

Constitutional Governance

*Niddhi**

Independent Legal Professional,

Bihar State Bar Council, Near MLA Flat, High Court, Veerchand Patel Path, Patna, Bihar 800001

Abstract

The core element of constitutional government is, of course, the existence of a "Rule-of Law" or set of "basic laws" that binds both public office-holders and all members of a society (i.e. citizens) within a given territory. Presently, most states avail of a constitution, which directs the organization of the state, the relations between the public offices within the state, as well as the human and civil rights of the individual. Constitutional governments, however, do not perform in the same manner everywhere. In this contribution, the following aspects are discussed comparatively: (a) The relationship between constitutional features and the existing state format; (b) The key institutions which define the type of government and the relationship between the executive and legislative; (c) The existing systems of "checks and balances" between governments, assemblies and heads of state, as well as the role of the judiciary; and (d) The actual performance of constitutional governance in terms of human and civil rights. Of course, these relations and practices of governance have been developing over time. It is also obvious that there is a strong tendency toward "liberal democracy" (after 1991 when the USSR collapsed as a political system). It is equally clear that the state format, i.e. federal versus unitary states; decentralized versus centralized government, as well as the type of governance, varies considerably across the world of constitutional government. In this research paper, firstly, the researcher tries to define constitution, governance, good governance, elements of good governance in depth, then rule of law, and role of judiciary in good governance, rule of law and independence of judiciary. The article also attempts to analyze the concept of constitutional governance, judicial governance and judicial activism's role in constitutional governance.

Keywords: *Rule-of law, constitution, governance, good governance, of constitutional governance, judicial governance, checks and balances, convention, judiciary, executive, legislature, separation of powers, comparative democratic theory*

***Author for Correspondence** E-mail: niddhiakhouri@gmail.com

CONSTITUTIONAL GOVERNANCE

The constitution of India was passed by the constituent assembly of India on November 26, 1949 and came into effect on January 26, 1950. India celebrates January 26 each year as Republic Day. We the people of India have the experience of more than 68 years of constitutional governance. It helps us to understand the working of the constitution in general and also the role of the judiciary in particular. On breaking down the word constitutional, the root word "constitute" will be found which means "to make up or form". Constitution can refer to the document that forms (or organizes) the government. Conceptually, governance can be defined as the rule of the rulers, typically within a given set of rules. One might conclude that governance is the process by which authority

is conferred on rulers, by which they make the rules, and by which those rules are enforced and modified. Thus, understanding governance requires an identification of the rulers and the rules, as well as the various processes by which they are selected, defined, and linked together and with the society generally as incorporated in constitution of a country.

The constitution lays down the basic structure of government under which the people are to be governed. It establishes the main organs of government: the executive, the legislature and the judiciary. The constitution not only defines the powers of each organ, but also demarcates their responsibilities. It regulates the relationship between organs and between the government and people.

The constitution is superior to all other laws of the country. Every law enacted by the government must be in conformity with the constitution. The constitution lays down the national goals of India as democracy, socialism, secularism and national integration. It also spells out the rights and duties of citizens. Hence, the present chapter establishes relationship between the constitution and the governance and how constitution ensures its supremacy above executive, legislature and the role of judiciary in ensuring it, resulting in good governance.

MEANING OF GOVERNANCE

The World Bank Defines "Governance"

It is the way the power is exercised in the management of country's economic and social resources for development [1].

The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) Explains Governance

Simply as possible, the concept of "governance" is not new. It is as old as human civilization. Simply put, "governance" means: the process of decision-making and the process by which decisions are implemented (or not implemented).

UNDP Defines "Governance"

It is the exercise of power or authority, political, economic, administrative or otherwise to manage a country's resources and affairs. It comprises the mechanism, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, pursue their obligations and mediate their differences [2].

GOOD GOVERNANCE

World Bank Report 1994

It conceptualizes as competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable, and responsive to people's needs.

Aus. AID, Australian Government Overseas Aid Program, August 2000

It is epitomized by predictable, open and enlightened policy making, a bureaucracy imbued with a professional ethos, an executive arm of government accountable for its actions

and a strong civil society participating in public affairs and all behaving under the rule of law [3].

European Union

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in managing and distributing resources and capacity building for elaborating and implementing measures that aim to prevent and combat corruption [4].

Office of High Commissioner of Human Rights (OCHR)

Governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights. Good governance accomplishes this in a manner essentially free of abuse and corruption and with due regard for the rule of law. The true test of good governance is the degree to which it delivers on the promise of human rights, civil, cultural, economic, political and social rights. The key question is the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food quality of education fair justice and personal security.

Elements of Good Governance

1. Accountability,
2. Participation,
3. Rule of Law,
4. Transparency and Openness,
5. Responsiveness and Responsibility,
6. Consensus,
7. Equity and Inclusiveness,
8. Efficiency and Effectiveness.

Accountability

It is defines holding responsible elected or appointed individual and organizations charged with a public mandate to account for specific actions, activities or decisions to the public from which they derive their authority.

It is the ability to account for the allocation, use and control of public spending and resources in accordance with legally accepted standards i.e. budgeting, accounting, auditing etc. It is a requirement that officials are answerable to the stakeholders on the disbursement of their powers and duties, act on criticism or requirement made of them, and accept responsibility for failure, incompetence or deceit.

Accountability works at macro-level and micro-level.

At macro-level, it ensures congruence between public policy and actual implementation and the efficient distribution and use of public resources. This requires financial accountability and efforts on the part of government to monitor their overall economic performance and social accountability.

At micro-level, it implies shifting of accountability directly to citizens, their organization and business. It has already been tried in India like client surveys, citizen's charter, independent ombudsman and social audits.

Two main forms of this are: Exit mechanism and voice mechanism. Exit mechanism is deregulation, contracting out, and promotion of public private or public competition. The crucial element in all these measures is competition enhancing performance and discouraging monopolies.

The voice mechanism allows articulation of preferences and demands by the service users. The voice can be heard through user polls, data gathering, grievance redress and an ombudsman, hot lines, and mail services. Information dissemination among the service users is one way to enhance accountability.

Carter 99 Accountability Index Charter: It is an organization dedicated to work towards democratic accountability in international decision making has developed a global accountability index.

Rule of Law

In a civilized society until about 2500 years, there was usually nothing like rule of law. It was only might is right and the words of the

king was the rule of law by which the subjects were governed. Mostly private disputes were settled. Any wrong done against the king was fraught with dire consequences. However, things gradually started to change. The famous Greek philosopher Aristotle had said that it is more proper that law should govern than any one of the citizens. But it was applied where the governance was by way of democratic means. In our country, in some parts, even though feudal system was in vogue, yet rule of law was the foundation on which the judicial system worked.

For rule of law to prevail, a true separation of power must take place to secure independence of Judiciary and a thorough reform of existing judicial system must be carried out. Includes introducing constitutional amendments that allow for greater participation in political life, provide for fair elections and modernize existing laws to consider the new social economic realities of societies undergoing democratic transformation [5].

Encompassing well defined rights and duties, as well as mechanisms for enforcing them and settling disputes in an impartial manner. It requires the state and its subsidiary agencies to be as much bound by and answerable to the legal system as are private individual and enterprises [6, 7].

ROL entails equal protection of human rights of individuals and groups as well as equal punishment under the law. It protects citizen against arbitrary state action. It ensures all citizens are treated equally rather than to the whims of the powerful. The law should also afford vulnerable groups protection against exploitation and abuse.

Transparency and Openness

It is broadly defined as public access to knowledge of the policies and strategies of government. It involves making public accounts verifiable, providing for public participation in government policy making and implementation. It entails low cost access to relevant information. Reliable and timely economic and financial information is a must for public. It is essential not only that information is provided but also that it be relevant and understandable. It makes public scrutiny accurate and makes timely

information on economic, financial, market conditions possible.

Right to Information Legislation: Direct participation of people in planning and implementation of government programs through deliberation councils, and people's committee and broad based public discussion of key policy, to establish a climate of openness and transparency in public affairs. It helps reinforce accountability. Transparency protects against government error, the misallocation of resources and corruption. From human rights perspective, transparency is people's right.

Responsiveness and Responsibility

The government's political and administrative system and market forces being responsible and responsive to the well-being of the citizens, is good governance. If response of the local governments is used as the strategy to contain the struggle citizens take up to reform the system, it is oppressive and bad governance. Responsibility of the governance system at all its levels to the citizens, is good governance.

Consensus and Equity and Inclusiveness

Consensus can be suggesting good governance as well as bad governance. Consensus, if emerges as the will of the citizenry in the public sphere, it is good. Consensus if used to contain different voices or a voice that differs from the government mechanism or market forces, it is bad governance.

Equity and inclusiveness are aspects of good governance. By equity we also mean providing equitable opportunity for citizens to lead a life of self-respect and dignity.

Efficiency and Effectiveness

The efficiency and effectiveness of the governance and the market in responding to the substantial needs as decided by the citizens is an aspect of good governance.

Indian Constitutional Provisions and Good Governance

- Preamble,
- Fundamental Rights,
- Directive Principles of State Policy,
- Rights of Minorities: Women, children,
- SC ST, Disabled,

- Fundamental Duties,
- Role of Judiciary,
- Other Provisions like Parliamentary form of Govt. Rule of law etc.

Preamble

It contains the ideals and aspirations of the constitution. It identifies the primary objective of good governance. From its standpoint, good governance will be the governance mechanism that promotes sovereignty, socialism, secularism and democracy with an ethical commitment to justice, liberty, equality and fraternity in the everyday life of the citizen. Anything that goes against the spirit of the constitution is violation of the constitution. According to the constitution, the governments and bureaucracy must work within the framework of the constitution. Post the landmark judgments of Keshavananda Bharti, each of these words have redefined the way we interpret the body of the constitution. Each of the constitutional provision, when construed in conjunction with the preamble paves a new path towards good governance.

Fundamental Rights

Generally, these are prohibitions against the state.

Provision of Judicial Review is there under Article 13: The state cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in Part 3rd. If it passes such a law, it will be called unconstitutional by the courts. Article 13: it provides for judicial review of all present, past and future legislations, this power has been conferred on SC, HC under Article 32, and 226. Upheld in fundamental rights case: Keshavananda Bharti v State of Kerala AIR 1973SC 1461. It has become integral part of constitutional system.

Provision of Equality before Law is there under Article 14: Among the equals, the law should be equal and should be equally administered without distinctions of race, wealth, religion, social status etc., that is, like should be treated alike.

Equal Protection of Law: It means subjection to equal laws applying to all in the same circumstances. All persons similarly placed should be treated alike both in privileges conferred and liabilities imposed by the laws.

Equality as Protection against Arbitrariness: Equality is antithesis of arbitrariness, an action that is arbitrary must involve negation of equality. AS upheld in E.P. Royappa v State of Tamil Nadu AIR 1974 SC 555.

Equality before Law, Equal Protection of Law: These two together establish rule of law. Maneka Gandhi v Union of India AIR 1978 SC 597.

Arbitrary Action State is Liable to Pay Compensation: Lucknow Development Authority v M K Gupta 1994 1 SCC 243, SC held If loss is caused to a citizen by the arbitrary actions of state employee the state is liable to pay compensation.

Provision of Non-Discrimination is there under Article 15: Prohibition on discrimination on the grounds of caste, race, religion, sex or place of birth; these discriminations can be said to be denial of equality before law.

Provision of Equal Opportunity is there under Article 16: Equal opportunity in public employment, equal pay for equal work etc.

Provision of Abolition of Untouchability is there under Article 17: Abolition of untouchability provides for prohibition of social disabilities.

Provision of Abolition of Titles is there under Article 18.

Provision of Right to Freedom is there under Article 19: Right to freedom is the most important of all fundamental rights. It gives meaning to right to personal liberty.

Six important freedoms conferred:

- Freedom of speech and expression,
- Freedom of assembly,
- Freedom to form association,
- Freedom of movement,
- Freedom to reside and settle, and
- Freedom of profession and occupation.

Various Facets of Freedom of Speech and Expression:

- Freedom of Press: It is implicit in the same. It is essential for political liberty and proper functioning of democracy. It is the cherished right of all democratic countries. The purpose of the press is to advance the public interest by publishing facts and opinion without which a democratic electorate cannot make responsible judgments. It is the primary

duty of the courts to uphold the freedom of press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.

Indian Express Newspapers v Union of India 1985, 1 SCC 641: The newspaper not only surveys news but also ideas, opinions, ideologies etc. They guard public interest by bringing to fore the misdeeds, failings and lapses of Govt. Thus, they cause public scrutiny of exercise of power. Hence, they are called the fourth estate this brings in accountability and transparency.

- Right to Know: Freedom of speech is based on the foundation of freedom of right to know. Every citizen has right to know how the state is functioning and why the state is withholding such information in such matters.

L.K. Koolwal v State of Rajasthan AIR 1968 Raj 2: The privilege of secrecy which existed in old times has ceased with the enactment of Right to Information Act 2005.

Article 20: contains provisions related to protection in respect of conviction for offences: Protection against ex post facto laws it is a law which imposes penalties retrospectively. It imposes limitation on the law-making power of the legislature in making retrospective criminal laws. No person shall be convicted of any offence except for violation of laws in force at the time of commission of the act charged as an offence.

- Protection against Double Jeopardy: No person shall be punished for the same offence more than once. Provided it is the same offence for which the person has been earlier prosecuted and punished.
- Protection against Self Incrimination: No person accused of any offence shall be compelled to be witness against himself. No one shall be compelled to give testimony which exposes him to prosecution for crime. This is the cardinal principle of criminal law.

Article 21 Protection of Life and Liberty: Broad judicial interpretation to include these rights, the list is not exhaustive:

- Right to live with human dignity,
- Right to food,
- Right to livelihood,
- Right to shelter,
- Right to privacy,
- Right to healthy environment,
- Right to good governance and
- Right against inhuman treatment (Handcuffing, bar fetters, solitary confinement, custodial torture).

Compensation for Violation of Article 21: Article 21 as right to good governance: The right to life under Article 21 includes all those rights which are essential for the dignified enjoyment of our life. In absence of same, it is impossible for citizens to lead a dignified and civilized life. Hence Article 21 must guarantee a right to good governance. The Allahabad HC accepted this argument. *Gobardhan Lal v. State of UP* 2000. 2 AWC 1515.

Article 22: Safeguards against Arbitrary Arrest and Detention: It prescribes the minimum procedural requirements that must be included in any law enacted by the legislature in accordance with which a person may be deprived of his life and liberty. If these minimum procedural requirements are not complied with then it would be deprivation of life and liberty.

Rights of Accused Persons:

- Right to be informed of grounds of arrest.
- Right to be defended by lawyer of his choice.
- Right to be produced before magistrate.
- No detention beyond 24 h except by orders of magistrate.

Kharak Singh v state of Punjab 1969, 3 SCC 569 TADA Act 1987, the validity of this act was challenged. The court struck down section 22 of this act as violative of Article 21 of the constitution. Section 22 provided for identification of the accused based on his photograph. This was held violation of human rights, constitutional guarantees.

Habeas Corpus case *ADM Jabalpur v Shukla* AIR 1976 SC 1207.

The constitutional validity of Section 16 A of the MISA Act was challenged. It was struck down as unconstitutional as it was violative of Article 226; it prevented HC from exercising jurisdiction under writ of habeas corpus.

Article 25 contains Provisions related to Freedom of Religion: The concept of secularism is implicit in the preamble of the constitution to secure to all its citizens liberty of thought, belief, faith and worship. The 42nd Amendment Act of 1976 has inserted the word secular in the preamble. Secular nature of state meant state is neutral in matters of religion. State is not anti-religious, nor does state favor any particular religion. It eliminates religion from state and ensures that no one shall be discriminated against on the ground of religion. It treats all religions equally. *S.R. Bommai v Union of India* 1994, 3 SCC 1. Secularism is the basic feature of the constitution. The state treats equally all religions. Religion is a matter of individual faith and cannot be mixed with secular activities.

Writ Jurisdiction: Right to Constitutional Remedies under Article 32: Constitution confers on SC and HC the power to grant effective remedies in the name of writs mandamus, prohibition, quo warranto, directions etc., when these rights are violated. It is one of most important fundamental rights to move the highest court of nation for the enforcement of fundamental rights. Court here is not bound by any procedural technicalities. The objective is to provide quick remedy.

Directive Principle of State Policy Part IV

Dr. Ambedkar rightly calls these “objectives of the welfare state”. G. N Joshi said they constitute very comprehensive political social economic program for modern democratic state. These are the ideals for establishment of welfare state; they lay down certain social economic policies to be pursued by the Govt.; they impose certain positive obligation on the state to take affirmative actions in certain directions to achieve economic social democracy.

Article 37 is not enforceable, but these are the principles which are fundamental in the governance of the country.

Broad Classification of the Directives:

- Social and Economic Charter,
- Social Order based on Justice,
- Social Security Charter, and
- Community Welfare Charter.

Social Order Based on Justice: The 44th amendment Act 1978 inserted the Article 38. State shall strive to minimize inequalities in income, status facilities, and opportunities.

Certain Social, economic principles to be followed by the state to direct its policy towards securing the same are contained in Article 39.

Clause (f) was modified by the constitutional, 42nd amendment Act 1976 with a view to emphasize the constructive role of the state about children. In *M C Mehta v State of Tamil Nadu* 1991, 1 SCC 283, known as child labor abolition case, the court issued certain directions with respect to child welfare and child protection in hazardous occupation.

Equal Pay for Equal Work: Parliament has enacted equal remuneration Act 1976. Though not fundamental right but a constitutional goal capable of enforcement through constitutional remedies under Article 32, as held in *Randhir Singh v Union of India* AIR 1982 SC 879.

Social Security Charter: Article 41 ensures right to work, to education and to public assistance in certain cases.

Article 42 contains provisions for just human conditions of work like maternity relief.

Article 43 ensures living wage for workers.

Article 43 ensures participation of workers in management of industries.

Article 45 gives free compulsory education for children.

Unni Krishnan v State of Andhra Pradesh 1993 1 SCC 645.

Right to education up to 14 years is a fundamental right within the meaning of Article 21 of the constitution, but obligation of state to provide subject to limits of its economic capacity. 93rd Amendment Act 2001, subsequently the 86th Amendment Act 2001 made the right to free compulsory education for children up to the age of 14 years, a fundamental right.

Social Security Charter: Under Article 46, promotion of education and economic interest of weaker sections, that of SC, ST and to protect them from social injustice and all forms of exploitation. Under Article 47, state should check consumption except for medical purpose of intoxicating drinks, drugs injurious to health etc.

Community Welfare Charter: Article 44 contains provisions related to uniform civil code.

Obligation on state to secure for its citizens throughout the nation Uniform civil code, this is for the protection of the oppressed and promotion of national unity and integrity.

Article 48: Organization of agriculture and animal husbandry.

Article 48 A: Protection and improvement of forest and wild life.

Inserted by the 42nd amendment act 1976.

A series of PIL has been filed: Supreme Court gave directions to take appropriate steps to control water, and air pollution. *MC Mehta v Union of India* 1981, 1 SCC 471.

Article 51 contains provisions related to promotion of international peace and security: Pursuant to directions enshrined in Article 51 of the constitution and International commitments parliament has passed the protection of human rights Act 1993.

Article 40: Organization of Village Panchayat: The state should take steps to organize village panchayats and endow them with such power and authority as necessary to function as units of self-governance. The objective of this provision is to introduce democracy at grass root level. These are introduced throughout the nation. Many states have enacted laws for the same. The 73rd Amendment Act and 74th Amendment Act in year 1992 enacted as Panchayati and Nagarpalika Constitutional Amendment Act 1992 incorporated a new part Part IX and Part IX A relating to panchayat and local bodies.

The 73rd Amendment: It provides for three tier panchayati raj system: at the village level, intermediate level and district level.

The 74th Amendment Act: It provides for urban self-governing institutions at three levels: Nagar Panchayat, Municipal Council, and Municipal Corporation.

Rights of marginalized constitution by guaranteeing these rights to the marginalized

section, empowers them and brings them into the mainstream; it ensures their participation and gives them equal opportunity. Thus, through their participation, good governance is ensured.

Article 15 (3): State can make special provision for women and children.

Article 15 (4): Special provision by law for the advancement of socially and educationally backward class, SC, ST.

This is added by First Amendment Act, 1951, Sec. 2.

Article 15 (5): Special provision by law for the advancement of socially educationally backward class, SC, ST in admission to educational institutions including private education institutions whether aided by state or not.

This is added by 93rd Amendment Act, 2005.

Reservation of 50% of posts in favor of female candidates held not arbitrary. *Rajesh Kumar Gupta v State of U.P* AIR 2005 SC 2540.

Article 16: Reservations contains provisions related to reservations.

Article 16 (4): State can make any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Added by Seventy Seventh amendment Act, 1995,

Sec. 2.

Article 16 is a spread of Article 14. Hence non-arbitrariness is a part of Article 16. It creates a constitutional right to equality of opportunity and employment in public offices. Main objective is to empower the state to make provision for reservation for SC, ST.

Article 17 contains provisions related to abolition of untouchability: Social disability imposed on certain class of persons by reason of their birth in certain castes and does not cover social boycott on conduct.

To ban the practice of untouchability in any form, it has been implemented by protection of Civil Rights Act 1955.

Article 23 contains provisions related to the prohibition of traffic in human beings and forced labor. Supreme Court has issued elaborate guidelines on child labor. It should not be engaged in hazardous employment. There shall be set up child rehabilitation

welfare fund in which the offending employer should deposit RS 20,000. *M. C. Mehta v State of Tamil Nadu*, AIR 1997 SC 699. Supreme Court issued directions as to nutrition, health and education of child labour. *Bandhu Mukti Morcha v Union of India* AIR 1997 SC 2218.

Article 24: Prohibition of employment of children in factories: No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Article 29 contains the provisions related to the protection of interests of minorities:

Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30 contains the provisions related to the right of minorities to establish and administer educational institutions: All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A): In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause. The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. *St. Xavier's College Society v. State of Gujrat* AIR 1974 SC 1389. Right to establish educational institution and right to administer it. *Sidhrajibhai v State of Gujarat* AIR 1963 SC 540.

Regulations imposed by state on a minority institution must be reasonable, must be regulative of educational character of the institutions, and must be conducive of making the institution an effective vehicle of education for minority community. It must not annihilate

the institution. Autonomy of minority institutions cannot be completely taken away. *St. Stephens College v. University of Delhi* 1992, 1 SCC558.

Article 41 contains the provisions related to the right to work, to education and to assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 45 contains the provisions related to the free and compulsory education for children. The State shall endeavor to provide, within a period of 10 years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of 14 years.

Article 46 contains the provisions related to the promotion of educational and economic interests of scheduled castes, scheduled tribes and other weaker sections. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and the scheduled tribes and shall protect them from social injustice and all forms of exploitation. A law prohibiting transfer of land belonging to a member of ST to non-tribals is valid. *Lingappa v. State of Maharashtra*, AIR 1985 SC 389.

Regarding the expression “Weaker Sections of Society”, the SC has directed the central Govt. to lay down appropriate guidelines. *Shantistar Builders v. Narayan Khimalal Totame* AIR 1990 SC 630.

Fundamental Duties by 42nd Amendment, was added

These are some of the constitutional provisions, which envisage good governance for India.

Certain Provisions Enumerated:

- To abide by the constitution and respect its ideals and institutions, national flag, national anthem etc.
- To uphold and protect sovereignty, unity and integrity of India.
- To promote harmony and spirit of common brotherhood.
- To safeguard public property.

- *Fundamental Duties Part IV A:*
- It makes the citizen accountable to the nation as well to the constitution. These duties require citizens to observe certain basic norms of democratic conduct and behavior.
- The fundamental duty under Article 51 A (a): the duty to respect national flag. *Union of India v Naveen Jindal* 2004, 2 SC C 510, 548. *AIMS Student Union v AIMS AIR 2001 SC at 3281* State action in violation of fundamental duties can be declared invalid by the court.
- These duties apply to both citizens and the state.
- These duties are statutory duties and shall be enforceable by law. Parliament by law will provide penalties for failure to fulfill these duties.

ROLE OF JUDICIARY IN GOOD GOVERNANCE

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 amour of the country and its constitution and laws. If this amour were to be stripped of its onerous functions it would lead to nullification, anarchy and convulsion”.

Motiram &, Motiram and others v. State of M.P. AIR 1978 SC 1594 dealt with judgements related to bail and the Supreme Court in *Hussainara Khatoon and others v. Home Secretary State of Bihar* AIR 1979 SC 1360 expressed anguish at the “travesty of justice” on account of under-trial prisoners spending extended time in custody due to unrealistically excessive conditions of bail imposed by the magistracy or the police and issued requisite corrective guidelines, holding that “the procedure established by law” for depriving a person of life or personal liberty (Article 21) also should be “reasonable, fair and just”.

Prem Shankar Shukla v. Delhi Administration 1980 SCC 526.

The Supreme Court found the practice of using handcuffs and fetters on prisoners violating the of basic human dignity, which is part of the

constitutional culture in India and thus not standing the test of equality before law (Article 14), fundamental freedoms (Article 19) and the right to life and personal liberty (Article 21).

It observed that “to bind a man hand and foot’ fetter his limbs with hoops of steel; shuffle him along in the streets, and to stand him for hours in the courts, is to torture him, defile his dignity, vulgarize society, and foul the soul of our constitutional culture”.

Strongly denouncing handcuffing of prisoners as a matter of routine, the Supreme Court said that to “manacle a man is more than to mortify him, it is to dehumanize him, and therefore to violate his personhood....”.

In *Joginder Kumar*, the court ruled that “the law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties of the single individual and those of individuals collectively.....”.

In *Nilabati Behera Nilabati Behera v. State of Orissa* 1993 SCC 746 12, the Supreme Court asserted the jurisdiction of the judiciary as “protector of civil liberties” under the obligation “to repair damage caused by officers of the State to fundamental rights of the citizens”, holding the state responsible to pay compensation to the near and dear ones of a person who has been deprived of life by their wrongful action, reading into Article 21, the “duty of care” which could not be denied to anyone. For this purpose, the court referred to Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which lays down that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Other Provisions

The constitution lays down division of power in many provisions, for instance separation of executive and judiciary laid down in Article 50. The constitution lays down the structure and defines, delimits and demarcates the role and function of every organ of the State and establishes norms for their interrelationships.

Another unique feature of Indian Constitution is that of the scheme of checks and balances: One of the most important principles of just democratic governance is the presence of constitutional limits on the extent of government power. Among the three organs of Govt., no organ of the Govt. is by itself supreme, it is the constitution which is the supreme. Each organ of the Govt. is functioning as a check on the exercise of power of the other organ and thus in turn balancing the power equation. For instance, judiciary exercises a check on legislative power by judicial review in Article 13. In parliamentary form of Govt., executive is responsible to legislature. Executive appoints the judges of Supreme Court and High Court. Legislature initiates impeachment motion on the judges of Supreme Court and High Court.

Rule of Law and Independence of Judiciary

The rule of law, one of the most significant characteristics of good governance prevails because India has an independent judiciary. The rule of law as dicey postulated is equality before law. The rule of law is expressed through the axiom that no one is above the 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 and ensures Good Governance.

One of the main instruments in securing the same is independent judiciary, a very vital instrument of good governance.

The express provision is contained in Article 50 of Indian constitution which separates executive from judiciary. There are other implicit provisions too, like the process of appointment and removal of judges of the Apex court, their tenure, remuneration which ensures independence of judiciary.

PARLIAMENTARY FORM OF GOVT.

The constitution of India establishes parliamentary form of Govt. both at centre and the state level. The essence of this form of Govt. is its responsibility to legislature. The president is the constitutional head of the state, the real executive power is vested with the council of ministers whose head is prime minister. Council of ministers are collectively responsible to the lok sabha or lower house. The members of the lower house are directly elected by people on the basis of adult franchise normally for five years. This form of Govt. is called as responsible Govt.

Periodical Election

The constitution ensures election after every 5 years at least, for electing representatives of people to the lower house.

Adult Suffrage

Article 326 provides for uniform adult suffrage without any distinction either of sex, property, taxation or like. This suffrage is wider than all the democratic countries which has given right to vote to people. Under this, every man and woman above 18 years of age has been given right to elect representatives for the legislature.

Achievement Post 60 years

In pursuance of goals laid down in DPSP for good governance, following are a few developments:

- Important amendments,
- Implementation of DPSP on par with fundamental rights, and
- Recent legislations.

Article 40 contains the provisions related to the organisation of village panchayat:

The 73rd Amendment Act, 74th Amendment Act in year 1992 enacted as Panchayati and Nagarpalika Constitutional Amendment Act 1992.

Article 45 contains the provisions related to the free compulsory education for children:

93rd Amendment Act 2001, after the 86th Amendment Act 2001 made the right to free compulsory education for children up to the age of 14 years a fundamental right.

Article 39 contains the provisions related to the free legal aid. Free legal aid and speedy trial are now held as fundamental right under Article 21 of the constitution available to all prisoners and enforceable by the courts.

The state is under constitutional mandate to provide lawyer to poor. As held in *Hussainara Khatoon v Home Secretary, State of Bihar*.

Recent Legislations

- Equal pay for equal work.
- Parliament has enacted equal remuneration Act 1976.
- In 1993, parliament has under Protection of Human Rights Act 1993 created a National Human Rights Commission and similar commissions in various States to supervise and to check violation of human rights. These commissions are manned by very high and responsible judicial and other public officials.
- National Rural Employment Guarantee Act, 2005.

In certain specified backward rural parts of the country, provisions have been made to ensure giving employment to the youth.

PERSISTENT THREATS TO GOOD GOVERNANCE

- Corruption.
- Criminalization of Politics.
- Law and Order problems.
- Communalism.
- Regionalism.
- Poverty.
- Unemployment.
- Still a long way to go.

Analysis of Constitutional Governance

In India, constitution is the supreme document containing the "Rule of Law". It establishes the main organs of government: the executive, the legislature and the judiciary. The constitution not only defines the powers of each organ, but also demarcates their responsibilities. It regulates the relationship between organs and between the government and people. The ability of constitution to act as limitations on the exercise of power, and in that process delineate the functions of the

government and outline the rights of the people, that distinguishes them from other legislation. The experience of 60 years of constitutional governance helps us in understanding the working of the constitution in general and the role of the judiciary in particular. The judiciary's effort to infuse accountability in the functioning of government institutions and the growth and development of human rights jurisprudence has demonstrated the importance of judicial governance. The mere adoption of a good constitution would not culminate in the values of constitutionalism permeating the civil and political culture in the country, nor could it ensure good governance.

In a parliamentary system, perhaps the greatest challenge of good governance is to bridge the gap between the expectations of the people and the effectiveness of the delivery mechanisms.

Thus, as long as the core ideals of a democracy: strengthening of accountability of the executive, ensuring welfare of the people through appropriate development policies and programs, enabling harmonious relationship among the organs of the State, mechanism for free and fair elections, empowerment of weaker sections of society including women and ensuring a free press and media; are protected and promoted, good governance would be a natural derivative of such measures.

Constitutional historian Granville Austin said the transcendent goal of the Indian constitution was to promote "social revolution". For this, the framers intended to fulfill the basic needs of citizens and hoped that it would bring about fundamental changes in the structure of Indian society. The theme of social revolution runs throughout the proceedings and documents of the constituent assembly. This theme formed the basis of the decision to adopt the parliamentary form of government and direct elections, the fundamental rights, the directive principles of state policy, and many of the executive, legislative, and judicial provisions of the constitution. Although the social revolution theme was espoused throughout the constitution, Parts III and IV, fundamental

rights and directive principles of state policy, demonstrate the core of this commitment. These are perceived as the conscience of the constitution, because they provide the base for human rights and human development policies for governance. The constitution ensures that the fundamental rights are guaranteed as a matter of legal obligation rather than as a political concession. These are basic human rights and have been interpreted as civil, political, economic, social and cultural rights. Articles 12–35 of Part III elaborate on the fundamental rights. Articles 36–51 outline the framers' vision for good governance and they constitute the directive principles of state policy. They are not enforceable in a court of law, but the principles laid down therein are fundamental to governance. It is the duty of the state to apply these principles in making and implementing laws.

The dialectical relationship between promoting constitutionalism and the development of judicial governance presents three important challenges for understanding the role of law and institutional politics in India.

Role of the Judiciary

The judiciary is uniquely placed in the matrix of power structure within the system of governance. Judges are not elected but clearly have the power and indeed the responsibility to check the exercise of powers and actions of elected representatives and appointed officials. The judiciary as an institution is vastly respected, notwithstanding huge challenges in ensuring access to justice, judicial process and issues of transparency and accountability. It is vested with ensuring that the rights and freedoms of the people are protected, and the powers exercised by the government in adopting policies are in accordance with the constitution and other legislation.

In theory, if the different branches of the government adhere to the basic principle of separation of powers and function within their limits, it is considered a sound system of governance. In practice, however, a number of issues have emerged, and challenges occurred. It is in this context that the three branches of the government: the legislature, the executive

and the judiciary, need to have a certain degree of trust in, and deference to, the actions of one another in matters within their respective jurisdictions.

However, trust and deference in relation to the actions of a branch should not undermine the judiciary's responsibility to adjudicate on the constitutional and legislative validity of the actions of the government. Clearly, this delicate balancing act of rightfully intervening when necessary requires a deeper understanding and appreciation of the principles of constitutionalism. Rule of law is about all people and institutions respecting laws and acting in accordance with the law. The legislature and the executive as collective powerhouses are bound by these principles as much as ordinary citizens are.

Judicial Governance

The term 'judicial governance' is subject to challenge as the judiciary is not supposed to be involved in 'governance'. However, the effort of the Indian judiciary to infuse accountability in the functioning of government institutions, and the growth and development of human rights jurisprudence has demonstrated the central importance of judicial governance. Of course, there is no doubt that it has posed critical challenges to parliamentary accountability and executive powers and, more important, reinforced the need for improving efficiency and effectiveness of governmental institutions.

The need for social reform preceded the constituent assembly bestowing on the judiciary the role of guardian of individual rights. Hence, the protection of liberties within the constitutional framework needed to be balanced with achieving social reform. The Supreme Court perceived itself to be an institutional guardian of individual liberties against political aggression. In that process, it went beyond the framers' vision of achieving an immediate social revolution. It took upon itself a role like that of the United States Supreme Court as defined by Chief Justice Marshall in *Marbury vs. Madison* (1803). This perception led the court to develop implied limitations on the powers of the political branch that is analogous to the US judiciary's approach to the separation of powers. The best

known of these implied limitations, the 'basic features limitation', precludes the Indian Parliament from amending the constitution in such a way as to displace its basic features.

Civil Society Expectations

Legal provisions relating to human rights as a normative framework provide little guidance and help for the masses in India who are aspiring to fulfill their basic rights their right to acquire and experience the basic needs of survival and existence. The civil society seeks to enforce good governance so that all human rights are promoted and protected. It is imperative for the Indian society to work towards internalizing the values of constitutionalism so that the exercise of all powers is subject to accountability.

Undoubtedly, the wider civil society has embraced the notion of judicial governance, given the fact that it provides certain social expectations for creating accountability. The relaxation of the rules of locus standi; recognition of a range of human rights under the "right to life" provision of the constitution, and the development of public interest litigation are important milestones in meeting civil society expectations on the working of the judiciary.

However, given the range of injustices in our society, institutional responses, including that of the judiciary, need to be further expanded. The Indian experience has demonstrated that the initial judicial recognition of human rights has culminated in the passage of an amendment, which guarantees the fundamental right to education.

If democracy is to become meaningful in India, it should be based on two important factors: enforcement of the rule of law and the reform of the political system, each dwelling upon the other. The judiciary is well suited to support both these initiatives.

SUPREME COURT AS AN INSTITUTION OF CONSTITUTIONAL GOVERNANCE

1. The Indian Supreme Court was imagined as a unique institution that was not supposed to conform to the traditional separation of powers paradigm but rather

become an institution of constitutional governance and how it has mostly lived up to these expectations.

2. Judicial activism and problems related to it.

An Institution of Constitutional Governance

To understand the Indian SC, one must understand India in its unique diversity and deep contradictions. The constitutional makers obviously shared with all constitution makers, worries about the imperfections of any democratic model. However, Indian contradictions on the lines of caste, religion, class and regions meant that shifting and unstable political majorities (not merely parliamentary majorities of the governments of the day but also political majorities forged by various social groups) were inevitable. The shift of the balance of power from the central to state level post nineties as one example that vindicates this suspicion. This inherent instability in our political system was sought to be balanced by envisaging a Supreme Court that played by some basic (and unchanging) rules not merely as an adjudicator of disputes between these political groups but as an instrument of governance itself. Thus, the Indian Supreme Court could not have followed the traditional model of separation of powers. Evidence of this idea is rooted in Article 32 of the constitution which makes the right to judicial remedies the 'heart and soul of the Constitution' (in the words of Dr. Ambedkar). The SC extended this idea in evolving the basic structure doctrine, public interest litigation, reading socio-economic rights and due process in Article 21 etc.

Judicial Activism

Whereas the above-mentioned judicial developments were unusual for constitutional courts and may be called 'activist', certain other actions of the SC are not so (contrary to popular belief). Here, we can refer to Prof. Rosencranz's criticisms, the SC's decisions in the Delhi CNG buses case and the forests case.

CNG Buses

The SC did not order the Delhi buses to convert to using CNG (compressed natural gas) instead of diesel. The legal reasoning of

the case thus: The Environment Protection Act (EPA) empowers the government to protect the environment, which the SC held to imply a duty to protect the environment as well (after all, the Fundamental Duties chapter of the constitution imposes such duty on all citizens). Where a statutory duty is violated, a mandamus lies. The SC directed the government to set up an experts committee that the govt. was empowered to set up under the EPA.

The committee was set up and notified by the government. It met all stakeholders and recommended a switch to CNG. The SC told the government that under the EPA, the recommendation of the committee was binding on the government and asked the government to comply. The bottom line is that policy was not decided by the court but by the executive. The court only forced the executive to take a decision and then to implement it.

Forests Case

The second case that will be discussed is the Forests case. The Forests Policy of 1980 required central approval for diversion of any forest land for non-forest use but did not define 'forest'. The only statutory definitions available were in colonial revenue laws which viewed forests as exploitable properties of the local ruler, and thus narrowly defined. The SC held that for protection of forests, such definitions were inadequate and used the dictionary meaning instead. The court insisted on strict implementation of the policy by adding teeth to it. It dealt with several nuances of the case, including the composition of the Forest Advisory Committee, the cut-off date of 1980 to determine 'encroachers' etc. to elucidate his point.

These cases illustrate that the SC has mostly been only insisting on holding the executive to account to the legislative mandate or its own policies, while disallowing extraneous considerations to affect decisions; this is a classic judicial review function.

There are reasons to worry about the current situation. The importance of the SC has evolved such that the executive of the day is more than happy to transfer all controversial

issues to the court (the latest affidavit in the Sethusamudram issue as an example). This is coupled with an enormous and ever-increasing burden of public expectations from the court and decreasing public faith in the legislature and the executive. This disproportionate burden of public expectations is reflected not in the PILs that are admitted by the SC but the hundreds of deserving PILs that are rejected because the judiciary just cannot keep up.

The system is strained and if unchecked, may collapse because the SC will find it increasingly difficult to live up to these expectations. The only remedy lies in the revival of the legislature and the executive branches as trustworthy organs of government that can deliver.

The next logical step in constitutional adjudication in India will be to develop a heightened standard of scrutiny in fundamental rights cases (which will probably be settled by the decision in the Mandal II case where he argued for strict scrutiny).

The current system of judicial appointments needs to change.

REFERENCES

1. Source Governance and Development. The World Bank; 1992; 1p.
2. Aus AID. Australian Government Overseas Aid Program. Aug 2000. UNDP Reconceptualising Governance, Discussion paper 2, New York. 1997; 9p.
3. www.worldbank.org/publicsector/overview.htm
4. www.europa.eu.int/
5. UNDP expert on ROL.
6. ADB defines ROL.
7. Governance: Sound Development Management. Manila: Asian Development Bank; 1995; 10p.
8. Dahl RA. Polyarchy, Pluralism and Scale. *Scand Political Stud.* 1984; 7(4): 225–240p. [This is an accessible and interesting account of his ideas on democratic government and Polyarchy].
9. Derbyshire JD, Derbyshire I. *Political Systems of the World.* New York: St. Martin's Press; 1996; 684p. [An up-to-date collection of political systems across the world].
10. Elazar DJ. *Exploring Federalism.* Tuscaloosa: University of Alabama Press; 1987; 310p. [A seminal survey of the relationship between constitutional federalism and the working of democracy].
11. Heywood A. *Politics.* London: MacMillan; 1997; 422p. [This contains a good introduction on constitutionalism and democratic government].
12. Keman H. Federalism and Policy Performance: A Conceptual and Empirical Inquiry. In: Wachendorfer-Schmidt U, editor. *Federalism and Political Performance.* London: Routledge; 2000; 249–268p.
13. Lijphart A, editor. *Parliamentary versus Presidential Government.* Oxford: Oxford University Press; 1992; 257p. [A cursory overview of the main differences between these types of government].
14. Maddex RL. *Constitutions of the World.* London: Routledge; 1996; 338p. [A survey of 90 democratic constitutions based on the original documents].

Cite this Article

Niddhi. Constitutional Governance. *Journal of Constitutional Law and Jurisprudence.* 2018; 1(1): 6–20p.