

# **ROLE OF JUDICIARY IN ENSURING TRANSPARENCY IN GOVERNANCE**

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Good governance signifies the way an administration improves the standard of living of the members of its society by creating and making available the basic amenities of life; providing its people security and the opportunity to better their lot; instill hope in their heart for a promising future. Providing, on an equal and equitable basis, access to opportunities for personal growth; affording participation and capacity to influence, in the decision making in public affairs; sustaining a responsive judicial system which dispenses justice on merits in a fair, unbiased and meaningful manner; and maintaining accountability and honesty in each wing or functionary of the Government. As per the United Nation's Commission on Human Rights, the key attributes of good governance include transparency, responsibility, accountability, participation and responsiveness to the needs of the people. Good governance is thus linked to an enabling environment conducive to the enjoyment of Human Rights and promoting growth and sustainable human development. In a nutshell, Good Governance entails effective participation in public policy making, the prevalence of the Rule of law and an independent judiciary, besides a system of institutional checks and balances through horizontal and vertical separation of powers, and effective oversight agencies.

Transparency means knowing the reasons, facts, logics and basis of the decision taken by the administration. Transparency in public administration in legal terms means that a citizen of India has a right (legal or fundamental) to have access to the information about government's actions. Undisputedly, transparency in Public administration will make the executive more responsible and friendly.

In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. Parliamentary democracy is a part of the Basic Structure of our Constitution. It is trite that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. Benjamin Disraeli, the Prime Minister of Great Britain said: *“I repeat..... that all power is a trust-that we are accountable for its exercise-that, from the people and for the people, all springs, and all must exist.”*

In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. To cover the veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. The Seven Principles of Public Life are stated in the Report by Lord Nolan, thus:

***“The Seven Principles of Public Life:***

***Selflessness***

*Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.*

***Integrity***

*Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.*

***Objectivity***

*In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choice on merit.*

### ***Accountability***

*Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.*

### ***Openness***

*Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.*

### ***Honesty***

*Holders of public office have a duty to declare any private interest relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.*

### ***Leadership***

*Holders of public office should promote and support these principles by leadership and example.”*

These principles of public life are of general application in every democracy and one is expected to bear them in mind while scrutinizing the conduct of every holder of a public office. Over the years these principles are evaporating from the holders of public office. It has resulted in complex decay of values in public life. Ill effects are felt in all walks of life. Antisocial elements have gained upper hand and are able to influence the running of the administration of the country. They have spread their tentacles in all wings of the Government. In this background it is relevant to recall the words of two eminent personalities who had an active role in framing the Indian Constitution.

Dr. Rajendra Prasad, Chairman of the Constituent Assembly of India, as its concluding session cautioned:

*“Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend on the men who administer it. It is trite saying that a country can have only the government it deserves..... After all, a Constitution, like a machine, is lifeless thing.... If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country... India needs today nothing more than a set of honest men who will have the interest of the country before them.”*

Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Constitution, stated in the Constituent Assembly at its meeting on 25<sup>th</sup> November 1949 as under.

*“However good a Constitution may be, it sure to turn out bad because those who are called to work it happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it happen to be good lot. The working of the Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of the State such as the legislature, the executive and the judiciary. The factors on which the working of these organs of the state depends are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave?”*

The honest men who will have the interest of the country before them have become scarce. The persons who are called to work the Constitution have turned out to be bad. The result is alarming. How the people of India and the political parties have behaved could be gathered from the following two reports:-

The union of India constituted a committee on 9.7.1993 under the Chairmanship of Sri N.N. Vohra, the erstwhile Home Secretary, which was popularly described as Vohra Committee *“to take urgent stock of all available information about the activities and links of all mafia organizations/elements, to enable further action.”* The Committee in its report in para 6.2 stated that, there has been a rapid spread and growth of criminal gangs armed senas, drug mafia, smuggling gangs, drug peddlers and economic lobbies in the country which have, over the years, developed an extensive network of contacts with the bureaucrats/government

functionaries at the local level, politicians, media persons and strategically located individuals in the non-state sector and members of the judiciary. Some of these criminal syndicates also have international linkages, including the foreign intelligence agencies. The Report recommended that an efficient Nodal Cell be set up with powers to take stringent action against crime syndicates, while ensuring that it would be immune from being exploited or influenced.

Similarly, the Law Commission of India in its 170<sup>th</sup> Report recommended for debarring a candidate from contesting an election if charges have been framed against him by a Court in respect of certain offences and necessity for a candidate seeking to contest election to furnish details regarding criminal cases, if any, pending against him. It also suggested that true and correct statement of assets owned by the candidate, his/her spouse and dependent relations should also be disclosed.

These two reports show the state of affairs of the country about two decades back. In spite of these reports, no remedial steps were taken by the Government. The reason is obvious. Actions have to be taken against the elected representatives and the persons in power. Action is to be taken by them. That is the predicament in which the country was placed. Then the judicial activism of the Apex Court followed by the various High Courts paved the way for ensuring transparency in Governments.

An independent judiciary is important for preserving the Rule of law and is, therefore, most important facet of good governance. The Judicial system has an important role to play ultimately in ensuring better public governance. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. There is no area where the judgments of Supreme Court have not played a significant role in the governance - good governance - whether it be environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution.

Indian Judiciary has been pro-active and has scrupulously and overzealously guarded the rights fundamental for human existence. The scope of right to life has been enlarged so as

to read within its compass the right to live with dignity, right to healthy environment, right to humane conditions of work, right to education, right to shelter and social security, right to know, right to adequate nutrition and clothing and so on. This has been achieved by filling the vacuum in municipal law by applying, wherever necessary, international instruments governing human rights. The Supreme Court has, over the years, elaborated the scope of fundamental rights consistently, strenuously opposing intrusions into them by agents of the State, thereby upholding the rights and dignity of individual, in true spirit of good governance. In case after case, the Court has issued a range of commands for law enforcement, dealing with an array of aspects of executive action in general, and of police at the cutting edge level in particular. Some of those areas where judicial intervention led to ensuring transparency in governance are:-

#### **(a) Electoral Reforms**

In a democratic form of Government, votes are of utmost importance. They have right to elect or re-elect on the basis of the antecedents and past performance of the candidate. The voter has the choice of deciding whether holding of educational qualification or holding of property to be his representative. The voter has to decide whether he should cast vote in favour of a candidate who is involved in a criminal case. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided, its result. If pending, whether charge has been framed or cognizance has been taken by the Court. There is no necessity of suppressing the relevant facts from the voters.

The right to get information in a democracy is recognized throughout and it is a natural right flowing from the concept of democracy. In a democracy, the electoral process has a strategic role. Voter's speech or expression in case of election would include casting of vote, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. When there was no provision in the Constitution or the Representation of the People Act, 1951 a Public Interest petition was filed in the Bombay High Court seeking for a direction to the Election Commission to secure to the voters the information regarding whether the candidate is accused of any offence punishable

with imprisonment thereof, if so the details thereof, the assets possessed by a candidate or his spouse and dependent relations and other particulars, pertaining to each of the candidates contesting election to Parliament and to the state legislatures and the parties they represent.

The Bombay High Court allowed the Writ Petition, issued the direction sought for. The same was challenged by the Union of India before the Apex Court in the case of *Union of India vs. Association for Democratic Reforms* {(2002)5 SCC 294}. The Apex Court held that the directions issued by the High Court are not unjust or beyond its jurisdiction. However, some of the directions came to be modified. It directed the Election Commission to call for information on affidavit from each candidate furnishing therein information, whether the candidate is convicted/acquitted/discharged of any criminal offence or fine and if any, whether he is punished with imprisonment or fine and also information regarding pending case, of any offence punishable with imprisonment of two years or more in which charge is framed or cognizance is taken; The assets of a candidate and of his/her spouse and that of dependents; liabilities, if any, particularly whether there are any over dues of any public financial institution or government dues and the educational qualification of the candidate. It was held that, in the absence of any law passed by the Parliament covering the said field, the Election Commission has the power to issue these directions calling for the said information by virtue of Article 324 of the Constitution of India which vests with the Election Commission- superintendence, direction and control of elections to Parliament and the State Legislature. The said phrase ‘conduct of elections’ was held to be of a wide amplitude which would include power to make all necessary provisions for conducting free and fair elections. To get over the effect of the said judgment, the Parliament promulgated the Representation of the People (Amendment) Ordinance, 2002 on 24-08-2002 by inserting Section 33A and 33B to the Representation of the People Act, 1951 though partially incorporating the directions, the legislature took shelter under the amendment to deny the rest of the information. The same was challenged before the Apex Court on the ground it sets at naught the judgment of the Apex Court. After hearing of the Writ Petition by the Apex Court, the said Ordinance was repealed on 28-12-2002 and the Representation of the People (Third Amendment) Act, 2002 was notified to come into force forthwith with retrospective effect. Therefore, an amendment application was moved challenging the validity of the amended Act. The Sections in the Ordinance and the Sections in the Amendment Act were identical. The Apex Court after hearing all the parties concerned held that, Section 33B does not pass the test of

Constitutionality as it offends Article 19(1)(a) of the Constitution and the directions issued earlier by the Election Commission was restored.

Subsequently, one more public interest litigation was filed before the Apex Court in the case of *Lily Thomas vs Union of India* {(2013) 7 SCC 653} for a declaration that sub-section(4) of Section 8 of the Representation of the People Act, 1951 is ultra vires the Constitution. The grievance was, when a member of the Parliament or the Legislature of the State suffers a conviction and a sentence in criminal court for the offences mentioned in Section 8(1)(a) of the Act, sub-section (4) provides that, in such a conviction or sentence, the disqualification consequent to such conviction would not take effect until three months have elapsed from that date or within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. After carefully examining the Constitutional provisions contained in Articles 102 and 191 of the Constitution, the said Section 8(4) was held to be unconstitutional and it was held the disqualification comes into effect forthwith. To get over the judgment an Ordinance was about to be passed, which was aborted because of the public opinion.

The last judgment is in the case of *People's Union for Civil Liberties vs. Union of India* {(2013)10SCC1} upholding the right of a voter by declaring the right to vote as well as right not to vote has been statutorily recognized under Section 79(d) of the Act read with Rules 41(2) and (3) and 49(O) of the Rules, which is now popularly known as "NOTA".

But, for the judicial intervention, the electoral process in the country, the Constitutional provisions and the provisions of the Representation of the People Act, would not have been transparent and those vital information which is required for a voter before he casts his vote would not have been made available. In fact, the effect of these judgments, are very much seen. Though in spite of these judgments, political parties are still giving tickets to persons with criminal record, considerably the said numbers have come down. At the same time persons who are convicted have vacated the seat of power forthwith. This is a healthy trend in an infant democracy like ours which was possible only because of judicial intervention.



## **(b) Right to Information**

A democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all aspects of the issue, in respect of which they are called up to express their views. One sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations.

To ensure the continued participation of the people in the democratic process they must be kept informed about the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. The right of access to public information is the first step to a more open public administration. Another important function of the right of access to information is that it allows citizens to supervise the public administration's work. That legally protected right of access means citizens can obtain any public information, thus placing the work of the public administration under the microscope of citizens. The public administration can no longer hide or hold back information for its own exclusive use, but must make it all available to interested parties. This allows citizens to supervise the authorities, which works toward preventing poor management, abuse of power and corruption.

The Apex Court has declared that right to information is a Fundamental Right emanating from Article 19(1) (a) of the Constitution of India. Starting from the judgment in *Rajnarayan's case* in 1975 and the judicial activism of the Apex Court in recognizing this right and enforcing the same, the Government was forced to promulgate the Right to Information Act, 2005. After the passing of such law, we have seen in the last decade how the said law has worked. It has worked miracles. It is very apt to recall the proposition of the

American Judge Louis Brandeis, which reads “*Sunlight is the best disinfectant and electricity is the best policeman.*” This is the foundational premise of right to information. In the realm of governance, if the decision making is veiled by mark of secrecy, the outcome will be at one level. If the decision making is open and transparent, it will definitely be in promotion of public interest.

### **(C) Public Employment**

In the field of public employment, the judicial pronouncements rendered from time to time for the past four decades have brought about transparency in recruitment process to public offices and brought complete transparency in disciplinary proceedings and also in enhancing working conditions of Government employees. Today however, high a person may be holding an office in the administration, he cannot pick and choose and appoint an employee even to the lowest post. For every recruitment to such a public post, equal opportunity should be given to all persons by giving wide publicity in newspapers, gazettes. After receipt of applications, depending upon the posts, examinations are conducted, interviews are conducted, on the basis of the merit selection is made. The results of such examination are made public, thus bringing about complete transparency in recruitment.

The various orders passed by various courts including the Supreme Court have brought in transparency in the functioning of not only the Government departments which are the recruiting agency but also in the functioning of the Public Service Commission, a Constitutional authority which is empowered to make the recruitments. Litigations arising out of these employments are threadbare discussed, analyzed and where they are illegal it is quashed and also guidelines/suggestions are given for a fair and proper recruitment. The law developed in this country in this regard is a sufficient indication of judicial intervention and efforts made in bringing about transparency in the selection process/public employment.

### **(d) Reservation**

Articles 15 and 16 of the Constitution of India provides for reservation for advancement of socially and educationally backward classes of citizens and for the Scheduled

Castes and Scheduled Tribes, both in the matter of admission to educational institutions including private educational institutions and public employment. Whenever the benefit of the said Constitutional provisions are not accorded, the High Court or the Supreme Court have interfered and ensured compliance of the said Constitutional provisions and the benefit conferred under these provisions reach the needy persons. In fact, a plethora of decisions of the Court speak volumes of the effort on the part of the Judiciary in upholding this concept of social Justice.

#### **(e) Educational Field**

Similarly, in the matter of admissions to professional colleges throughout the length and breadth of the country, judicial intervention over a period of more than three decades has ensured a meritorious student, who is entitled to admission on the basis of merit or reservation is not deprived of the seat. Private educational institutions which are imparting education in professional course were brought within the purview of Article 226 of the Constitution by treating them as 'State' as they are performing the functions of the State in imparting education. Therefore, the entire process of admission, examination conducted, to decide the merits prior to such admissions, are all transparent and every one would know what is the marks obtained by each candidate in such examination, what is their ranking, how many seats are available in each educational institution, how those seats are filled up and whether they are filled contrary to Rules or directions issued by the Courts, are all made known by publication. Therefore, by such judicial intervention, not only transparency is brought about but also the social objective of the Constitution is also fulfilled.

#### **(f) Protection of Women at Workplace**

In the absence of any law protecting working women from sexual harassment at the work place, nearly about 16 years back the Apex Court in its landmark judgment in *Vishaka and others, v. State of Rajasthan* laid down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right of gender equality of working women. The Supreme Court guidelines were based on the Convention on the Elimination of All Forms Discrimination against Women, adopted by the General Assembly of the United Nations, in 1979, which

India has both signed and ratified. Even after the court laying down the guidelines protecting the interest of the women at the work place, the Parliament has taken 16 years to pass a suitable legislation ensuring women a safe and healthy environment. Finally Parliament enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Therefore, the Courts are always ahead of the legislature.

#### **(g) Right to Education**

The Apex Court in a series of judgments declared right to primary education as a Fundamental Right and thereafter it went issuing directions to the Union Government in various contexts. The Apex Court held that right to primary education emanates from Article 21 of the Constitution which deals with protection of life and personal liberty. It was held that, without education the said fundamental right has no meaning. This compelled the Parliament to amend the Constitution itself inserting Article 21A- Right to Education providing free and compulsory education to all children of the age 6 to 14 years in such manner as the State may be law determine. Today up to 14 years a child is entitled to free education in a Governmental institution. To give effect to this Fundamental Right, the Parliament has also enacted the Right of Children to Free and Compulsory Education Act, 2009 providing for education to children even in private educational institutions and making obligatory for the State Governments to bear the expense of that education. Therefore, the said Article in the Act aims at not only providing primary education to the children but also quality education and at the expense of the State.

#### **(h) Protection and Conservation of Forest**

The Apex Court in the case of *Rural Litigation and Entitlement Kendra and Others vs. State of Uttar Pradesh and Others* {AIR 1987 SC 359}, the first of its kind in the country invoking the issues relating to environment and ecological balance, directed closing down of quarries located within the municipal limits of Mussoorie and also passed orders on how the lime stone quarries at other places have to function. In fact, it appointed a committee for the purpose of inspecting all the mines other than those belonging to the State and the Union. With a view to determine whether the safety standards laid down in the Mines Act, 1952 and the Rules were observed or not and whether there was any danger of landslides on account of

the quarrying operation particularly during the monsoon in any of the mines and if there was any other hazard to individuals, cattle or agricultural lands by reason of the carrying on of mining operations. Blasting operations in the area were also directed to be stopped. The said committee was known as Bhargava Committee and its recommendations were accepted. Appropriate actions were taken. Thus, the Himalayan range on the northern boundary of India which is responsible to regulate the monsoon and consequently rainfall in the Indo-gangetic belt is safe. Consequently, the perennial rivers the Ganga, Yamuna and Brahmaputra as also several other tributaries are also saved. The threat to the valley because of erratic, irrational and uncontrolled quarrying of limestone came to be stopped. But for the judicial intervention, probably, we would have damaged the Himalayas which has been the store house of herbs shrubs and plants. Deep forests on the lower hills have helped to generate congenial conditions for good rain.

Similarly, the Apex Court in the case of *T.N. Godavarman Thirumulkapad vs. Union of India and Other* {AIR 1997 SC 1228} intervened for the protection and conservation of forest throughout the country. Though Forest (Conservation) Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance, the said provisions were applied to all forests irrespective of the nature of ownership or classification thereof. Therefore, interpreting the word 'forest' it was held, the term 'forest land' occurring in Section 2 will not only include 'forest' as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. Therefore, all on-going forest activity within any 'forest' in any state throughout the country without the prior approval of the Central Government was directed to be stopped forthwith. Running of saw mills, of any kind of industries including veneer or ply-wood mills and mining of any mineral are non-forest purpose and was held to be not permissible without prior approval of the Central Government. Directions were issued to State Governments to promptly ensure total cessation of such actions forthwith. The State Governments were directed to constitute expert committees to identify the forest and to take appropriate steps for its protection. In the said case, from time to time, directions are issued for protection, conservation of forest and the forest wealth. But for the judicial intervention of the Apex Court, by this time the forest cover in the country which is most essential for getting proper rainfall would have been reduced to minimum. Recently, the Apex Court has passed orders stopping mining activities which are within the forest area.

### **(i) Whistle Blowers Protection Act, 2011**

In November 2003, Satyendra Dubey, a whistleblower and a National Highways Authority of India (NHAI) engineer was murdered after he exposed corruption in the construction of highways. Two years later, an Indian Oil Corporation Officer, Shanmughan Manjunath, was murdered for sealing a petrol pump that was selling adulterated fuel. A Karnataka official S.P. Mahantesh, said to be a whistle-blower in controversial land allotments by societies was murdered in May 2012. The activists demanded that a law should be framed to protect the whistleblowers, to facilitate the disclosure of information and uncover corruption in government organizations. Taking note of these unfortunate instances, the Apex Court pressed the Government into issuing an office order. As a result, the Public Interest Disclosures and Protection of Informers Resolution, 2004 designating Chief Vigilance Commission (CVC) as the nodal agency was issued. However, the Apex Court refused to frame any guidelines for protection of whistle blowers in the country but allowed the petitioners to approach the High Court for protection of whistleblowers in a specific case. In 2013, the Apex Court ruled that identity of whistleblower can never be revealed to the accused facing prosecution under the Prevention of Corruption Act, 1988. As a result of these efforts the Parliament enacted law to protect the whistleblowers, i.e., persons making disclosures relating to corruption, misuse of power, or criminal offence by a public servant.

These are only some of the instances where the judicial intervention has brought about revolutionary changes in the working of the Constitution as well as in the governance of the populace. Today there is no aspect of governance which is untouched by the Judiciary. It is axiomatic that in a Constitutional democracy, citizens have a right to know about the affairs of the Government, which has been elected by them. One of the main reasons for failure of experiment of democracy in other countries is the denial of its right to know and the affairs of the State not being transparent. In India, immediately after independence, as great men shouldered responsibility of running the democratically formed Government, their actions were not only transparent but fair. But over the years, because of the persons who occupied the office of power and the way they started exercising this power they did not allow their actions to be transparent. It is here that the role of Indian Judiciary assumes importance. The citizens approached the Courts for enforcement of these rights. The judicial

activism of the Apex Court and also the High Courts led to transparency in governance. That is the main reason why democracy has taken deep roots in this country notwithstanding so many deficiencies, which are there in the system. It is here that India stands out differently from all its neighboring countries.

Where society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their Government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only if people know how Government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory. The Judiciary has enabled the citizens of this country to participate in the democratic process and has thus strengthened the democracy in the country.