difference between ends or means were really to be attempted, it would be more proper, to view Fundamental rights as the ends of the endeavours of the Indian people for which the Directive Principles provided the guidelines. It would be still better to view both Fundamental Rights and the "Fundamental" Directive Principles as guide lines.*"<sup>14</sup>

In the *Minerva Mills* case the Supreme Court held *"The Indian Constitution was founded on the bed rock of the balance between Parts III and IV. To give absolute primacy to one over other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution."*<sup>15</sup>

The mandate of all the judgments of the Supreme Court results that impliedly the good governance is the basic feature of the Indian Constitution.

On the question of amendments inserted to the Ninth Schedule, The Supreme Court declared recently that *"Once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into Ninth Schedule does not restrict Part III review, it completely excludes part III at will. For this reason, every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in part III."* In judgment between *I.R. Coelho (dead) By LRs. v. State of Tamil Nadu*, (2007) 2 SCC 1.

Before this judgment the Laws inserted in to Ninth Schedule are not amenable to Court interference. By this judgment the each and every aspect in the constitution is comes under the judicial scrutiny which resulting the flood of gates to question the bad laws of the Government which are inserted in the Ninth schedule.

13. *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643; *State of Madhya Pradesh v. Pramod Bhartiya*, AIR 1993 SC 286; *C.B. Boarding and Lodging v. State of Mysore*, AIR 1970 SC 2042, *Mafatlal Industries Ltd. v. Union of India*, (1997) SCC 536.

14. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 = 1973 (4) SCC 225 = (1973) Supp. SCR 1.

15. *Minerva Mills v. Union of India*, AIR 1980 SC 1789 = (1980) 3 SCC 625



The implication of introduction of the word “*socialist*” into the preamble of the constitution is clearly to set up a “*vibrant throbbing socialist welfare society*” in the place of “*feudal exploited society*”. Court must strive to give such an interpretation as will promote the match and progress towards a Social Democratic State<sup>16</sup>.

The fundamental rights and Directive principles are therefore harmoniously interpreted to make the law a social engineer to provide flesh and blood to the dry bones of law. The Directives would serve the Court as a beacon to the interpretation. Fundamental rights are the rightful means to an end, *viz.*, social and economic justice provided in the Directives and the Preamble.

Even though the directives *per se* cannot be enforced by the Court nor can the Court compel the state to undertake legislation to implement a directive, the Supreme Court has been issuing directions to the Government and administrative authorities to take positive action to remove the grievance which have been caused by non-implementation of directives.

Today, thus, the directive principles are no longer mere moral<sup>17</sup>, obligations of the Government. Even Dr. *Ambedkar* could not foresee that an individual could go to the Court for non-implementation of any directive, say, and failure to construct roads in remote inaccessible areas {Article 38(3)}<sup>18</sup>.

The governance enshrined in the Article 37 mainly depend upon the effective executive and it is the primary duty of the Executive to provide a fair and just Government. Justice - social, economic and political - can only be achieved if every organ of the Government functions as per the constitutional mandate. The Constitution of India, having

divided the powers of governance among different institutions, has assigned to the Judiciary a role of supervision and correction, through what is known as ‘judicial review’. Thus, under the Constitution, the Judiciary has the ultimate duty for oversight and maintenance of the rule of law in its dynamic and social justice - oriented dimension. To fail here is for the Judges to fail their Oath of Office. It has rightly been noted by *D.P. Madon*<sup>19</sup>, “A Judge who denies to himself judicial activism denies to himself his role of a Judge”.

The years since independence have seen progressive, marked and unabashed interference in the management of civil services and excessive political interference, and arbitrary, unguided and blatant misuse of discretion in all personnel matters, even at the highest levels of bureaucracy. Introduction of self-serving criterion such as “*officer enjoying the confidence of the Government*” for purposes of promotions, postings and transfers has led to highly personalized administration. This is against all precepts underlying the creation of permanent civil services. Rule of law, equality before law and equal protection of law are given a go by in the process. This is not the governance, which was visualized by the Constitution and is an anti-thesis of democratic and accountable Government. This is nothing but authoritarian use of power by a democratically elected Government. Inevitably, this has led to politicization of the services leading to the civil services becoming the instruments and handmaiden of the political party in power. Thus, the constitutional protection to civil services has not just been eroded but has been wiped out altogether. This has led to a substantial decline in their morale and the standards of their efficiency and integrity. Public image of a civil servant is now that of a rent seeker and exploiter who has

16. *Atam Prakash v. State of Haryana*, AIR 1986 SC 859.

17. *CF. Mathew, J. in Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

18. *State of H.P. v. Umed Ram*, AIR 1986 SC 232.

19. *Madon, D.P.* Conference Paper, the Third International Conference of Appellate Judges, p.207 at p.210.

no respect for the rule of law. He has ceased to be either civil or a servant of the society. One noteworthy feature in this behalf is that the situation is equally bad and worrisome at the centre and the states, and irrespective of which political party is in power.

The fundamental rights enshrined in the Constitution cannot be safeguarded unless civil services are given independence and are made accountable for their actions and inactions. In *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487 at 493 = (1981) 1 SCC 722, Bhagwati, J., has observed, "*It must be remembered that the fundamental rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation.*"

The Administration is required to implement the will of "WE THE PEOPLE OF INDIA", as reflected in the Constitution of India, in accordance with the laws and policies adopted thereof. For the attainment of the constitutional goals the Administration must essentially be responsive to the needs and aspirations of the people and sensitive to the demands of the rule of law. Open Government, democracy, transparency and accountability are some of the significant values that should inform the democratic institutions of the contemporary polity. However, other contrary outcomes may result if any one or more of the three organs come to be divested or robbed of the original ideology. When value-erosion or operational aberration takes place, mismatch follows and cracks surface; governance strays off its orbit resulting in goal-derailment and administrative disaster<sup>20</sup>. That is why, the Judiciary, in any system of good governance, is entrusted with the power

of judicial review of administrative actions as 'sentinel in qui vive'.

It must be recognized that, in a polity like that of India, constitutional governance is possible only if the autonomy of each organ of the Government is respected and the delicate balance of power maintained. Diversion from the traditional course must be made only to the extent necessary to activate the concerned public authorities to discharge their duties under the law and to catalyze the process, but not to usurp their role.

Admitting all these aspects, it is acknowledged that judicial activism is welcomed not only by individuals and social activists who take recourse to it but also by Governments, political parties, civil servants, constitutional authorities such as the President, the Election Commission, the National Human Rights Commission, statutory authorities including the Tribunals, commissions, or regulatory bodies, and other political players. None among the political players have protested against judicial intrusion into matters that essentially belonged to the executive. Some feeble whispers are often heard but they are from those whose vested interests are adversely affected<sup>21</sup>.

The fundamental rights play a noteworthy role in the area of administrative law due to the phenomenal increase in the functions, powers and activities of civil administration, particularly in a welfare state. A large amount of discretion has to be inevitably left in the hands of administration. This has meant close scrutiny of both the administrative laws as also the procedures to ensure that they do not bestow arbitrary and unregulated discretion in the hands of administration. This brings out the close inter-relationship between the fundamental rights and good governance.

*The Supreme Court already directions given to the Union of India, State Governments and the*

20. Dey, Bata K, "Defining Good Governance", Indian Journal of Public Administration, Vol.44, July-Sept., 1998, P.412 at P.419.

21. Sathe, S.P., Judicial Activism in India : Transgressing Borders and Enforcing Limits, Oxford University Press, 2005 edition, at p.251.

*Local bodies constitute an integral executive to implement the Directive Principles and reminded the Municipal corporation about its constitutional duty and authority to implement the directives contained in Articles 38, 39, and 46<sup>22</sup>. It is a necessary that the Supreme Court may go step further and declare that the good governance which is implicit in various provisions of the Constitution explicit as basic fundamental right of the citizen, as done by the Court in respect of some other fundamental rights referred to earlier on and hope that the same is happened in near future.*

### Conclusion

The Trinity - Legislature, Judiciary and Executive - is an accomplished phenomenon. And a harmonious existence. If, we are to be governed by the rule of law and not rule by men, the legislative and executive actions must remain subject to scrutiny by the Judiciary, albeit such review has to be exercised within the settled parameters.

The Court will not and cannot fold up its hands and keep quiet if the Executive defaults in doing justice and respecting the rights of citizens. It will be activated enough to render justice and right the wrong<sup>23</sup>; the Court will not be dysfunctional. For instance, if a Policeman rapes a woman or wrongfully confines a person in the lock-up, the Court will not fold up its hands on the ground that the Executive will give redress. On the contrary, justice shall be done in the constitutional sense; and no protest, that the Judiciary usurps the power or discretion of the Administration, will hold good. The question is of constitutional proprieties, democratic conventions and the principle of good governance.

Over the last 60 years, a number of committees and commissions have applied

their mind to the issues critical for the proper management of civil services. Unfortunately, their recommendations have fallen on deaf ears. Neither the state Governments nor the central Government, irrespective of which political party was in power, has taken any interest in reforming the system. In fact, there is a secular and all-round deterioration in governance at all levels. The review of the performance of the institutions of governance (the parliament, the judiciary, the institutions of local self governance and policy making) gives out the mixed signals and it in fact a symptom of how the patterns of governance and governance accountability are going to take shape in the coming years. A detailed review shows a continued dilemma between growth and equity, intentions and reality, programmes and performances which again bring us to question of 'rhetoric vs. reality?' The policy formulation and its performances vacillate between cross-cutting objectives indicating their indubitable impact on effective governance. While such ambiguity is perhaps understandable in the existing socio-economic realities, a continued sense of ambiguity certainly leads to some imponderable difficulties in the area of governance. The need of the hour is to work out the strategies and tactics for tackling the vexing problems in the manner of clear cut direction. The governance and democracy can become meaningful only when they touch the lives of millions of marginalized and the poor still existing on the periphery.

The expectations of the people are high and their patience is ruining. People are watching the administration, the judiciary, the bar, even the media Each organ has to conduct itself with determination, dignity and sobriety not only for the sake of survival today but also for the legacy it leaves for the youth who are the future of the country and the flag-bearers of its rich conversional values and traditions.

Parliament must act to strengthen the grievance redressal systems at various levels.

22. *Ahmadabad Municipal Corporation v. Nawab Khan Gulab Khan*, AIR 1997 SC 152

23. *Iyer, V.R. Krishna*, "Judicial Activism and Administrative Autonomy", *The Administrator*, Vol.XLII, April-June 1997, P.1 at P.4.

Reform of the mainstream judicial system is long overdue. Further, the creation of a network of regulatory agencies independent of Government, providing for an ombudsmanning of the Governmental authorities, and making governance transparent by giving people the right to information would go a long way towards making Governments more accountable.

Good governance is not a fill-in-the blank rhetoric. This has to be article of faith on the part of all those who have anything to do with the instruments of governance. Good governance and effective management is the only panacea for all the evils, ills and stumbling blocks plaguing. Transformation of the country is possible only when the necessary transformations are brought about. India need a revolution of a different kind led by the right thinking and right acting leaders, who should not only prepare, but implement blue print for the future development in a fixed time schedule.

Good governance can transform a developing country like India into a developed world. The need for the hour is to develop dynamism, development, democracy through good governance based on innovation, creativity, talent, skill, etc., in order to usher an era where there is no poverty, no exploitation, no fear, as well as follow ethical values.

If the Legislatures executives will not care of the good governance, as mandated in the Indian Constitution, it effects the public interest and it is a high time for the Honorable Supreme Court may took the issue *suo motto* contingency and declare the good governance is as a basic fundamental right of the citizens of India, as in past it was rightly held by Supreme Court "*The Constitution envisages the establishment of a welfare state at the federal level and state level. In a welfare state, the primary duty of the Government is to*

*secure welfare of the people*".<sup>24</sup> *A welfare state is a state which renders social services to the people and promotes their general welfare*<sup>25</sup> and as Justice Dharmadikari observes "Ours is a constitutional democracy and we are called a 'WELFARE STATE'. 'WELFARE' does not mean that we have only strive for fulfillment of political theory 'Greatest Good of Greatest Number'. Our motto from Vedic times has been 'sarva Jan hitay, sarva Jan sukhai' (benefit of all and happiness of all)"<sup>26</sup>

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#### JURISDICTION OF ARBITRAL TRIBUNAL UNDER SECTION 16 OF ARBITRATION AND CONCILIATION ACT 1996

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The Arbitration and Conciliation Act 1996, has been passed to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral award and also to define law relating to conciliation and for matters connected therewith or incidental thereto. The conciliation has been introduced for the first time in India for settlement of commercial disputes. The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have therefore; to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words, the provisions of 1996 Act have to be interpreted being, uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to Article 6 of the UNCITRAL Model Law rather than the 1940 Act.

In Arbitration Act 1940, there is no provision akin to Section 16 of Act 1996. The Act 1996 was enacted basing the UNCITRAL Model Law on International Commercial Arbitration, 1985. The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral Tribunal and the extent of Court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

The UNCITRAL Model Law on International Commercial Arbitration, 1985.