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Good governance as a legal concept with a bite

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1. Introduction

A few years ago, the biggest brewer in the Netherlands launched a campaign with the slogan: *"Heineken refreshes the parts other beers cannot reach"*. At first sight the same cannot be said about the concept of good governance, at least from a legal perspective. It may be that good governance plays a useful part within policy discussions, but it has little or nothing to add to the legal debate.¹ Many of the elements which have been identified as belonging to the core of the concept, like constitutionalism, separation of powers, due process and good administration, have been part of the public law vocabulary for a long time, and have been expressed in constitutions, statutes, principles and conventions. Since this paper had been commissioned for the purpose of reflecting on good governance as a legal tool, it could have ended here and now.

However, although the concept of good governance has limited value in the Western legal arena, it does play an important part in jurisdictions elsewhere. This paper discusses its standing in two of those jurisdictions, *i.e.* India and the People's Republic of China. In India the Supreme Court has used the concept of good governance as a stepping stone for enhancing its own role. This development will be discussed in section 2. In China the good governance concept is increasingly being used as a source of checks on administrative authorities, which results in limited government and which provides the basis for the strengthening of individual rights and the Rule of Law. This process will be the subject of section 3. Section 4 contains some concluding observations.

2. Good governance and judicial activism in India

2.1 Good governance as a justification for enhancing the role of the courts

¹ Kenneth K. Mwenda, *Can 'Corruption' and 'Good Governance' Be Defined in Legal Terms?*, 1 (2008) Journal of Global Change and Governance, available at: www.jgcg.org

In Asian countries like Sri Lanka, the Philippines and India the concept of good governance has sometimes been used by the courts to compensate for the shortcomings of the political branches. This movement has been led by the Supreme Court of India, which has used the need to achieve good governance as a justification for enhancing its own role and that of the courts generally. It is also known as the ‘good governance Court’,² and its members regularly refer to the concept in their statements made on and off the bench.

What good governance actually means is less clear. In his speech called ‘Role of the Judiciary in Good Governance’ Chief Justice Sabharwal identified the following elements as being part of the concept:³ 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’.⁴

The Court, and commentators favouring its good governance philosophy, emphasise that the Indian Parliament is not up to its job because of incompetence, abdication of responsibility and even corruption.⁵ This dysfunctional image has also tarred the government, which is composed of members of the ruling coalition.⁶ The representative institutions at the state level suffer from the same defects.⁷ The idea therefore is that the responsibilities of the political branches to a certain extent have to be taken over by the Court.⁸ In other words, in order to correct the failures of the political branches and to compensate for them, the Supreme Court has felt the need to expand its role and that of the judiciary as a whole.⁹

This philosophy is encapsulated by the majority opinion of Justice Jeevan Reddy in *Indra Sawhney v. Union of India*,¹⁰ as case dealing with set-asides in the public service workforce for members of the socially and educationally backward classes:

“We are dealing with complex social, constitutional and legal questions upon which there has been a sharp division of opinion in the Society, which could have been settled more satisfactorily through political processes. But that was not to be. The issues have been relegated to the judiciary – which shows both the disinclination of the executive to grapple with these sensitive issues as also the confidence reposed in this organ of the State”

Since courts can only come into action when claims are brought before them, the Indian Court needs cases to be able to substitute for the political branches. These cases serve as vehicles which allow the Court to pronounce itself on policy issues. Consequently, the Court is more interested in cases being brought, than in who brings them. It has therefore introduced public interest litigation, or PIL as it is usually called, which has effectively removed the standing

² Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 (2009) Wash. U. Global. Stud. Rev. 1.

³ Available at: www.supremecourtindia.nic.in/new_links/Good%20Governance.pdf

⁴ Robinson, *supra* n. 2 at 2, 5, 6.

⁵ *Ibid.* at 5, 12, 14.

⁶ *Ibid.* at 15.

⁷ *Ibid.* at 15.

⁸ *Ibid.* at 14, 16-17.

⁹ *Ibid.* at 5,7.

¹⁰ AIR 1993 SC 477 at 518.

barrier. In addition, to allow members of disadvantaged groups also to enjoy the benefits of this 'curial democracy' the PIL procedure has been kept very informal.

2.2 *The absence of a standing requirement in PIL*

The first reported case in which the Supreme Court of India accepted a petition which was brought to further the public interest rather than a private one was *Hussainara Khatoon v. State of Bihar*.¹¹ In this case the petitioners, who applied for a writ of habeas corpus, challenged the lawfulness of the incarceration for years on end of those awaiting trial in the State of Bihar. In relying on reports in the Indian press, the petition focussed on the general state of affairs rather than individual cases of named individuals. The judgment did not discuss the background of the petitioners nor their relationship to the detainees.

Some clarification was given in *Fertilizer Corporation Kamagar Union v. Union of India*.¹² In a concurring opinion, endorsed by Justice Bhagwati, Justice Krishna Iyer argued in favour of democratisation of judicial remedies. According to his Honour, it was necessary to broaden the concept of standing to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power. If the petitioner belongs to an organisation which has a special interest in the subject matter, or if he has some concern deeper than that of a busybody, he should have standing. All justices involved in this case felt that it was up to the courts to police the performance of the public sector, because the control exercised by Parliament is ineffective.

This case was soon followed by *Dr. Upendra Baxi v. State of Uttar Pradesh*.¹³ Two law professors addressed a letter to the Court, claiming that the inmates of a protective home for women and girls in Agra were living in inhuman and degrading conditions in violation of Article 21 of the Constitution. Although the petitioners were not in any way related to the inmates, the Court decided to treat the letter as a writ petition filed as a 'public interest' litigation.¹⁴

However, the breakthrough came in *Gupta v. President of India*, also known as the *Judges Case-I*.¹⁵ In this case the petitioners challenged a circular letter issued by the Law Minister to the heads of the executives of the States. In this letter he expressed the view that one third of the judges of a High Court should as far as possible be from outside the State in which that High Court was situated. According to the Minister, in this way the national integration would be furthered and narrow parochial tendencies bred by caste, kinship and other local links would be combated. In order to achieve that aim, the Minister requested the chief executives to obtain from all Additional Judges working in the High Court of their State, their consent to be appointed as permanent judges in any other High Court in the Country.

The petitioners expressed the view that the circular letter undermined the independence of the judiciary, as it contained a veiled threat to the Additional Judges that if they did not consent to their appointment as judges in a High Court other than their own, they might not be appointed as permanent judges at all. The standing of the applicants in relation to the circular letter and the policy concerning the length of the appointment of Additional Judges was not as self-

¹¹ AIR 1979 SC 1360.

¹² AIR 1981 SC 344.

¹³ (1983) 2 SCC 308.

¹⁴ *Ibid.* at 309.

¹⁵ AIR 1982 SC 149.

evident, since they were practising lawyers rather than judges. Not surprisingly, therefore, the respondent contested their standing.

Bhagwati, J, (as he then was) for the Court, pointed out that according to the traditional standing rule judicial redress was available only to a person who had suffered a legal injury by reason of violation of his legal right or legal protected interest by the impugned action of the public authority. According to his Honour, the basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from actual or threatened violation of the legal right or legally protected interest of the person seeking such redress. However, in the case at hand the petitioners did not claim private but public injury. The question therefore was whether the petitioners had the necessary standing to maintain an action for redress of this public wrong.

His Honour felt that they did. He pointed out that in the present case the issue was whether members of the public were entitled to sue for redress of injury to the public interest rather than that caused to a particular person or a determinate class of persons. He therefore raised the question whether an individual member of the public has the necessary standing to act in the interest of the general public. Again, his Honour felt that he does.

His Honour emphasised that it is an essential element of the rule of law that every organ of the State must act within the limits of its power. It is the function of the judiciary to confine the legislative and executive organs within their powers. Courts can only fulfil that function if they are able to review acts performed by organs beyond the scope of their powers. This will be the case when the *ultra vires* act has resulted in private injury because then the court can be moved by or on behalf of the person or the determinate class of persons to whom the injury was caused. If the unlawful act causes injury to the public interest rather than to private individuals it should not go unredressed.

If no one would be allowed to maintain an action for redress, the courts would not be able to intervene, which would be disastrous for the rule of law: it would be open to the organs of the State to act with impunity beyond the scope of their powers. Or, in the words of his Honour: “the observance of the law is left to the sweet will of the authority bound by it”. According to his Honour, in order to prevent such a lacuna from happening, courts have indicated that any member of the public acting bona fide and having sufficient interest can maintain an action for redress of such public wrong or public injury. This broadening of the rule of locus standi makes it possible to effectively police the exercise of powers.

Applying these principles to the case at hand, his Honour came to the conclusion that the petitioners clearly had standing. They had argued that the circular letter issued by the Law Minister constituted a serious threat to the independence of the judiciary. This threat, if found to be founded, would not cause private injury to an individual or to a determinate class of individuals, but public injury. As ‘priests in the temple of justice’ lawyers have a special interest in the independence of the judiciary and are therefore entitled to challenge the constitutionality or legality of any act of the State threatening that independence. Being lawyers, the petitioners therefore had sufficient interest to challenge the constitutionality of the circular letter. As has been set out above, the idea is that it is more important that a potentially unlawful act will be brought to the attention of the Court, than that the person who does so has a personal stake in the outcome.

2.3. *The flexible procedure of PIL*

In order to allow members of disfavoured groups to make use of this avenue as well, PIL has been fashioned into a flexible, informal process in which the judge plays a very active part. In *People's Union for Democratic Rights*, Bhagwati, J (as he then was), made clear that PIL is intended to bring justice within the reach of the poor masses, by redressing violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position.¹⁶ PIL is brought before the Court, therefore, not for the purpose of enforcing the right of one individual against another but to promote the public interest.

Consequently PIL should be conceived as a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure the observance of the constitutional or legal rights conferred upon the vulnerable sections of the community. The State or public authority against whom PIL is brought should be as much interested in ensuring basic human rights to those who are in a socially and economically disadvantaged position, as the petitioner. It must even welcome PIL, because it gives it the opportunity to right a wrong done to the poor and weaker sections of the community whose welfare is the prime concern of the State. PIL, therefore, is totally different from the ordinary traditional litigation which is essentially of an adversary character: there is a dispute between two litigating parties, one making a claim or seeking relief against the other and that other opposing such claim or resisting such relief.

As a consequence, a simple letter addressed to it may move the Court. In *S.P. Gupta v. Union of India* the Court pointed out that in this type of cases it does not expect the public spirited individual to file a regular writ petition.¹⁷ It admitted that the Court's rules required various formalities to be gone through by a person seeking to approach the Court. But it emphasised that procedural technicalities should not be allowed to thwart the cause of justice. The Court would therefore cast aside the technical rules of procedure and treat the letter of a public spirited individual as a writ petition and act upon it.¹⁸ This has been called 'epistolary jurisdiction'.¹⁹

In later years, when the Court started to move away from its earlier activism, it became more critical of the poor quality of petitions. In *S.P. Anand v. Deve Gowda*,²⁰ the petitioner claimed that the serving Prime Minister of India could not have been appointed to that office because he was not a member of either House of Parliament. Although the Court proved willing to entertain the petition, it took the opportunity to complain about the cavalier and casual way in which petitions about constitutional issues, including the present one, were being drafted. It therefore called on those having no expertise in constitutional law to refrain from filing such petitions.

In addition, the proceedings have a non-adversarial nature. In *Bandhua Mukti Morcha v. Union of India*,²¹ Justice Bhagwati expressed the view that public interest litigation should

¹⁶ AIR 1982 SC 1473.

¹⁷ AIR 1982 SC 149.

¹⁸ See also *People's Union for Democratic Rights* AIR 1982 SC 1473 at 1483.

¹⁹ See *M.C. Metha v. Union of India* ((1987) 1 SCC 395 at 406 and *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488 at 493.

²⁰ (1996) 6 SCC 734.

²¹ (1984) 3 SCC 161.

not be seen as adversary litigation, but as a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice. According to his Honour, this is 'the signature tune of our Constitution'. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether social and economic justice has become a meaningful reality or has remained 'a teasing illusion'.

Furthermore, proceedings tend to be very broad in nature and to result in class remedies. Thus, in *Sunil Batra (II) v. Delhi Administration* a prisoner complained about the serious bodily harm inflicted on a fellow inmate.²² After having dealt with the relief in the individual case, the Court also provided remedies related to the broader area of prison reform. It urged the courts to appoint 'masters' who would be allowed to visit prisons and to communicate with prisoners in order to verify whether they would have any grievances. It instructed the authorities to maintain grievance deposit boxes to which all prisoners should have access. It obliged judicial officers to pay visits to the prisons in their jurisdiction, to afford prisoners effective opportunities for ventilating legal grievances, to make expeditious enquiries into these grievances and to take suitable remedial action. They prohibited the imposition of sanctions without judicial appraisal. In addition, the Court asked the State to prepare a prisoner's handbook in Hindi, to abide by the UN Standard Minimum Rules for Treatment of Prisoners and to revise the Prison Act.

According to the Court it was entitled to issue this 'pre-emptive' guidance despite the fact that nobody had specifically asked for it, because, as in medicine, prevention is better than the cure. According to the Court, it is always ready to correct injustice but it is no practical proposition to drive every victim to move the court for a writ, knowing the actual hurdles and the prison realities. The Court conceded that new legislation would have been the best solution, but when lawmakers take far too long to solve the problem, as was the case regarding prison reform, courts have to come up with solutions.

2.4 Assessment of the Court's role

The Indian Supreme Court has relied on the need to ensure good governance as a justification for bypassing the elected branches and for enhancing its own role. In certain areas it has manifested itself as a 'shadow government' which takes care of the issues the political branches fail to address. The low standing bar and the flexible procedure, which are the hallmarks of Public Interest Litigation, act as the fuel that keeps the engine of judicial involvement running. Although the need to pursue good governance serves as the rationale for its high profile role, the Court has never clearly defined the concept. The justices keep referring to broad generalizations and aspirations which are not easy to pin down.

The question is whether on balance this amplified role of the judiciary is a benign phenomenon. It is clear that by taking up some responsibilities belonging to the other branches, the Court is disregarding the separation of powers.²³ Most Indian commentators feel that that is a sacrifice worth making. Professor Sateh expressed the view of many observers when he argued that the activism of the Supreme Court is necessary to protect the rights of

²² (1980) 3 SCC 488 at 493.

²³ S.P.Sateh, *Judicial Activism in India, Transgressing Borders and Enforcing Limits*, New Delhi, 2002, pp. 21 and 251.

powerless minorities and to compensate for political circumstances affecting the other two branches, like corruption, maladministration and inertia.²⁴

Whether courts should be allowed to disregard the separation of powers to safeguard the democratic process depends on one's approach towards this concept. When one adopts a static view, judges are obliged to stick to their traditional role whatever the circumstances, whereas a dynamic approach recognises that the proper role of the judge is determined by the circumstances prevailing at the time and it acknowledges that there are situations in which judges may take action from which they should normally refrain. Those adhering to the dynamic view will welcome decisions like *Brown v. Board of Education*,²⁵ in which the U.S. Supreme Court abandoned the 'separate but equal' doctrine which had condemned black children to attending segregated schools. The Court's intervention was necessary to break the democratic deadlock. Instead of violating the separation of powers the Court breathed new life into it.

The dynamic approach is exemplified by the test developed by Chief Justice Stone in his footnote in *United States v. Carolene Products Co.*²⁶ In 'the most famous footnote in history' his Honour explained that, although courts will generally show deference to the legislature, laws that interfere with individual rights, discriminate against minorities or restrict the ability of the political process to repeal undesirable legislation will be subject to 'more searching judicial inquiry'.

The most recent addition to this dynamic approach is the 'chain theory' put forward by Lord Woolf in his Neill lecture.²⁷ According to Lord Woolf, in Britain where there is the absence of a written constitution, the three branches of government are held in position by unseen chains. If one chain slackens, then the other needs to take the strain. In other words, if other checks on the Government are not operating as effectively as they are supposed to, the courts should compensate for that by exercising a more probing review. In this way the balance of power between the legislature, the executive and the judiciary will be maintained. As Lord Woolf has pointed out, such judicial intervention was warranted during the period of Conservative rule: the opposition to the executive in Parliament was weak, local government was under the pressure of increasing centralisation, while the Government was taking all kinds of measures which had negative implications for the justice system and vulnerable groups, like prisoners and asylum seekers, who rely on the courts for their protection. The flexible separation of powers concept put forward by Lord Woolf clearly warrants the good governance approach adopted by the Indian Supreme Court.

3. The potential of good governance as a source of human rights in China

3.1 The apparent chilly reception of human rights in China

At first sight the existing political and cultural conditions in China do not favour human rights, because they do not sit very well with the two dominant schools of thought, *i.e.* Marxism and Confucianism.

²⁴ *Ibid.* at 278-281.

²⁵ 347 U.S. 483 (1954).

²⁶ 304 U.S. 144, footnote 4 at 152.

²⁷ *Judicial Review – The Tensions Between The Executive And The Judiciary*, (1998) 114 *LQR*, p. 579.

Marxism has a very instrumental view on human rights. In the bourgeois state human rights serve as the sweeteners given to the workers to prevent them from rejecting the existing order. In the ideal communist society rights will not play a part, because there the state will cease to exist and the people will not need protection against it. Everybody will be provided for, so positive rights will become unnecessary. Since private property will be abolished and class conflicts will cease to exist, there will also be no need for the horizontal effect of human rights.²⁸

Confucians make a distinction between humans as a biological species – man or *min* - and as a moral being – person or *ren*.²⁹ The basic idea of Confucianism is that humans at birth are not distinguishable from animals, being led by the same instincts, passions and bad habits.³⁰ This raw biological material can, however, be turned in virtuous human beings, in persons. For a man to become a person he will have to behave as a constructive member of society. The basis for this development, his moral compass, should be virtue or *li*. By stimulating humans to develop and rely on virtue they will become constructive members of the community.

According to Confucianism, as soon as man becomes a person through his constructive participation in society, he will acquire some rights. Men who do not make an effort to become such constructive members of society are not entitled to those rights. There is a striking difference, therefore, with the dominant view in the West that human rights are acquired at birth and are ‘inalienable’. In Confucian theory birth acts as the firing shot for a journey that will lead to the acquisition of rights as a result of the efforts made. In Western thought birth is the finish line.

Confucians see society as of a harmonious social order. It is therefore expected of the members of society to participate in collective living and to search for cooperative solutions. Since one is a member of a harmonious social order, one is not expected to simply insist on one’s rights. A person must be willing to negotiate and to compromise. This also explains why China is not a litigious society and why many disputes are resolved through mediation and conciliation.

The Confucian concept of *ren* assumes a duty to act appropriately in relation to others.³¹ In China country and family come first, followed by the individual. Since human beings will become part of a community, they cannot only take, but are also supposed to give. In other words, rights are only one half of the story, the person also has to perform duties. Confucianism promotes natural duties rather than natural rights. Persons owe duties to the members of their family, to each other, and to the state.

According to Confucianism, the ruler is superior to the people. He should be trusted to act in the common interest, by relying on his moral character. He will use his moral compass to bring about a harmonious society. Confucianism confers great discretionary power on the government, to allow it to act in the interest of the community and to tailor its action to the needs in society. Confucians reject the idea that the government should be reined in by rules.

²⁸ R.P. Peerenboom, *What’s Wrong With Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 Harv. Hum. Rts. J. 29 at 48.

²⁹ See Stephen C. Angle, *Human Rights and Chinese Thought, A Cross-Cultural Inquiry*, Cambridge, 2002; Daniel A. Bell, *Beyond Liberal Democracy*, Princeton, 2006, pp. 52-83; Peerenboom, *supra* n. 28 at 39-47.

³⁰ Peerenboom, *supra* n. 28, at 41.

³¹ *Ibid.* at 43.

Written laws are inevitably incomplete and rigid. A government that hides itself behind the rules is considered weak. Confucianism therefore promotes the rule of man. Consequently, there are no constraints on what the government can do.

This belief in the virtuous behaviour of government means that there is no need for a corrective mechanism, like judicial review, accountability, or checks and balances. Confucians recognise that fallible humans may want to gain unlimited power, but they believe that moral education of the rulers will prevent and solve this problem, rather than legal remedies. Creating legal safeguards against abuse of power would go against the core of Confucianism which relies on virtue rather than sanctions.

3.2 Good governance as a potential source of human rights.

Although the sceptical approach towards human rights, as fuelled by Marxism and Confucianism, undoubtedly still has considerable appeal within Chinese society, other, more favourable views have emerged. Marxism remains the official state ideology, but it no longer plays a dominant part in the every day life of most Chinese people.³² Furthermore, Confucianism, rather than being one single coherent theory, consists of different strands, some of which are compatible with a human rights approach.³³ Consequently, there are several shades of grey within the Chinese human rights discourse. Even Western notions find a favourable audience, in particular among the young and well-educated Chinese in the Eastern provinces.

But it is only when one moves beyond the theoretical discussions that the full potential of human rights in China becomes clearly visible. Over the centuries the need to govern and manage a huge country facing many challenges has resulted in the development of a set of sophisticated administrative institutions, norms and practices. The rulers were supposed to respect these good governance principles to ensure the legitimacy of their regime. This obligation resulted from the theory of 'Mandate of Heaven', which was developed by Mencius.³⁴ According to this theory, the emperor enjoyed a 'Mandate from Heaven' as long as he behaved as a just ruler. If he would resort to despotism, Heaven would become displeased and it would withdraw his mandate.

Since it started to rebuild China's legal system some thirty years ago, the country's leadership has tapped into this good governance arsenal, has expanded it and has turned it into a body of administrative law. These principles of good governance may be less visible to those looking for human rights in China, but since they provide the necessary checks and balances, they can offer the same level of protection.

Prominent among them is the concept of 'administration according to law' (*yifa xingzhen*), which was introduced in 2004 by the State Council. According to this concept, state powers can only be exercised insofar as they have a basis in law and in accordance with the requirements set out in the underlying regulation. As Peerenboom has pointed out, this concept exemplifies the increasing importance of limited government in China and the

³² Daniel A. Bell, *China's New Confucianism, Politics and Everyday Life in a Changing Society*, Princeton, 2008, pp. 1-8.

³³ Joseph Chan, *A Confucian Perspective on Human Rights for Contemporary China*, in: Joanne R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights*, Cambridge, 1999, pp. 212-237.

³⁴ Karin Buhmann, *Implementing Human Rights through Administrative Law Reforms, The Potential in China and Vietnam*, Copenhagen, 2001, pp. 217-218, 219, 221.

recognition of the protection of the rights and the interests of the individual as one of the aims of administrative law.³⁵ The concept of ‘administration according to law’ will make it more difficult for administrative authorities to arbitrarily restrict liberty and property.

Another element of good governance in which the leadership has invested heavily is the independence of the judiciary.³⁶ Not only do the judges have to meet more stringent entry requirements, they are also supposed to take part in regular training exercises. Increasingly the judges are being appointed and the courts are being financed centrally, to prevent them from being pressurised by regional officials. The judges are matching these efforts by building networks and developing an informal precedent system. The right to a fair trial may not be a justiciable guarantee yet, but having access to independent courts is an important step towards that goal.

The good governance arsenal also includes a number of remedies which are at the disposal of the Chinese people. From a Western perspective it is important that those who are affected by administrative acts may challenge them before the courts under the Administrative Litigation Act. Since suing administrative authorities does not sit well with Chinese culture, other remedies are deemed more important. Thus, any individual or organisation who believes that his rights or interests have been negatively affected by an administrative act performed by an administrative authority, may challenge that decision before an organ at the next higher level by way of administrative reconsideration. In addition, citizens can resort to the ‘Letters and Visits’ (*xinfang*) petitioning system that allows them to express grievances and submit petitions to the government.³⁷ This very popular way of seeking redress was officially established in 1951, but it originates from time-honoured practices like beating a drum outside government offices and petitioning the emperor or a visiting imperial official.

3. Conclusion

Many of the elements which have been identified as being included in good governance are already part of Western legal systems, and therefore it has little to add to Western law. However, it does play an important part in jurisdictions elsewhere. The present paper discussed the role of good governance as a legal instrument in two of those jurisdictions, *i.e.* India and the People’s Republic of China.

In India the Supreme Court has used the concept of good governance as a stepping stone for enhancing its own role. In order to correct the failures of the political branches and to compensate for them, the Supreme Court has taken over some of their responsibilities. Since courts can only come into action when claims are brought before them, the Indian Supreme Court is more interested in cases being brought, than in who brings them. It has therefore introduced public interest litigation, or PIL as it is usually called, which has effectively removed the standing barrier. In addition, to allow members of disadvantaged groups also to enjoy the benefits of this ‘curial democracy’ the PIL procedure has been kept very informal.

³⁵ Randall Peerenboom, *More Law, Less Courts, Judicialization and Dejudicialization in China*, in Tom Ginsburg, Albert H.Y. Chen (eds.), *Administrative Law and Governance in Asia, Comparative Perspectives*, London, 2008, pp. 175-200, at 177.

³⁶ Benjamin L. Liebman, *China’s Courts: Restricted Reform*, 21 (2007-2008) *Colum. J. Asian L.* 1.

³⁷ Taisu Zhang, *The Xinfang Phenomenon: Why the Chinese Prefer Administrative Petitioning over Litigation*, paper available at: <http://ssrn.com/abstract=1098417>; Keyuan Zou, *The Right to Petition in China: New Developments and Prospects*, available at: www.eai.nus.edu/BB285.pdf

At first sight the existing political and cultural conditions in China do not favour human rights, because they are deemed to be incompatible with the two dominant schools of thought, *i.e.* Marxism and Confucianism. However, the good governance concept is increasingly being used as a source of checks on administrative authorities, which results in limited government and which provides the basis for the strengthening of individual rights and the Rule of Law. Since it started to rebuild China's legal system some thirty years ago, the country's leadership has tapped into the traditional good governance arsenal, has expanded it and has turned it into a body of administrative law. Through concepts like 'administration according to law', the independence of the judiciary and remedies like judicial review, administrative reconsideration and 'Letters and Visits', administrative law is paving the way for the strengthening of human rights and the Rule of Law in China.

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