LAW *opinion*

Constitutional oath reflects the duties and obligations of a judge

BY K. G. KANNABIRAN

If they are merely moral precepts do the judges require a code of conduct like the clerical cadre? Does not the constitution imply a Code of Conduct? The objectives enumerated in the Preamble to the constitution and the Constitutional oath prescribed for these appointees regulate their working in courts and the same values give rise to moral principles on a which to regulate ones conduct in life.

IT is recorded in the "Mirror of Justices" that King Alfred the Great, the Saxon King hanged forty-four judges in one year for reasons of violating the code of conduct prescribed for the judges. Long before the heard of constitutions, Alexis de Tocquoville, separation of powers and principles of natural justice, Alfred the Great laid down some rules of conduct for his judges. He had a right to, for he appointed them. "If the judges acknowledged they had given a judgement because they knew no better, he discreetly and moderately reproved there in experience and folly in terms such as these:

"I wonder truly at your insolence, but where as by God's favor and mine, you have occupied rank and office of the wise, you have neglected the studies and labors of the wise." He firmly told them "Either there fore give up the discharge of the temporal duties which you told, or endeavour more zealously to study the lessons of the wisdom." He was obviously aware that learning is not a prophylactic against corruption. So he commanded: Judge them very fairly. Do not judge one judgement for the rich and another for the poor; nor one for the one more dear and another for the one more hateful." One can safety presumes that the 44 were intractable and therefore sent to the gibbet for violating these norms. The maladies, which King Alfred found among his judges, continued to plague societies down to the end of the present century.

Rule of law and role of judiciary

People's struggles against slavery, arbitrariness in governance degenerating in to tyranny leading to revolts rebellions and revolutions yielded these institutions of governance and justice, as also the law and procedure, which should regulate the working of these institutions. These found their definition in their present form during the period, which struggled against and successfully defeated Stuart absolutism culminating the English Revolution. This marks the beginning of Role of Law. There has never been any visible severance with the past. It was by a patient theoretical re- formulation and re-definition during the course of long periods in history that the severance with the arbitrary past was effected. But long side with these developments absolutist trends against which people struggled, were dexterously woven in to jurisprudence and theories of law. The power of the King stood transferred to parliament and the courts. The privileges which parliament claimed against the King, were by, by an in comprehensible legerdemain, transformed in to privileges against the people who elected them. Similarly the courts were given independence against transference by the king and the executive mainly to protect the people and realm against arbitrariness. But very often they worked in tandem with the parliament and the executive in perpetuating and justifying arbitrary governance, whenever they felt that people are in a state with an insurrection against the institutions and the state. Ironically it was in the process of securing rights for the people and establishment of Rule and Law that parliament clamed contempt powers against citizens and the absolute powers of legislation. The limits of its legislative power are exposed by the example given. Theorists were of the view that parliamentary power is so absolute that it can legislatively order drowning of all blue eyed babies in river Tames - a power which no absolute monarch ever claimed…

Theorists of parliamentary democracy defined thus the expansiveness of the power of parliament very proudly. As at present this adoration of absolute powers of the parliament is the view point which is questioned by those who have started a movement for the inclusion of the entrenched rights in the English Constitution. Historically there was an appropriation of the power of the absolute monarch by the legislature and the courts. Where as there have been attempts in limiting the power of the legislature and the executive by popular pressure, periodic elections which act as a check on authoritarian trends and principally judicial review by Courts of executive actions and legislative measurers, no such systematic attempts has been made to contain the absolute powers of the courts without impairing the independence. Any attempt at reforming judiciary leads to paint these attempts as attempted erosions of judicial independence. Judicial independence is not a value in itself. It is expected so subserve the social values, which have been incorporated in to the constitution. Despite this assurance theory of independent Courts have neither promoted democracy nor personnel liberty or social economic and political justice in the fifty-year period of the constitution. This independence coupled with contempt power has made the institution absolutist and such an institution can never be the bulwark of democracy. A transgression of moral sanction comes easily for absolute power.

Contempt of court

The judiciary appropriated the contempt power the king had as an aspect of justice. It was an emanation of Royal authority and any contempt of court was really contempt of the Sovereign. If under the constitution the people are the sovereign no legitimate inference can be drawn that constitution delegated the court the sovereign power to punish the people or any one among them. Just as the Indian parliament inherited the privileges of the House of commons, The Indian Courts inherited the contempt power from the king of England. The Courts in India trace their genealogy of power to the Royal power of punishing people for contempt and its subsequent metamorphoses. This power was transformed in to a power, which inheres in a court of record, and the offence has become sui generis and transcends the limits of reasonable restraint judicially defined with impunity…

The myth of original court of records in which the power of punishing for contempt inheres has become part of the occult jurisprudence which law abounds in. To the principle that untrammeled power whether de jure or de facto would encourage impunity the judiciary is no exception. These powers are absolute and one cannot even plead justification in public interest when accused of contempt. The elected representatives do not have such absolute powers.

An authoritative statement of the character and magnitude of contempt power would demonstrate why a code of conduct for any judges may not really be effective:"…

It is an offence purely sui generis, and that its punishment involves in most cases an exceptional interference with liberty of the subject, and that, too, by a method or process which would in no other case be permissible, or even tolerated …

The jurisdiction should be exercised in more carefully in view of the fact that the defendant is usually reduced, or pretends to be reduced, to such a state of humility, in fear of more severe consequences if he shows any recalcitrance, that he is unable or unwilling to defend himself as he otherwise might have done" (Oswald "On Contempt of Court")

Code of conduct for judges

Having been fed on hope and illusions all of us applauded the Judges for prescribing for themselves a code containing principles, which are merely Polonius style pious homilies. These cannot be enforced and can be breached at will. The conducts the code addresses to are old habits and they hard die. The Chief Justice who is only first among equals he has no authority to command his colleagues to commence their sittings strictly according to the prescribed timings.

In the life of a constitutional appointee the private and public divide or dichotomy does not exist. One cannot be unjust unequal and arbitrary in personal life and claim to adjudicate constitutional principles completely and fairly in courts. Talking about professional ethics Durkheim raises issues, which appear to be quite relevant in today's context " A way of behavior, no matter what it be, is set out on a steady course through habit and exercise. If we live a morally for a good part of the day, how can we keep the springs of the morality from going slack in us. We are not naturally inclined to put ourselves out or use self restraint; if we are not encouraged at every step to exercise restraint upon which all morals depend, how should we get the habit of it? If we follow no rule except that of clear self interest, in occupations that take up nearly the whole of our time, how should we acquire a taste for any disinterestedness, or selflessness or sacrifice?" If they are merely moral precepts do the judges require a code of conduct like the clerical cadre? Does not the constitution imply a Code of Conduct? The objectives enumerated in the Preamble to the constitution and the Constitutional oath prescribed for these appointees regulate their working in courts and the same values give rise to moral principles on a which to regulate ones conduct in life. A whole lifetime is spent in career seeking and career promotion and that has brought about a debasement of public morality. The colonial mind-set and the iniquitous feudal and caste practices, which every one of us has internalized, still is the predominant culture of these institutions. This is compounded by the adversarial system a legacy of laissez faire to the profession, has brought about a legal culture, which is unredeemingly competitive impervious to social mores and social purposes.

Concluding remarks

The pharisaical righteousness, the aggressive, authoritarian and pompous demeanor and other feudal habits, and the discourse in courts highlight and inform any causal observer that this institution is arbitrary and no code of conduct. The first step towards reforming the judiciary is to introduce democracy in the structure, the mode of discourse and dispense with the professional robes, a symbol of power. The simulated obsequiousness which one is a witness to in courts is quite disgusting and it goes with the colonial-feudal structure. The obsequious mode of address gets transformed into a title and we find a judge being addressed as "your Lordship" outside the court and in seminars or on any such occasion where a judge is participating or is merely present.

The expression "Justice" is similarly used to a judge who has demitted his office as if it is a title. Though we abolished titles the habit continues. The whole scene appears quite pompous. The institution should be exposed to public criticism by confining contempt power a very narrow field of administration of justice and that will discipline the institution. Everything about the Court requires a radical transformation and the first step should be to discard the colonial and feudal vestiges which alone would give a democratic visage it so badly needs. Not the least is the liberation of a profession from self imposed servitude as a part of a lawyer's professional competence.

LAW *alter views*

Corporate democracy

Interest of small shareholders is at stake

A. K. A. MUQTADIR

IN a corporate environment, there are obligors like owners, directors and management. They work, however, in separate spectrums. But by all means, the supremacy in leading the company lies with directors of the company. This authority in running the company has been spelled out, albeit loosely, in the stipulations of regulation 72 at schedule-I to the Companies Act 1994. It is provided in the regulation that the business of the company shall be managed by the directors. The provision continues further, with the ultimate analysis that subject to the various provisions of the Companies Act, the Board of Directors of a company shall be entitled to exercise all such powers and to do such things as the company is authorised to exercise and do except those which are required by the Act or the articles of the company to be exercised by the members in general meeting. Now, what those members can really do!

With the growing intricacies and complexities of modern business, commerce and industry and the mushrooming growth of laws and rules to regulate the formation and management of companies, it is but imperative that the management and control of the companies be entrusted to a more compact specialised representative agency, rather than the shareholders themselves, who are very large in number. Though in great numbers, but they are not organised to safeguard their interests. Still more, they have no time, fund or the required experience to exercise their rights and are not effective in putting control over the management of their undertakings.

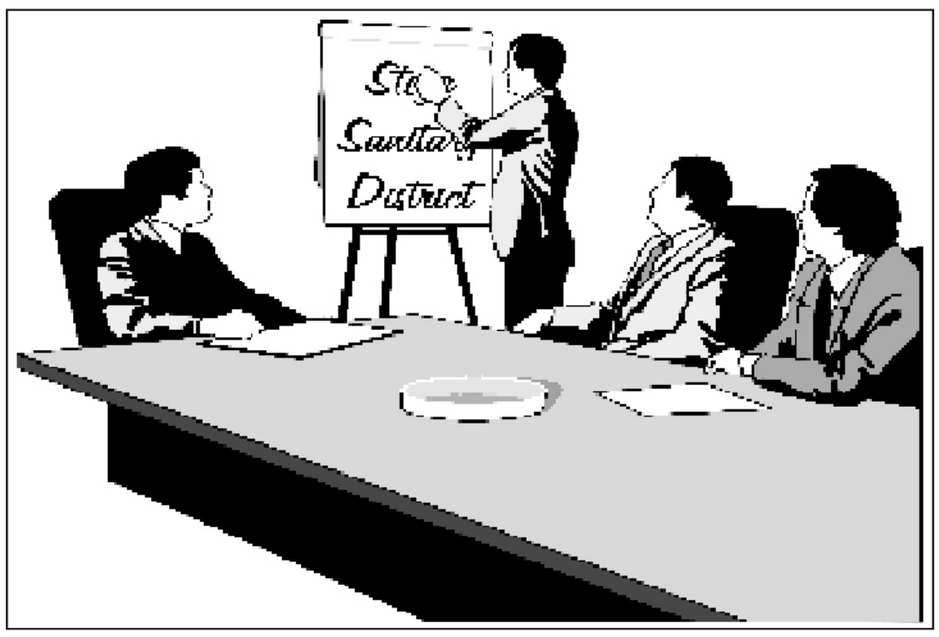
Shareholders' rights

Several laws recognised the rights of the shareholders. Among these Companies Act 1994 has for the first time recognised the supreme authority of the shareholders at various levels. It gives authority to the shareholders to appoint the directors at the annual general meeting to direct, control and manage the business and affairs of the company. The shareholders have also the power to monitor functioning of the directors. The Act has armed the shareholders with very effective and powerful weapons so as to enable them to ensure that the business and affairs of the company are on the right track and they are properly managed. They have the authority to appoint the auditors to look into the financial activities of their undertaking. If any of the Board actions appear to be to their detriment, the shareholders can even approach the court to reverse the same. Of late, the Securities and Exchange Commission has introduced an amendment requiring that a portion of the directors have to be elected from amongst the public shareholders.

But the conventional rights, in fact, do not say strongly in favour of a true governing power in the corporate affairs. Democratic rights are those, which render a sort of interposing influence in companies. There are other stipulations given in the Companies Act, which allow the shareholders some credible additional rights. Those rights are somewhat more inspiring in spirits.

Composition of the Board

In a corporate environment there should be reciprocity in Board management, so that it could generate mutual trust and respect among the directors. If equity is to originate from investors, and then the majority of them are categorised as the so-called 'minorities', there is possibility that such a situation may develop mistrust and misgivings. But there is no tug of war in it. The Board should be strewn properly and tenderly giving representation of all sides - large investors and small investors. There is SEC directive in this respect as well for inclusion of small shareholders' representatives in the Board. Presently, the Boards of directors of most of the companies are having nominees of the minority shareholders who covertly and cleverly represent the sponsors group to the exclusion of the majority small investors. They have no other option but to vote in favour of those who take them in the Board. When that be the situation, it is but obvious that the directors of those companies would manage the business and affairs of the companies keeping in view the interests of only those who bring them on the Board and would ensure their continued presence on the Board, unmindful about the interests of a large number of the small but majority section of the shareholders. This is a poor show and has to be reversed.



Company Boards should be properly represented. To make a meaningful discharge of the Board affairs, first of all composition of the Board has to be balanced. In Bangladesh, only a few instances are there that Board members are inducted considering experience and expertise of the incumbents in the relevant fields. Instead of policy framing and monitoring, they indulge more in grouping and bickering.

Why corporate democracy does not flourish

Despite the powerful weapons handed down to the shareholders by the Companies Act, the Securities and Exchange Ordinance and Rules, the Stock Exchange Regulations and by some other regulatory laws, the shareholders have not been able to assert themselves at any place. Most of the stipulations remained dead provisions and have not been used at all by the shareholders as a potential weapon to correct any wrongful or inept actions on the part of the directors or to give them any direction. As a result, the Boards of Directors of companies are elected only by a few shareholders who attend the annual general meetings.

The attendance records at the AGMs might show a huge number present. But, in fact those are only 'packet lifters' who come only to go back with the packets, satisfied that the directors have honoured them with inflated boxes of cookies or birianies etc.

In Bangladesh scenario, the minority shareholders constitute a large section. But they are seemingly obsessed by a thought of ingenuity and indifference from the majority. This hunch of deprivation is often frequented by hue and cry at the meeting, which sometimes renders it rather difficult for companies to keep control and order at the meetings and transact the AGM business in a sober way. It is thus a paradox to peacefully conduct the AGM these days.

One recent trend in AGM by companies is convening it outside Dhaka, may be at the factory locations. Often it is called at mofussil towns.There is of course, the other side of the coin. Although company meeting is classified in nature, but instances are there, that non-members, even minors are carried to the meeting, much to the distraction of meeting proceedings. In many cases extra-agenda deliberations take place, which reduces discussion on formal issues and thereby minimising knowledgeable shareholders participation.

Company general meetings are strictly statutory events where only members are allowed to participate and that too for transaction of specific items only. There is no room, whatsoever, to treat a general meeting to be a forum for general discussion. To express personal grudge and agitation is none the least permissible.

There should be some sort of manner and discipline for entrance and exit and of course for deliberations at the meeting. Registration at the entrance cannot remain open throughout the course, nor could the meeting afford to continue indefinitely. Moreover, one single body cannot be expected to take the floor for all and keep asking complementary questions, rather others are also to be invited and given the chance to say. Democratic practices grow and flourish with tolerance. Live and let live!

Concluding remarks

Corporate democracy has got nothing to do with the national democratic scenario. However, one just cannot afford to be totally oblivious of the warmth and influence of the later. Rather, taking the fortitude therefrom, it is the initial Board members who have to sow and grow democracy within the company management. Thus, composition of the Board plays a very important role in cultivating corporate democracy. Together with that, the regulatory authorities have also to play their part in developing a congenial and democratic environment in company management. Let us look ahead for the solemn and sombre nice days.

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LAW *news*

Anti-tobacco treaty adopted

A historical task was accomplished at the 56th World Health Assembly (WHA), the annual meeting for Health Ministers in Geneva on May 21, 2003. The WHA formally adopted the Framework Convention on Tobacco Control (FCTC), the first public health convention negotiated under the auspices of the World Health Organisation (WHO).

It took the WHO's 192 member countries almost four years to negotiate the convention. The convention's final draft was agreed upon on March 1, 2003. Consumers International (CI) led by its Asia Pacific Office played a significant role along with CI members and other civil society organisations in campaigning for this convention.

The adoption of the FCTC is but the first step. More arduous will be the task of implementation. The convention will come into force 90 days after 40 members have ratified it. This is expected to be completed before the end of the year. It will require another level of negotiations within individual countries to formulate legislation, create the necessary regulatory infrastructure, and earmark resources. The problems will be particularly acute for Least Developed Countries (LDCs) and other low-income countries.

Implementing the FCTC will require the political commitment of the entire government, not just the Ministry or Department of Health. It will require member countries to put comprehensive tobacco control on top of national development agendas. Such agenda must be backed by political will, financial resources and civil society participation.

Governments must continue the spirit of the convention. It aims to curb health problems caused by a product known to be harmful yet being legally traded in our markets. Civil society role is critical for successful implementation and CI urges governments to include civil society in their rule making, monitoring and educational programmes.

The tobacco epidemic already claims 5 million lives annually and if left uncontrolled will claim 10 million lives annually by 2020. Transnational tobacco companies have targeted developing countries as the most promising growth markets. The FCTC gives these countries a tool to protect their people from the influence of the tobacco TNCs' advertising, promotions and sponsorships.

Courtesy: Consumer International (CI).

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