

**HUMAN RIGHTS: THE ESSENCE OF CONSTITUTIONAL
GOVERNANCE - INDIAN SCENARIO***

[LECTURE II]

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The greatest of all the means—for ensuring the stability of Constitutions - but which is nowadays generally neglected - is the education of citizens in the spirit of the Constitution.— Licentiousness may exist in a state as in individual persons—. The education of a citizen in the spirit of his Constitution does not consist in his doing the actions in which—the adherents of democracy might delight. It consists in doing the actions by which—a democracy will be enabled to survive.— The democrat starts by assuming that justice consists in equality: he proceeds to identify equality with the sovereignty of the will of the masses; he ends with the view that 'liberty and equality' consist in 'doing what one likes'.—

This is a mean conception of liberty. To live by the rule of the Constitution ought not to be regarded as slavery, but rather as salvation.

[Aristotle's Politics (335-322 B.C.)]

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1. LINKAGE OF HUMAN DEVELOPMENT INDEX (HDI) WITH GOVERNANCE

As has been noticed earlier, the Human Development Index (HDI) depends on good governance and it is now the measure of nation's progress and ranking. The crisis of governance in South Asia, according to the Human Development Report (1999) of the Mahbub ul Haq Development Centre, is the cause for its lower HDI. The foreword to the report says:

The unique feature of this Report is the concept of humane governance that puts people at the Centre of all governance policies, strategies, and actions. The basic precepts of the human development model are to improve the capabilities and expand the opportunities of all people, irrespective of class, caste, gender, and ethnicity. The concept of humane governance takes this model forward by asserting that governance, if it is to promote human development, has to be not just pro-people or people-centered, it has to be owned by people.

The legitimate goal of development is to build human capabilities and enlarge human choices which is the task of good governance. Augmentation of human resources is achieved through human development. An overview of the situation in South Asia identifies the causes of the crises of governance: democracy is fast turning into an empty ritual in many Asian states, crushing burden of taxes on the poor, endemic corruption, illogical priorities in core human development concerns, snapping of link between the governed and the government, between the public and the policy makers. It is emphasised that a new vision and architecture of humane governance, built upon the principles of ownership, decency and accountability, have become imperative and that humane governance must lead to broad-based economic growth and social development.

Amartya Sen has identified illiteracy, malnutrition and lack of health care as the three great unfreedoms while speaking of

'development as freedom'. Rampant poverty is a prevailing curse and misgovernance is adding to the misery. Amartya Sen has also highlighted that famine is unknown in a democracy which emphasises the significance of democratic form of governance for human development and human rights. If there are even now starvation deaths in India, they are not because of lack of food but because of misgovernance in not making available the stored extra food elsewhere to the needy, in spite of available means of transport. These are all issues relating to governance. The linkage between human rights, human development and governance is clear and explicit.

2. NATURE OF POLITY

The nature of polity envisaged by the Constitution of India appears from the objective specified in the Preamble, which contains the basic structure of our Constitution. The mosaic of pluralism and the creed of secularism are distinctive features of the Indian culture which finds reiteration in the Constitution. Justice, liberty, equality and fraternity are promised to be secured to all citizens assuring the dignity of the individual and the unity and integrity of the nation. 'Unity in diversity' is the unique feature of the Indian polity, peculiar in the existing world order. The Constitution has been framed to embody these principles of the Indian polity, respecting human rights and providing the guiding principles of the envisaged governance.

The Directive Principles of State Policy are the principles fundamental in governance of the country (art. 37). The Directive Principles embody the concept of a welfare state. [*Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461]. The Directive Principles are a supplement to the Fundamental Rights for achieving a welfare state, and this is how the scope and content of the Fundamental Rights, which are justiciable, have been enlarged. These Directive Principles are a mandate to the State indicating the nature of polity envisaged, while the Fundamental Rights in Part-III are the guarantee of human rights to the individuals protecting their invasion by the State. The two are to be read together for a

The Directive Principles fundamental in governance of the country (Part-IV-arts. 38 to 50) require the State to secure a social order for the promotion of welfare of the people, to secure distributive justice and right to development with full dignity, right to work, to education and social security, provision for just and humane conditions of work, provision for free and compulsory education for children, promotion of the educational and economic interests of the weaker sections, to raise the level of nutrition and standards of living and to improve public health, and protection of environment, ecology and wild life etc. In short, while the Fundamental Rights in Part-III (arts. 14 to 32) guarantee the civil and political rights of the individuals, the Directive Principles in Part-IV mandate the state to constitute a welfare state wherein the economic, social and cultural rights of the people are realised. Parts-III and IV of the Constitution correspond to the provisions of the Universal Declaration of Human Rights.

Article 51A in Part IVA was inserted later by amendment to enumerate the Fundamental Duties of citizens. Parts-III, IV and IVA together form a compendium and indicate the nature of polity in which every citizen along with the government has a role to play in achieving the desired result. The linkage between human rights and human development and of the two with governance is clearly the scheme of the Constitution of India. It is, therefore, unthinkable that any one of them can be visualized independent of the other two or separately as a different or distinct concept.

3. HUMAN DIGNITY - A CORE VALUE

It is obvious that dignity of the individual being a core value, and the aim of a welfare state through human development being fundamental to governance, the essence of constitutional governance is emphasis on human rights, and that is our constitutional philosophy. The enactment of art. 51A - Fundamental Duties, indicates the emphasis on the participatory role of the people in governance to make it truly representative in character. The bond between Fundamental Rights, Directive Principles and Fundamental Duties has also been judicially

recognized in India by resorting to some Directive Principles and Fundamental Duties to enlarge the content and scope of some Fundamental Rights, namely, right to equality (art. 14) and right to life (art.21).

Our Constitution provides for restriction on the Fundamental Rights only in exceptional situations, and then too, arts. 20 and 21 are expressly made non-derogable by art. 359. The need for any such curb arises when there is a situation in which the normal constitutional governance faces difficulty. Not unoften, these exceptional situations, which give rise to the need to curb human rights in national interest, are themselves the result of misgovernance or aberration in constitutional governance. The need is to remember that the constitutional governance, as envisaged, respects basic human rights and promotes human development in all situations.

4. CONSTITUTIONAL PHILOSOPHY

Good governance promotes economic growth and development. There is need for economic growth model which empowers people and raises HDI level. Even though India has 1/6* of the world population, its GDP is 1.35% of the world GDP which needs to be raised to 4%. China has increased its GDP to 3.2%. The Foreign Direct Investment (FDI) inflow in India is US\$ 3.5 billion against US\$ 105 billion of China, of which 70% is from Non-Resident Chinese. Indians are very successful in foreign countries which show their high potential. Below par performance within India is attributable only to the crisis in governance. Twenty-five million NRIs generate GDP of US\$ 400 billion against India's GDP of US\$ 440 billion. NRIs save over US\$ 100 billion. The need is to attract FDI to give our economy the needed capital. This can be achieved only through good governance as envisaged by the Constitution. It is worth recalling the factors identified in the Human Development Report (1999) on the crisis of governance in South Asia.

The vast potential in the form of human resources in our country remaining unrealised is the cause of tardy and lop-sided progress

of the nation. Good governance is needed, which is envisaged by our Constitution, to realise the full potential and achieve uniformity in development. This aspect has recently been highlighted even by the US Treasury Secretary, Paul O'Neill, while in India. He said that India is one of the most restrictive economies in the world and bribery and corruption in the country were frightening away businessmen and investors. He also said that *'Good governance means ruling justly, enforcing laws and contracts fairly, respecting human rights and property rights and fighting corruption.'* The emphasis laid is that fairness, justice, respect for human rights and corruption-free governance are necessary concomitants of good governance. The US Treasury Secretary mentioned the disturbing trend of lower FDI inflow in India as compared to China, in spite of the democratic polity in India which China lacks; and attributed the contrast to poor governance in India. A three-point formula suggested by him is: 'good governance, economic freedom and investment in people to realise the full potential of human resources'. This is stating the obvious, which needs urgent action.

Failure to realise the full potential of human resources is due to failure to effectively invest in the people by ensuring human development through education and good health. Incidentally, the mandate of the Directive Principles includes free and compulsory education until the age of 14 years (art. 45) and raising the level of nutrition and the standards of living of the people and the improvement of public health (art.47). These continue to remain unfulfilled promises even after half a century, notwithstanding the judicial interpretation of art. 21 to include these aspects in the 'right to life'. These facets are also two unfreedoms named by Amartya Sen.

India on the one hand has amazing examples of high technological developments and on the other, the spread of HIV/AIDS pandemic, child labour and bonded labour, and vast numbers surviving even now on less than \$1 a day. These glaring disparities coupled with starvation deaths even now, in spite of surplus food, is attributable to lack of good governance, if not mis-governance. The principles fundamental in governance prescribed in the Directive Principles

indicate the essence of good governance envisaged by the Constitution and the deficiency is, therefore, only in the requirement of conformity to those principles.

The text of the Constitution and the constitutional philosophy are of the good governance. Dr. Rajendra Prasad, at the time of adoption of the Constitution in the Constituent Assembly was prophetic when he said that the worth of the Constitution would depend on the worth of the men who work it. Good governance transcending to the level of humane governance is the vision of the Constitution of India. Policies with country's interest as paramount and their implementation with honesty and integrity lead to good governance. Public service is a public trust requiring all public men to place nation first and above personal gain.

The significant feature of our constitutional governance is the accountability of all public men for which there is need of an effective mechanism for enforcement. The nature of mechanism may vary, depending on the level at which it has to be applied, but the basic principle in a republican democracy of accountability of every public functionary to the people must be adhered to. Our Constitution envisages, as indicated by Dr. Rajendra Prasad, the development of proper conventions in due course to fill the gaps i.e. silence of the Constitution. Good governance also requires that to be done. We have enough human capability and the competence but the need is to capitalize our assets by good governance and effective administration.

It is worth recalling the 'standards in public life' and the seven principles recommended by the Nolan Committee in England, which apply to all aspects of public life, are:

1. *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.
2. *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.
3. *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 choices on merit.
 4. *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.
 5. *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.
 6. *Honesty*: Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
 7. *Leadership*: Holders of public office should promote and support these principles by leadership and example.

5. RULE OF LAW IN DIFFICULT TIMES

One of the current issues impacting on governance is of combating terrorism. It has assumed greater significance after the terrorist attacks in USA on September 11, 2001. A steady erosion into the meaning of 'rule of law' appears to be gaining acceptance. It is, therefore, necessary to appreciate the meaning of 'rule of law', a constituent of constitutional governance, even in difficult times.

The UN Secretary General, Kofi Annan, in a recent statement (upon receiving honorary degree at Tilburg University, the Netherlands) on 21 November 2002, recognising the threat of terrorism and the need for combating it firmly, emphasised the

need to adopt the counter-terrorism measures consistent with the Constitution and the laws, which respect human rights. In the current state of threat posed by terrorism, the need to match counter-terrorism measures with the idea of good governance has assumed significance and also raised doubts in the minds of many, of the need to respect human rights during the extraordinary threat posed by national and international terrorism. The extent to which the notion of sovereignty is allowed to trump the protection of citizens was considered by Kofi Annan, and he said:

Terrorism is one of the threats against which States must protect their citizens. States have not only the right, but also the duty to do so. But States must also take the greatest care to ensure that counter-terrorism measures do not mutate into measures used to cloak, or justify, violations of human rights. Terrorism has a nasty habit of casing the whole spectrum of opinion in a society to lurch in a repressive direction.

Even as many are rightly praising the unity and resolve of the international community in this crucial struggle, important and urgent questions are being asked about what might be called the 'collateral damage' of the war of terrorism - damage to the presumption of innocence, to precious human rights, to the rule of law, and to the very fabric of democratic governance.

Domestically, the danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it - and thereby corroding the vessel of democratic government from within. Whether the question involves the treatment of minorities here in the West, or the rights of migrants and asylum seekers, or the presumption of innocence or the right to due process under the law - vigilance must be exercised by all thoughtful citizens to ensure that

entire groups in our societies are not tarred with one broad brush and punished for the reprehensible behaviour of a few. —

—But our unrelenting position must be that any sacrifice of freedom or the rule of law within states, or any generation of new disputes between States in the name of anti-terrorism, is to hand the terrorists a victory that no act of theirs alone could possibly bring.

Kofi Annan's speech is a continuation of the UN Security Council's Resolution 1373 of September 28, 2001 and other UN Resolutions which emphasise that respect for human rights is not merely a requirement of the rule of law but also the essence of good governance to be observed even during difficult times. This summarises the true position under the rule of law, which is never in suspension in a democracy.

6. DEMOCRATIC ETHOS

The theme of the UNDP Human Development Report, 2002 is 'Deepening Democracy in a Fragmented World'. The report highlights the need for an inclusive democracy so that every section of society is involved in policy making and decision making. The report emphasised the need to strengthen and develop complementarity between institutions of governance. An independent judiciary provides the necessary checks and balances between the democratic instruments of governance. The report points out that India's independent judiciary is the corner stone of the country's democracy. Complementarity developed between the Indian judiciary and the National Human Rights Commission constituted under the Protection of Human Rights Act, 1993 is proving more effective in governance and accountability by improving the quality of governance. I have often said, that the NHRC acts as a catalyst for this purpose, and, therein lies its efficacy.

A constitution of a country depicts the basic structure of its political system. India is a federal polity with a unitary bias. A strong Union is necessary to ensure cohesion and to preserve the core value of 'Unity in Diversity' on account of multi-religious, multi-ethnic and multi-cultural pluralist society. The admixture of diverse traits into a unified composite culture is the peculiarity and panorama of the Indian ethos. The polity assured to the people of India by the Constitution is described in the Preamble as a 'Sovereign, Socialist, Secular, Democratic, Republic' and the Preamble begins with the words 'We the People of India' which indicates that the political sovereignty in India vests in the People. Secularism is embedded in the Indian ethos. '*Sarva Dharma Sambhava*' (equality of all faiths) in '*Vasudhaiy Kutumbakam*' (world is one family) wherein prevails '*Sarve Bhawantu Sukhinah*' (peace and happiness for all) is our faith.

These concepts emphasise respect for human rights treating every member of the human family as equal. Respect for human dignity is assured in the Fundamental Rights guaranteed to the individuals which carve out the sphere of non-invasion of individual's rights by the State. Along with that is the mandate to the State in the Directive Principles to ensure the formulation and implementation of its policies consistent with the fundamental principles of governance therein, all of which are for human development and respect for human rights. The participatory role of the people in the representative form of government requires certain duties to be performed by every citizen which are the Fundamental Duties. This is necessary, because it is the people who are the '*only keepers*' of the Constitution, to use the words of Joseph Story.

7. FREE AND FMR ELECTIONS

To enable the people to discharge their participatory role, they should be empowered to make informed decisions, and this requires human development through respect for human rights. Good governance is possible only when the State observes the principles fundamental in governance, laid down in the Constitution, and the people in whom the political sovereignty vests and from whom all public power is drawn, discharge

effectively their participatory role through their true representatives elected in a free and fair election. The role of the judiciary and other democratic institutions is to perform the duty assigned to them by the Constitution, and to be equally accountable to the people, so that the constitutional governance is achieved. No individual, howsoever highly placed, is immune from accountability, or has absolute power in our constitutional scheme, and it is the duty of the people to ensure that the constitutional scheme becomes a reality. Good governance is possible only in this manner.

The representative form of government based on the premise of the participatory role of the people requires that the elected representatives should be the true representatives of the people. This is possible only if the elections are free and fair, with equal opportunity to every intending suitable candidate to be considered by the electorate for the choice of its representative. The election process must, therefore, satisfy this requirement and it should not have the effect of confining the elections only to a few, eliminating in that process other suitable candidates, denying to the people their right of making an informed choice of their representative.

Unfortunately, for quite some time, the election process appears to have been vitiated by criminalisation of politics and the dominant influence of muscle and money power. Consequent electoral results are, therefore, skewed in many ways: exclusion of suitable candidates at the threshold, impact on election results by the use of muscle and money power, and absence of issue-based differences amongst political parties which denies the people their right of making an informed choice. Politics is governed more by personal interest, than by national interest. Governance through representatives chosen by a vitiated election process does not, therefore, reflect the true will of the people and it does not have a truly representative character. The ensuing result is not in conformity with the nature of constitutional governance. The result also militates against the people's right to a truly democratic governance which is a denial of inclusive democracy. This is a negation of constitutional governance.

8. ROLE OF JUDICIARY, MEDIA AND THE PEOPLE

Right to corruption-free governance is also a basic human right in a democratic polity. Corruption anywhere is detrimental to society but it is even more in a developing nation. Corruption has the adverse effect of denying to the people that which is legitimately due to them for their development. The IMF and the World Bank have indicated that the quality of governance in a developing nation and the state of corruption therein would be a relevant factor for their decision to provide support for development, since corruption results in the funds not being utilized for the purpose of development. Based on the premise that the people have a right to corruption-free governance, without which there is violation of their right to equality guaranteed in art. 14 and right to life under art. 21 of the Constitution of India, the Supreme Court intervened in the *Hawala Case [Vineet Narain & Ors. v. Union of India & Anr, AIR 1996 SC 3386]* to enforce probity in public life and accountability of public men. This was done by invoking the constitutional remedy under art. 32 (also a Fundamental Right) to enforce the people's fundamental rights, and the CBI (the premier investigating agency) was directed to equally apply the law for investigation into the accusations of bribery against highly placed persons, and to launch prosecution for the criminal offences made out against them. The linkage between human rights and constitutional governance was clearly accepted by the Supreme Court, and an innovation was made to utilize the judicial process for correcting an aberration in governance for enforcing human rights.

Development of the judicial process of Public Interest Litigation (PIL) is due to the seeming failure of the other branches to effectively discharge their functions in certain spheres of public concern. Since the issues raised in the PIL pertain to enforcement of Fundamental Rights, whenever the issue has a legal component, the Supreme Court has stepped in under art. 32 to fill the vacuum. Nature abhors vacuum. The Supreme Court has invoked its power under art. 142 to make such orders, as are necessary, to do justice in the cause. To begin with, PIL commenced on an uncharted

regulate its course and give it a precedent value. This has happened, more by judicial orders, as yet. The need is to compile these judicial orders and give it the form of binding rules to ensure uniformity of procedure and predictability of the outcome, in accordance with settled norms. Juristic basis for every order in PIL is necessary for uniformity, certainty and its lasting effect. The principle underlying a representative action under Order 1 Rule 8, of the Civil Procedure Code (CPC), and control of the court through prior leave, with similar procedure, and appointment of an '*amicus curiae*' would prevent the possibility of abuse of PIL for ulterior purposes by motivated people. There is need to amend the rules of Supreme Court and the High Courts to embody these principles. An exercise on these lines to amend the Supreme Court Rules was performed in 1997 by a Committee constituted by me as Chief Justice of India for this purpose. I am not aware of the steps, if any, taken thereafter for its implementation.

It is through the judicial process of PIL that serious issues pertaining to probity in public life, rights of the marginalized and sustainable development, relating to environment, ecology, public accountability etc. have been dealt with by the Supreme Court and High Courts. Notwithstanding the resistance of other branches, PIL has come to stay because it is perceived by the people as a public law remedy for the enforcement of their rights. *Vishaka v. State of Rajasthan* [AIR 1997 SC 3011] is an instance of filling legislative vacuum in the sphere of gender justice. PIL has come to stay because it is within the ambit of constitutional governance.

Even though, an independent judiciary is the constitutional watchdog in our scheme, the ultimate responsibility for good governance is that of the people. Mahatma Gandhi administered this caution when he said:

There is a higher court than courts of justice and that is the court of conscience. It supercedes all other courts.

It is also useful to recall the words of wisdom of Judge Learned Hand, who said:

A society so riven that the spirit of moderation is gone, no court can save, a society where that spirit flourishes, no court need save. In a society which evades its responsibility thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

What is the spirit of moderation? It is the tempo which does not press a partisan advantage to its bitter end which can understand and will respect the other side, which feels a unity between all citizens - real and not factitious product of propaganda which recognises their common fate and their common aspirations in a word, which has faith in the sacredness of the individual.

I often wonder if we do not rest our hopes too much upon constitutions, upon laws and upon courts. Believe me, these are false hopes. Liberty lies in the hearts of men; when it dies there, no court can do much to help it.

Education of the citizens in the spirit of the Constitution and their empowerment 'to live by the rule of the Constitution' would ensure good governance as envisaged by the Constitution. After all, it is the *People* who are the '*only keepers*' of the Constitution.

The media has an important role in the formation of public opinion. It is the public watchdog. The freedom of press is derived from the people's 'right to know', implied from the freedom of speech and expression [art. 19(1)(a)]. Accountability of public men can be enforced by a vigilant and objective media. The media is, therefore, a powerful tool of good governance. It is meant to inform the people, and also be its powerful voice.

9. CONCLUSION

Granville Austin, speaking of the Indian Constitution, said:

I conclude with a grand and cheering paradox. Although the sins of omission and commission of past governments have shaken democracy, and although the credibility of governments and politicians has dropped to a level that appears to endanger constitutional government in India, the democratic ethos, the principle of representative government, seems deeply rooted among citizens. It has taken time for the constitution to become secure. In the future, government or the citizens may slight or ignore it, yet it is accepted as the nation's foundation document, some say the new *dharmasastra*. It has given citizens standards by which to measure performance, to vote for or against their representatives. —.

A final remark: All these years the citizen's lot has been improving, even if slowly, and government in the country has been functioning, and this is something we non-functionary historians and analysts should not forget.

By and large, the constitutional governance in India has been functional, even in difficult times. This has been possible because the governance has centered around respect for human dignity, which is a core value of our constitutional philosophy, and the democratic institutions have come to stay, notwithstanding the allergy to them, at times, of those in power. This is the strength of our constitutional philosophy backed by the Indian ethos.