CHAPTER 7

Two Models of Judicial Oversight of Good Governance

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1 Introduction

The idea that the political organs within the state should adhere to good governance is by now widely accepted. In addition, courts and judges increasingly have taken it upon themselves to review to what extent the political authorities turn the concept of good governance into reality.1 This chapter contrasts two different models of such judicial oversight of good governance, labelled the “interim manager” and “repairman,” which can be regarded as ideal types.

A court acts as an interim manager when it virtually takes over from the government authority, which fails to meet good governance standards. Consequently, when a government agency falls short of discharging its good governance responsibilities, the court will act as a substitute by providing the solution it deems necessary. This kind of court intervention will usually be accompanied by an express reliance on constitutional law. It will also involve “police patrol oversight” as identified by McCubbins and Schwartz: the court constantly monitors the behaviour of the political organs, while using the cases, which are being brought before it as vehicles for doing so.2

In Asian countries like Sri Lanka, the Philippines and India, courts have been reviewing the good governance performance of the political branches. This movement has been led by the Supreme Court of India, which has taken the “constitutional law high road” to achieve good governance. It is also known as the “good governance Court,”3 and its members regularly refer to the concept in their statements made on and off the bench.

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In his speech called “Role of the Judiciary in Good Governance” Chief Justice Sabharwal identified the following elements as being part of the concept of good governance: improving the standard of living; providing security to the people; instilling hope in their hearts for a promising future; providing access to opportunities for personal growth; affording participation in the decision-making in public affairs; sustaining a responsive and fair judicial system; maintaining accountability and honesty in each branch of government. Not surprisingly, Robinson has called the concept broad and almost “transcendent” and “metaphysical.” Therefore, the highly visible constitutional course adopted by the Supreme Court, which is usually referred to as Public Interest Litigation, will be discussed as exemplifying the interim manager model.

By contrast, the repairman model is used by courts, which are reluctant to intervene in the political process. They will only act after a case has been brought by a person who has a sufficient stake in the outcome, or in the words of McCubbins and Schwartz has raised the “fire alarm.” Such courts prefer the more technical “administrative law low road” to the more eye-catching constitutional high road favoured by the interim managers.

This “repairman” approach was applied by English judges from the 1960s until the 1990s. Under the concept of “Sovereignty of Parliament,” judges in the UK are not allowed to review the constitutionality of Acts of Parliament. Despite this fact, English judges have not stood idly by: there are strong indications that in England the courts have used the development of administrative law to further good governance.

This article proceeds in four sections. In Section 2 the interim management model which is prevalent in India will be discussed. Section 3 will deal with the repairman model which was applied in England from the 1960s until 2000. Section 4 contains some concluding observations, including a presumption about which model judges apply in China.

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4 Available at <www.supremecourtofindia.nic.in/new_links/Good%20Governance.pdf>.
5 Robinson, see note 3 above, 2, 5, 6.