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Link: **Improving Governance through the Judicial Process,** J.S.Verma

Good governance has to conform to the rule of law. Judiciary is the organ of the State entrusted with the task of supervising the faithful implementation of the rule of law as its custodian through the judicial process. This is the critical role of judicial review in the polity governed by the rule of law in every civilized society. Observance of the rule of law is generally accepted as an imperative for any contemporary regime.

Rule of Law

Rule of law is opposed to arbitrariness. The term is derived from the French phrase *'Le Principe de Legality'* meaning administration based on law and not on men. The concept of rule of law dates back to Lord Coke and Bracton who asserted the supremacy of law over the king. This evolved into the principle: *"Be you ever so high, the law is above you".* Dicey's concept of the rule of law initially excluded totally any discretion in the exercise of executive power, but later accepted the minimum discretion needed for decision making exercised judicially, in accordance with known guidelines.

The International Commission of Jurists in the Delhi Declaration (1959) defined and later in 1961 at Lagos confirmed the formulation: *"The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. The dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".* Overtime, the concept of *'fairness'* has emerged as the essence of the concept of the rule of law.

The Indian Supreme Court has described the rule of law as the medium, which synthesizes 'law' and individual 'liberty' in such measure that neither does the law become tyranny, nor liberty a license: Indira Gandhi's case, AIR 1975 SC 2299

Talk by former CJI, J.S.Verma at Singapore on 31 October 2011

Role of the Judiciary in Governance

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

The evolution of the Beijing Principles commenced in 1985 in the Conference of the Chief Justices of the Asia Pacific region in conjunction with the LAWASIA, and culminated in the adoption of the revised principles at Manila in 1997. Its Preamble refers to the UN Charter, UDHR, ICCPR and ICESCR and states the primary object: *"To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region".* Each of them relate to qualitative improvement of governance. It states that *"The judiciary is an institution of the highest value in every society"* (Article 1). A few important provisions in it are indicated.

Article 10. Objectives of the Judiciary

The objectives and functions of the judiciary include the following:

(a) To ensure that all persons are able to live securely under the rule of law;
(b) To promote, within the proper limits of judicial function, the observance and attainment of human rights; and
(c) To administer the law impartially among persons and between persons and the State.

Article 33. Jurisdiction

The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

The Bangalore Principles of Judicial Conduct, 2002 are also important. The essential values stated therein are: *judicial independence, both individual and institutional, as a prerequisite to the rule of law; impartiality, not only to the decision itself but also to the process; integrity; propriety, and appearance of propriety; equality of treatment to all; competence and diligence.*

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

Protection of human rights

Corruption-free governance is recognized as a human right, more so in developing countries. Corruption was identified as the 'Crisis of Governance in South Asia' in the Human Development Report of 1999. The statement of Singapore's Lee Kuan Yew in 1964 is significant. He said:

"The moment key leaders are (less) than incorruptible, less than stern in demanding high standards; from that moment the structure of administrative integrity will weaken and

eventually crumble. Singapore can survive only if Ministers and senior officers are incorruptible and efficient…Only when we uphold the integrity of the administration, can the economy work in a way which enables Singaporeans to clearly see the nexus between hard work and rewards".

In short, the key leaders should be persons of *'impeccable integrity'*, with no past to hide. The political will to combat corruption was the key to the Singapore strategy based on a Corruption Practices Investigation Bureau under the Prime Minister's Office. The strategy included legislation in the form of Prevention of Corruption Act, 1960 and Confiscation of Benefits Act, 1989. In addition, Singapore has signed and ratified the UN Convention Against Corruption, 2003 (UNCAC).

It was the combination of the political will and the legal process which enabled the prevention and punishment of corruption in Singapore. High risk and no gain is the effective strategy to combat corruption in which implementation of the rule of law through the judicial process is a significant component. Singapore has become one of the best models for controlling corruption; it is cited vigorously in India's current crusade against corruption for improving the quality of governance and betterment of people's welfare.

Strategies differ depending on local conditions and needs. Another success story of the region is Hong Kong. The crusade against corruption in Hong Kong was triggered by a commission of inquiry headed by a judge, Sir Blair-Kerr in 1973 to investigate the charge of corruption against a high level police officer who fled the country in a bid to avoid any action. This led to the creation of the Independent Commission Against Corruption (ICAC) in 1974. It uses *prevention, deterrence and education* as strategies to prevent and punish corruption. A holistic approach is the more efficacious mode. Transparency international has ranked Hong Kong among the least corrupt countries in the world. This model is also emphasized in India as an effective method to combat corruption, necessary for good governance.

It is educative to study other models as well. Finland has developed a culture of responsibility in public life by declaring ethical values as the core of public service. Legislation has been enacted to strengthen openness or transparency in government. The UNCAC has also been signed and ratified by Finland. The efficacy in combating corruption has been due to institutions (including judiciary) which are independent in taking action against even the corrupt in the political executive. *The efficacy of action and faith in the independence of the legal framework are critical factors in good governance. This is the essence of the rule of law.*

Corruption has a cascading deleterious impact on all institutions of governance, including those meant for the protection and promotion of human rights. Corruption in the law enforcement agencies is responsible for the violation of several human rights. It also affects the prevention, investigation, prosecution and punishment of crimes. It leads to 'criminalization of politics' and 'politicization of crime'. It facilitates discrimination by arbitrary exercise of power. These are some instances of violations of human rights. Human rights and development are inter-linked. It affects both—justice and development. Thus, corruption erodes the foundation of constitutional governance based on the rule of law.

The seven principles of 'Standards in Public Life' recommended by the Lord Nolan Committee in UK are: *selflessness, integrity, objectivity, accountability, openness, honesty and leadership.* These principles are of universal application. In my view, the three principles needing elaboration to cover all aspects are: openness (transparency), accountability and leadership. Openness or transparency enables availability of all information necessary to enforce accountability of public men, in addition to acting as an internal check against arbitrariness; and leadership is by practice and not by mere precept, which requires leaders to lead by example. These are factors essential for good governance.

The Indian Supreme Court has quoted the above principles with approval in the Vineet Narain v. UOI, AIR 1998 SC 889 (Hawala case):

"These principles of public life are of general application …and one is expected to bear them in mind while scrutinizing the conduct of every holder of a public office….If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated."

More recently, in Centre for PIL v. UOI, (2011) (3) SCALE 148 the Supreme Court set aside the appointment of the Chief Vigilance Commissioner (CVC) on the ground that he did not satisfy the criterion of *'impeccable integrity'* because of being named an accused in a pending criminal trial for corruption; and it also gave statutory status to 'institutional integrity' observing:

"The [High Powered Committee] must also take into consideration the question of institutional competency…Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making the recommendation…for appointment of the Central Vigilance Commissioner."

The above have become law of the land by virtue of Article 141 of the Constitution of India.

Judiciary is regarded with reverence in South Asia. Judicial independence is protected by the constitutional framework in these countries. The Beijing Principles, 1997 are adopted for uniformity of a minimum standard of judicial review with judicial independence and accountability. This has enabled the judiciaries of the region, e.g. in India, Sri Lanka, Bangladesh, Pakistan etc. to liberally interpret and protect the rights of the people, and to develop the human rights jurisprudence.

Indian Experience

Recognition of corruption as an egregious form of human rights violation has empowered the judiciary in India to enforce probity in public life and accountability of public men indulging in corruption. The above Hawala case developed the judicial process of *'continuing mandamus'*

to monitor investigation into such offences alleged against the high and mighty when the premier investigating agency was dragging its feet to subvert the rule of law. Since then, this process has become a precedent for its use in the later similar situations, such as, 2G spectrum and CWG cases.

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

Even though the *'due process'* was consciously excluded in drafting the Constitution, it has been read into the requirement of *'fairness'* and *'non-arbitrariness'*, which are constitutional guarantees. Similarly, the socio-economic and cultural rights enacted as the directive principles of State policy, though stated to be non-justiciable, are made justiciable by judicial creativity of reading them within the scope of the justiciable fundamental rights.

Right to speedy trial and right to privacy in telephonic conversation so that unauthorized telephone tapping is illegal, domiciliary visit by police without authority of law have been read judicially into the justiciable right under Article 21. Right to know is implied into the right to freedom of speech and expression guaranteed in Article 19(1)(a). The freedom of press without any mention in the Constitution of India is derived from the people's *'right to know'*. It has also been held that the fundamental rights under Articles 14 and 21 are available even to non-citizens. The *'doctrine of trust'* and the *'principle of intergenerational equity'* to preserve environment and ecology have been read judicially into the scope of Article 21 with the aid of the directive principle in Article 48A and the citizen's duty under Article 51A(g). Adequate medical aid to preserve life has been held to be a State obligation even for an offender. It was also held that the rule of non-arbitrariness in Article 14 applies equally to the contractual obligations of the State. The principle of *'legitimate expectation'* in decision making by the State has received judicial recognition. Due process was consciously excluded from the enacted constitutional provisions, but it has been read in Articles 14 and 21 as requisite of 'fairness'. Fairness has been construed as a necessary concomitant of not only the judicial process, but also of administrative action. The doctrine that the *'basic structure'* of the Constitution is indestructible and beyond the amending power of the Parliament evolved by the Supreme Court in Keshavananda Bharti, AIR 1973 SC 1461 has been revolutionary.

Some judicial verdicts that relate to the specified instances are: Ku. Srilekha Vidyarthi, AIR 1991 SC 537; Food Corporation of India, AIR 1993 SC 1601; Smt. Maneka Gandhi, AIR 1978 SC 597; Hussainara Khatoon, AIR 1979 SC 1360; PUCL, AIR 1997 SC 568; Govind, AIR 1975 SC 1378; Kharak Singh, AIR 1963 SC 1295; Express Newspapers, AIR 1986 SC 872; NHRC, AIR 1996 SC 1234; Parmanand Katara, AIR 1989 SC 2039; Francis Coralie Mulin, AIR 1981 SC 746; RLEK, AIR 1987 SC 359 & AIR 1989 594; TN Godavarman, AIR 1997 SC 1228 etc.

The judicial intervention in the above Hawala case was occasioned by the failure or inaction of the CBI to investigate and prosecute many high functionaries accused of corruption and pilferage of public money for personal gains. The legitimacy of judicial intervention was based on violation of the fundamental rights of equality (Article 14) and of the right to life (Article 21) of the entire populace, which obliged the Supreme Court to invoke the constitutional remedy under Article 32 to protect and enforce these rights, and to invoke its plenary power under Article 142 to make such order as may be necessary for doing complete justice in the cause. This intervention led to the development of the judicial tool called *'continuing mandamus'*; and recognition of corruption-free governance as a human right way back in the year 1993.

The Indian Supreme Court also read the mandate of the non-justiciable directive principles of State policy into the fundamental rights, particularly Articles 14 and 21, to indirectly make them enforceable through the judicial process. Judicial intervention in environmental matters was made possible from the decade of 1980s by reading the directive principle of State policy under Article 48A of preserving the environment and ecology with the citizen's fundamental duty under Article 51A(g) into the fundamental right to life under Article 21. These judicial interventions have made a visible impact on the international programme for protection of the environment; and also promoted the realization of the MDG of *'sustainable development'*.

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

There is also an interesting instance of the judiciary stepping in to fill the lacuna in legislation for the protection and enforcement of the fundamental rights of the working women at the work places. The decision in Vishakha v. State of Rajasthan, AIR 1997 SC 3011 is that instance. The Supreme Court defined *'sexual harassment'* at the place of work and prescribed a mechanism for its prevention and punishment. This is the declared law under Article 141 to operate in the vacant field till the legislature enacts legislation to replace it. Its efficacy can be judged from the fact that the State as well as the private sector has adopted it, and the legislature is relying on it for drafting legislation to cover the field.

Another instance of judicial creativity for quicker access to justice is the development of the public law remedy of compensation as a model for enforcement of a human right, distinct from

and in addition to, the private law remedy in tort: Nilabati Behera, AIR 1993 SC 1960. Many of these decisions have been followed by the judiciaries in similar jurisdictions.

The Supreme Court of Bangladesh has adopted the doctrine of 'basic structure' relying on the decision in Keshavananda Bharti. Nilabati Behera has been followed in New Zealand. Pakistan judiciary has liberalized locus standi to expand the fields of human rights and environment etc. Judicial review has been extended to determine the constitutionality of dissolution of the legislature, akin to the view of the Indian Supreme Court in SR Bommai, AIR 1994 SC 1918. Similarly in the matter of appointment of judges, the concept of judicial independence and the Indian view in the Second Judge's case, AIR 1994 SC 268 has been followed. In Nepal, judicial review has been extended to the issue of the loss of confidence of the House in the Ministry; Sri Lanka's judiciary has taken a similar view on many such issues.

State responsibility

The state responsibility of protecting the human rights within its jurisdiction is to be ensured by the judiciary. The constitution of the National Human Rights Institutions (NHRIs) according to the Paris Principles in the countries enables the NHRI to complement the judiciary's role in the performance of this task. The National Human Rights Commission of India has set the tone for better protection of the human rights by its complementarity with the Supreme Court. In the context of the communal violence in Gujarat in 2002, the NHRC spelled out the State responsibility, thus:

"It is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights".

On the above principle, the State government of Gujarat was held accountable for the violation of human rights of the victims of the communal disturbances. The Supreme Court has taken the follow up action to proceed against the culprits. The complementarity between the judiciary and the NHRC in India is assisting in monitoring misgovernance and in improving its quality. Strengthening the two institutions and developing the complementarity between them is an example worth replication everywhere.

Conclusion

The judiciary as the custodian of the rule of law is the vanguard of all the national institutions to ensure good governance by overseeing the functioning of all public authorities; and by compelling the performance of the public duties by them. The oversight of judicial review is meant to serve this purpose. There has been a sea change in the judiciary's role from that of the 'least dangerous branch' described by Alexander Hamilton in the 78th Federalist, to a very

potent tool of the State. The pro-active judiciary must justify that status by maintaining its independence with accountability, confining itself within the limits delineated by the national Constitution.