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ADMINISTRATIVE LAW AND GOOD GOVERNANCE: TOWARDS A COHERENT DECISION MAKING FRAMEWORK

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Abstract

Good governance principles are often framed as normative goals for a legal system to achieve. This paper argues for a tighter link between administrative law and good governance. In particular, it argues that administrative law should be considered as a subset of good-governance principles. By reading principles of administrative law in conjunction with principles of good governance, we can create an effective framework to better understand the actions of the judiciary, legislature, and the executive. This paper highlights specific instances of poor administration by the judiciary, executive, and the legislature, to show how gaps in the present administrative law framework allows for highly arbitrary decision making. Principles of good governance offer a clear salve to the existing system and will encourage more fair decision making across all branches of the government. This paper finally suggests that the legislature should pass a general statute to govern administrative law, which explicitly incorporates principles of good governs.

INTRODUCTION

As early as 1989, the World Bank had recognized that "bureaucratic obstruction, pervasive rent seeking, weak judicial systems, and arbitrary decision-making" were barriers to effective economic growth.[1] In a 1991 report, the close relationship between the effectiveness of developmental aid and quality of governance was carefully discussed.[2] The most important aspect of that report, however, is the recognition of the key principles that are closely associated with good governance today.[3] With respect to legal systems, special emphasis was placed on stability and predictability of the law.[4] Generally, the globally recognized components of good governance are that it is "participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law".[5] Administrative law and good governance principles are inexorably linked. When a principle of administrative law is not followed, principles of good governance are also always violated. The judicially evolved principles of administrative law in India follow closely, if not exactly, with these ideas of good governance. The triangle of Arts. 14, 19, and 21 cover within its area several principles such as accountability, transparency, equity, and rule of law.

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[1] The World Bank, 'From Crisis to Sustainable Growth - Sub Saharan Africa : A Long-Term Perspective Study' (30 November 1989) 3.

[2] The World Bank, 'Managing Development: The Governance Dimension' (29 August 1991) 5.

[3] ibid 16–18.

[4] ibid 35–41.

[5] United Nations Economic and Social Commission for Asia and the Pacific, 'What is Good Governance?' (10 July 2009);

Towards the end of the twentieth century, India found itself on the brink of financial ruin. Saddled with staggering amounts of debt and no easy pathway to repayment, India was forced to open its gates and let foreign investment flow into the walled garden of its largely socialist economy. In exchange for financial aid, India was forced by international financial institutions to substantially restructure and reorient its development strategies and bring it closer to globally recognized principles. Thus, the neoliberal model was let loose in the hitherto protected and largely centrally managed industrial complex in India. Measures such as the Right to Information Act and numerous other laws were brought in to ensure that the principles of good governance were effectively imposed upon the administration. The executive's routine disregard for these principles is widely recognized and well documented. However, coupled with judicial and legislative indifference in recent times, these principles have been largely ignored in the administrative landscape. In order to ensure that these principles are effective, ethical and value-based reforms need to be instituted.[6]

My main proposition is that administrative law and good governance are not simply mutually compatible ideas, but that administrative law principles should be viewed as a subset of principles of good governance. Whenever an administrative law principle is not followed, that necessarily means that a principle of good governance is violated. The inverse, however, is not always true. The goal must be to develop administrative law to the extent that all good governance principles are recognized as administrative law principles. I shall show how closely the principles of good governance and administrative law are linked and how this linkage can be used to better understand and improve the evolution of administrative law. This, however, can only be done when all the branches of the government effectively implement the principles of good governance. In this paper, I shall also show how despite the efforts to implement good governance upon the executive, the legislature and judiciary themselves have failed to internalize the principles of good governance. This has led to broad disregard for these principles in matters of administration.

Judiciary and good governance

The principles of administrative law in India are but creatures of the judiciary. As described by Prof. Upendra Baxi, the manner in which the principles have evolved can be viewed in distinct stages: beginning from the largely pro-state decisions in the early years of independence, to the citizen-centric reforms in the 1970s and the later contemporary decisions following the liberalization of the Indian economy.[7] Throughout the process, there has not been a single, unified theory towards which the Supreme Court has been moving. Rather, the evolution of administrative law has been on a case-to-case basis.[8]

Administrative law developed primarily to restrict the abuse of power by the executive. The executive is infamous for its reluctance to be more transparent and accountable, which is why laws regarding access to information are necessary. The judiciary, however, is expected to act as a guardian of citizens' rights in such cases and pierce the veil behind which the executive hides. The right to be given a hearing, speaking orders, impartiality, etc. are all significant in the judicial process. However, when the judiciary begins to act in a like manner as the

[6] SN Sangita, 'Administrative Reforms for Good Governance' (2002) 63 The Indian Journal of Political Science 325, 336, JSTOR.
[7] Upendra Baxi, 'The Myth and Reality of Indian Administrative Law' in I.P. Massey, *Administrative Law* (8th edn, EBC 2008) XXII-XXXII.
[8] Ibid.

executive, it becomes impossible to raise any challenge against its actions. Increased judicial involvement in matters traditionally considered the executive's domain poses a significant issue for administrative law. Traditional routes of appeal are blocked and the affected citizen is left with no recourse whatsoever. Fundamentally, such judicial usurpation of power violates the separation of powers doctrine and also has other consequences with respect to good governance.

I shall reference the Supreme Court actions with respect to the Assam National Register of Citizens process and highlight certain aspects to show how it has failed to adhere to the standards of both administrative law and good governance. From 2009, the Supreme Court has been involved in the administration of the NRC through the case of *Assam Public Works v. Union of India and Ors*.[9] The court has been periodically demanding status reports and issuing orders to hasten the process. Though this process raises several issues with respect to judicial overreach, the focus in this paper shall be on the administrative orders that have been passed by the Supreme Court.

It is quite deplorable that the entire judiciary-led NRC process has been shrouded in secrecy. Given that the NRC exercise involves adjudication on a matter that would substantively alter the rights and duties of a person, the process should have been conducted with utmost care, taking into account the various needs and concerns of those involved. When the executive conducts such activities, it is open for those affected to challenge the action taken upon different constitutional grounds; in the present case, that option is not available. Normally, delegated legislation is presented before the Parliament or the authority that made the law for basic scrutiny. S.18 of the Citizenship Act, 1955 empowers the central government to make additional rules regarding, inter alia, the process regarding the registration of citizenship, and S.18(4) mandates that all such rules are laid down before the Parliament. Though failure to follow such provisions may not render the rules void, it is nevertheless an important step in ensuring transparency and accountability. In this case, however, none of the orders passed by the judiciary, which are on much the same areas as those covered by S.18, have been scrutinized by the executive or the legislature.

A large number of status reports and representation appear to have been made before the judges in a non-transparent manner. Regular references to sealed covers are made in the orders.[10] In another order, the Supreme Court appears to reference a PowerPoint presentation made by the State Controller for the NRC, and states that "full liberty should be given to the State Coordinator" and grants him permission to "seek appropriate orders from the Court so that the future/further course of action is unhindered".[11] In an ordinary situation, this might have been challenged for being an excessive delegation of power, yet in this case it is fully endorsed. At one point, the Supreme Court even directs the project coordinator to extend a contract with a private party, bypassing the normal tender process and eliminating the need for approval by a coordination committee.[12]

The implication of these actions on the principles of both administrative law and good governance are clear. Legally, administrative law principles cannot offer any solution to these issues, but principles of good governance can be used to analyse the impact of these actions

[9] WP (Civil) 274/2009.
[10] WP (Civil) 274/2009, order dated 16th October, 2014; WP (Civil) 274/2009, order dated 17th February, 2016.
[11] WP (Civil) 274/2009, order dated 14th February, 2017.
[12] WP (Civil) 274/2009, order dated 20th April, 2017.

and provide a reasoned critique. Interestingly, all eight principles of good governance mentioned in the introduction of this paper can be said to be violated in some manner. None of the Supreme Court orders mention any reliance being placed by the court on those who would be affected by the exercise. The court, in its relentless desire to complete the exercise, has failed to consider the impact its orders would have on the marginalized.[13] The Supreme Court has been using sealed covers not only in this case, but in a variety of other cases, denying the opposite party the opportunity to challenge and analyse the evidence provided.[14] Sealed covers are antithetical to the idea of a free and open adversarial judicial process and are characteristic of an opaque system of governance without any accountability

It is evident that the growth of administrative law, and the infusion of good governance into it, cannot be left to depend upon the whims and fancies of individual judges. The Supreme Court of India speaks, not as an institution, but as a loose collection of individual judges. The varying sensibilities and ideas of each judge will not lead to the development of a unified system of governance. Through several landmark decisions, the court has brought in what seems like principles of good governance. Yet, what the Supreme Court gives, the Supreme Court also takes away. The growth of administrative law should not hinge upon such arbitrary and capricious factors. Good governance principles offer a charted course through which the development of administrative law can effectively continue, and it is imperative that they are internalized by those who are entrusted with upholding the rule of law.

Legislature and Good Governance

The Indian legislative bodies have historically been reluctant to enact reforms to the existing systems of governance. It was only when India was on the brink of financial collapse that economic liberalization took place. As early as 1975, the Supreme Court had recognized the fundamental right to information.[15] Yet, it was only in 2005 that the Central Legislature passed the Right to Information Act. For every progressive law that promotes good governance, the legislatures pass other laws which take it several steps backwards. Both the central and state governments have routinely enacted laws that defy rationality and principles of good governance. The legislature's record, particularly in ensuring transparency and accountability in administrative decision making is quite discouraging. In this section, I shall refer to three sets of laws— preventive detention, anti-corruption, and right to information— to show legislative endorsement of deviation from principles of good governance in administration.

Arbitrariness is antithetical to good governance and administrative law. Non-arbitrary exercise of administrative power is one of the key elements of the rule of law as propounded by Prof. Dicey.[16] It is necessary that the laid down law is clear and provides clear

[13] Shaswati Das, 'Assam: How NRC Spurred Applicants to Trace Family Trees' (*Livemint*, 5 August 2018) <https://www.livemint.com/Politics/2f257SUFCnz9sbx1UjlCKK/Assam-How-NRC-spurred-applicants-to-trace-family-trees.html> accessed 01 April 2020.

[14] Gautam Bhatia, '"A Petty Autocracy": The Supreme Court's Evolving Jurisprudence of the Sealed Cover' (*Indian Constitutional Law and Philosophy*, 17 November 2018) <https://indconlawphil.wordpress.com/2018/11/17/a-petty-autocracy-the-supreme-courts-evolving-jurisprudence-of-the-sealed-cover/> accessed 05 April 2020.

[15] *State of Uttar Pradesh v Raj Narain* [1975] AIR SC 865.

[16] MP Jain, *M.P. Jain and S.N. Jain: Principles of Administrative Law* (Seventh edition, Lexis Nexis India 2011) ch II.

directions.[17] Arbitrariness, however, is writ large on most public safety and anti-terrorism legislations. One such example is the Jammu and Kashmir Public Safety Act, which was passed in 1978 and retained by the Parliament during the bifurcation of the Jammu and Kashmir state. Under the scheme of the Act, a person may be detained without being given any reason or justification for the detention for up to ten days.[18] The reasons for detention cannot be challenged for being vague, non-relevant, or non-existent.[19] Furthermore, the offenses created by the act are vague and unclear and only require the subjective satisfaction of the administrative officer, giving the executive wide discretionary powers.[20] The arbitrariness of the law invariably leads to a lack of transparency and accountability. The law implicitly condones mala fide and mechanical actions without proper application of mind. By providing an easy path for dissenters to be silenced, the law prevents effective decision making based on the consensus of all interested parties. This digression from established principled of administrative law, though sanctioned by the legislature, is nevertheless an example of how such deviance also leads to a violation of good governance principles.

On the other hand, there have been several recent lapses in good governance which do not violate any principle of administrative law. In *Vineet Narain v. Union of India*[21] the Supreme Court had recognized the need for the independence of institutions investigating offenses of corruption and rejected the Executive's attempt to protect certain officers from being investigated. The legislature, in an attempt to override the judgement, passed certain amendments to the Delhi Special Police Establishment Act 1946 and reintroduced the protection given to officials above a certain rank under S.6A of the Act. In *Dr. Subramanian Swaky v. Director, CBI and anr.*[22] the Supreme Court struck down S.6A under Art. 14 reasoning that the provision created an illegal distinction between bureaucrats. Consequently, the legislature amended the Prevention of Corruption Act and granted a blanket protection to all bureaucrats from being prosecuted without government approval, thereby pre-empting a future Art.14 challenge. By repeatedly attempting to bypass the various check instituted by the Supreme Court, the legislature clearly shows its disregard for the ideals of transparency and accountability. The legislature's actions, though ostensibly legal, constitutes a gross breach of the principles of good governance. Under the present administrative laws in India, the actions of the legislature are perfectly valid. Striking this down would require the Supreme Court to evolve additional standards and incorporate more good governance principles within the scope of administrative laws.

A final example of legislative disregard for good governance can be seen through the history of the Right to Information Act.[23] Until 2005, the legislature dragged its feet and delayed the enactment of a law to provide important information to citizens despite a 1974 ruling by the Supreme Court recognizing the public's right to know. The Right to Information Act 2005 is extremely important for the purposes of transparency as it is only through open access to information that arbitrary administrative action can be curbed. Challenging administrative

[17] Sangita (n 6) 337.
[18] Jammu and Kashmir Public Safety Act 1978, s 13.
[19] Jammu and Kashmir Public Safety Act 1978, s 10A.
[20] Jammu and Kashmir Public Safety Act 1978, s 8.
[21] [1998] 1 SCC 226.
[22] [2014] 8 SCC 682.

[23] Deepali Singh And Others, 'Good Governance & Implementation In Era Of Globalization' (2009) 70 The Indian Journal of Political Science 1109, 1115, JSTOR.

action on the grounds of non-application of mind, mala fide, or other grounds would become impossible if the materials referred to by the officials were not made available to the public. Despite the law, officials remain highly reluctant to reveal information, as evidenced by the large number of pending cases before the Central Information Commission.[24] The 2019 amendments to the Act allows the government to alter the terms of service of the information commissioners. Considering that some arm of the government is always a party in RTI appeals, such measures will reduce the accessibility and openness of decisions made.

Considering the wide scope of the legislature's powers in India, it is imperative that principles of good governance are internalized by those in power. Unless the laws passed contain safeguards and protections, administrative authorities will be free to act in violation of existing norms. One possible solution might be to enact an overriding law to lay down general principles and procedures that all administrative authorities are mandated to follow. One such example is the General Administrative Law Act in Netherlands, which lays down a non-exhaustive set of guidelines to be followed by all administrative officials. This Act allows citizens to challenge administrative action on clearly laid down grounds which are designed to ensure good governance.[25] Once such a law is passed, future legislatures may not be willing to repeal it, owing to the political consequences that might potentially follow. Though principles of good governance do not lend themselves to direct application in matters of procedure, they can nevertheless be used as a foundation to build detailed rules and regulations to ensure effective administration.

Conclusion

In order for governance to be effective, there needs to be a clear set of principles, guidelines and directives on how administrative action can be taken. The manner in which administrative law has evolved so far is clearly unsatisfactory and the principles of good governance offer a set of ideals towards which we can aspire. The actions of all the organs of the state—the executive, legislature, and judiciary— can be better evaluated when weighed against the principles of good governance. Despite the reluctance of the legislature so far, it is the only body capable of widening the scope of administrative law to include the principles of good governance. The growth of administrative law may otherwise be inadequate, considering the relative indifference of the executive and the judiciary. Though the judiciary is considered the guardian of individual rights, its recent track record suggests that we may need to move away from the piece-meal, case-by-case manner in which the Supreme Court has built up principles of administrative law. Furthermore, the judiciary's actions do not inspire confidence in its abilities to create a suitable framework.

The manner in which administrative law has been developed so far leaves open several gaping holes through which actions that are considered morally and politically undesirable are allowed to pass through. As we have seen, the principles of good governance almost always provide a framework from which these actions can be critiqued. Expanding the scope of administrative law to cover the wider gamut of good governance principles, therefore, is the only manner in which the rights and interests of the citizens in a democratic nation can be effectively safeguarded.

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[24] Scroll, 'Over 13,000 RTI Cases Pending with the Central Information Commission in Last One Year, Says Centre' (*Scroll.in*, 28 November 2018) <https://scroll.in/latest/945166/over-13000-rti-cases-pending-with-the-central-information-commission-in-last-one-year-says-centre> accessed 08 April 2020.

[25] Henk Addink, *Good Governance: Concept and Context* (Oxford University Press 2019) 101.

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