

Administrative Courts & Ombudsman¹

by Masood Hasan

THERE has been a tremendous expansion in the last few years in the range, complexity and power of the State and this process will continue. It devolves upon the civil servant to man and run the administrative process so as to allow smooth and free flow of activities with the proviso that in the exercise of administrative discretion there should be no arbitrariness or insolent use of the powers so delegated to him.

The present position regarding redress of a citizen's grievance against a decision made by a Government functionary is to obtain justice through the courts. And who is not aware that this procedure is cumbersome, justice is delayed (hence denied) and expensive. This amounts to saying that the excessive discretion enjoyed by Pakistani officers leaves no speedy or effective remedy for the aggrieved citizen.

It is also clear that whatever attempts have been made in the past to improve efficiency have failed if only on account of the fact that it has never been appreciated that modifications of procedures or rules are required to be made from time to time to suit the changed circumstances. The reason lies in the incompetence of the human being to forecast the future accurately enough. This means whatever administrative instrument is devised to provide citizens with a safety valve must also have a built-in mechanism to sense change, measure it and be able to initiate corrective action, i.e. exercise control. And what is more important is to keep going through this cycle again and again. The maintenance of this cyclical process is the secret of good administration. There can be no let-up, the world is moving far too fast to permit us the luxury of taking things easily and making attempts at evaluation every third or fifth year or even annually.

No Effect

Everybody knows how the West Pakistan Government Servants (Efficiency and Discipline) Rules 1962, failed to achieve the desirable results, even though these provided for censure, for stopping increments, for demotion, for compulsory retirement, etc. Equally ineffective were the Government Servants (Conduct) Rules. The Anti-Corruption Rules, the Establishment Manuals, the system of internal inspections by departmental heads, the Vigilance Officers Scheme, the External Inspection Teams have all achieved precious little. Even the setting up of Organization and Methods (O&M) Units with a view to promoting efficiency to government business have proved unsuccessful. Apart from all this several circulars have been issued from time to time mentioning the necessity of eliminating corruption, of improving efficiency, of doing this, of doing that Where does one go from here? Should we throw in the towel. But is that not the gospel of despair? Are we not told, "Verily We have created man into toil and struggle" (XC-4) and "if you turn away my Lord will make another People to succeed you" (X-57). The injunction is clear: that unless we take action ourselves, unless there is tireless striving towards reducing disorder, unless we deliberately and

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consciously study our problems and devise solutions to suit our genius, it will never be possible for us to achieve any balance in progress. Knowledge is everyone's lost property, he who labours makes it a part of himself. We are told: "O Lord! Increase me in knowledge" and even if one has to travel far one must do so – even to China – to acquire the same!

What have other countries done in an effort to redress citizen's grievances? The Swedish Constitution (1809) created the office of the Justetieo-Ombudsman. Later, Finland (1919), Denmark (1954-55), and Norway (1953) introduced the same, though there are some differences in their activities. Other countries have also considered or gone in for this administrative safety valve, New Zealand is one such country.

The Ombudsman is generally elected by the Parliament for a fixed tenure and his annual report is submitted to the Parliament. The Ombudsman gives no orders but can prosecute a delinquent official. He can initiate enquiries himself or look into matters brought up to him and has unlimited success to files. He advises administrators to give reasons for decisions. Generally, whatever administrative remedies for relief exist must be exhausted before the Ombudsman listens to complaints brought to him by government servants also concerning such matters as the Services Tribunal is concerned with here.

Administrative Courts

However, because the Ombudsman cannot always redress grievances arising out of harsh and unreasonable exercise of administrative discretion the need for Administrative courts arises. These courts must be a part of the Executive and not the Judiciary. Whilst the Judiciary is concerned with the proper implementation of procedures it usually does not concern itself with the content of an administrative decision. The Administrative courts are not handicapped by any jurisdictional or procedural niceties. In Finland or Sweden there are Supreme Administrative Courts similar to the French Conseil d'etat with its hierarchy of Courts. In France the six main features of the methodology of the Administrative courts are as follows:

- 1) Their procedure is inquisitorial i.e. the judges are not just umpires, they go into the propriety of the administrative decision and collect information through their own rapporteurs, if necessary – thereby reducing the possibility of injustice due to lack of resources on the part of citizens to engage expensive lawyers, or in getting relevant information from Government Departments.
- 2) Their judicial review is comprehensive – i.e. the Court goes not only into the facts and law, but also into the motive, be it personal, political or social, the onus of proving the bona fides lying on the administrative authority.
- 3) The court insists that subjective satisfaction must be justified externally, that administrative decisions must be justified face to face.
- 4) The court's jurisprudence is creative and dynamic; that is, the court is not bound by precedent or bogged down in jurisdictional issues. The underlying principle is to secure a proper, ethical and decent standard of administrative behaviour – "administration shall not lie."

- 5) The Conseil is marked for its independence and fearlessness even though it is constituted within the Civil Service structure.
- 6) The Conseil has gone farthest in extending the vicarious liabilities of the State. Damages have been frequently awarded against the State, because in France there is no immunity of the State against claims arising out of wrongful assault, battery, false arrest, malicious prosecution or interference with contracted rights, in many of these cases the Conseil has awarded damages against the State.

The success of this system lies in the fact that the Conseil is part of the Executive, coming directly under the Prime Minister. Where doubts or difficulties arise as to jurisdiction in France, there is a Tribunal of Conflicts which is composed of representatives of the Conseil and the Judiciary in equal numbers under the presidentship of the Grade des Sceaux (Minister of Justice) who is also President of the Conseil d'etat. He normally does not attend, but if there is a deadlock he uses his vote. It may appear improper for a Minister to have this power, but this is probably the best solution as no independent chairman could be drawn from the Judiciary.

When we consider the tremendous expansion of organized activity that has taken place in all walks of life in Pakistan within a few years we realize that the procedures (in all their glorious detail) are by and large not defined because by the time one gets round to definition further modifications are required. It would appear that we just simply cannot catch up with ourselves. The concept of continuous (as opposed to periodical) evaluation has not been accepted because continuous evaluation imposes a certain administrative discipline on individuals running the organizations. This discipline can never be enforced by a court of Law. This discipline can only be enforced by a branch of the Executive armed with the authority to penalize the offending official. The judgements of the Administrative Court would be enforced like declaratory decrees of the judiciary. If an official does not take cognizance and acts accordingly his decisions may be declared null and void. What is more important: if he persists he can be found guilty of personal fault and damages be awarded against him or the State.

In criminal action the citizen is the defendant and the onus lies on him to prove his innocence. In handling grievances the Administrative Court looks upon the State or public body as the defendant and the onus lies on the State to disprove the accusation. This means the agents of government, other than Ministers, cannot be prosecuted for acts related to their official duties except by virtue of a decision by the Administrative Court. Naturally, only a judge fully aware of administrative exigencies and rules within which it must function can do justice. This implies specialization of a type that cannot be expected from a judicial judge with all his current preoccupations out here just take a look at the waiting list of cases.

Executive Agency

There can be no doubt in the wisdom of the President's statement when he not so long ago spoke of the need for administrative reform and need for an Ombudsman-like

organization. The organization required to set up the Administrative Courts – lodged within the Executive – would call for selection of men of proven integrity, administrative experience and capacity to make bold decisions. Our administrative tradition is yet moribund with the Macaulayan legacy of maintaining the status quo. The essence of control lies in action which adjusts the output of a process to predetermined standards. Standards can only be predetermined if there is predictability which is currently lacking. This makes it impossible in very many cases to forecast the hierchical route a case or a file may take. A file may capriciously be broken up into two or more parts each merrily moving in different streams. The co-ordination that should be possible disappears in a confusion or welter of notings, moving vertically, laterally and diagonally, depending on the current sweet will of the individual handling the case. Little wonder that frustration is writ large on the face of the aggrieved citizen who has literally nowhere to go for succour. With the establishment of Administrative Courts such frustrations will disappear by permitting effective protection of the citizen against encroachments of the State in any of its many forms.

Now that the will to do right by the citizens is present there should be no difficulty in translating the thought into reality. This will be yet another feather in the cap of the Government. Under a presidential form of government it would appear the best place to lodge the Administrative Courts would be under the President and an annual report be made by the Number One of the courts to the National Assembly.