

The Ombudsman *

THE RECENTLY published draft Ordinance on a proposed Ombudsman seeks firstly to define maladministration ie when a government servant does something contrary to law, rules, regulations, procedure established practice, or when he does something that is perverse, arbitrary, unreasonable, unjust, biased, oppressive, discriminatory or makes a decision on irrelevant grounds of uses or doesn't use his administrative powers for corrupt, improper motives or is guilty of neglect, inattention, delay, incompetence, inefficiency or ineptitude. All this certainly makes very impressive reading - like a legal rendition of terms that distinguish between stealing, theft, robbery, dacoity, larcency (petty or grand), misappropriation, embezzlement and so forth and all this should leave the layman cold.

It is important to concede, in the first instance, that it is established practice that has generated the need to look for ways and means to ensure that administrative decision making is understood that in matters of law the hyphen, the comma and the full stop may be highly significant and their wholesale and retail application to administration leads to more attention being paid to the form, the letter or the procedure rather than to the spirit of achieving results.

But then, why should the administrator, executive or manager be interested in results when his decisions may come under judicial or audit scrutiny long after they event? Yes, indeed why should he!

Any society does require, among others two institutions---the judiciary and audit. Both deal with historical evidence---a murder was committed or an embezzlement had taken place. Further, if the body is not found the murder was not committed. And because judicial standards along with its Law of Evidence become arbiters of administrative decisions, we make pretty sure (and who doesn't know the ways and means!) that the available evidence effectively camouflages the body. The legal pundits are, therefore, chained to their procedures as are the auditors, which must be followed and very correctly so. What would happen if we had innovative judges or auditors! Whatever good exists would also disappear!

Who is not familiar with tendering procedures and the fine print which says "we reserve the right not to accept the lowest offer" or "we reserve the right for, this, that and the other.....On several occasions retendering takes place until the favoured individual or organisation does obtain the contract. All is procedurally ie legally and from an audit standpoint, quite in the clear, but all concerned know very exactly what has happened. This means our requirement is to look into the reasons for the lack of administrative accountability or if that is too much of a bore, to bypass all this by saying: what is required is a systematic exposure of the facts resulting in a decision being handed down.

* The Muslim Dec 18, 1981 – Letters to the Editor

How does one get about this! After all, a decision is a mere moment of a long drawn out process. Again, since it is usually too much of a bore to make an explanation because the problem is complex, handy assumptions are made and in so doing, the baby is thrown out with the bath water! It has to be accepted that an approach based on the type of assumptions we like to make leads to treating the symptoms and not the disease. Is the way to ensure justice (legal variety) because of the increasing backlog of cases brought about by keeping on increasing the number of judges, or is it to try to define the underlying reasons why "one half of Pakistan is litigating against the other" and then to attack the problem "preventively" and not "curatively". But exposing the facts is one thing which any blue-blooded bureaucrat must ensure doesn't happen—it just isn't an *established procedure*. A lot of the results of salting away information creates administrative excesses. Why not consider the means for self-regulation?

Who is not familiar with hoarding of wealth! Fewer may be aware of hoarding of authority. But over the years this is what has happened in the country and when hoarded authority and wealth got together in President Ayub's time, it surely and steadily led us on the wrong path. Political institutions or what was left of them were demolished. However, hoarded wealth and hoarded authority are directly dependent on hoarded information, are they not? So attack the basics first---this is the essence of preventive action. Is not an ounce of prevention worth a pound of cure?

In order to determine whether maladministration, etc, has taken place, the Ombudsman can investigate (but not matters that are sub-judice), arrange for studies and research and conduct the investigation in private. It is ensured that the conduct of an investigation will not affect any future action taken by the agency. In addition to the Ombudsman conducting investigations in private, the President may claim privilege of secret documents. If after all this it is established that maladministration has taken place the Ombudsman may refer the matter to the appropriate authority for corrective action which must report back within 30 days. If corrective action is not taken by the concerned agency, the Ombudsman may in that case present a special report before the President. Defiance of the Ombudsman's recommendations therefore, has to be resolved by the President himself.

However, does this mode of attack either bypass existing problems or attack them head-on?

It does neither. The Ombudsman, the draft Ordinance says, has to point out in private, where amends should be made and then leave the executing agency to correct itself. This is a half measure, but as far as Ombudsmanship is concerned it is all right. Since the Ombudsman cannot always redress grievances arising out of harsh and unreasonable exercise of administrative discretion, another agency has to be found for this. It is this agency that should correctly be termed the Mohtasib-i-Ala and not the Ombudsman.

The first requirement is that the Mohtasib-i-Ala is not an umpire. He will have to go into the propriety of the administrative decision and collect information through his own rapporteurs. He will have to go not only into the facts and legalities of the case but also

the motives be they political, social or personal and the onus of proving bonafides will lie on the concerned administrative authority. The Mohtasib-i-Ala will have to insist that subjective satisfaction be justified externally, that administrative decisions must be justified face to face. The Mohtab-i-Ala's interpretation of law will, therefore, have to be creative and dynamic and will not be bound by *established practice or precedent*. The objective is to secure a proper, ethical and decent standard of administrative behaviour. He would, where necessary, go far in extending the vicarious liabilities of the State and award damages. There will obviously be no immunity of the State arising out of wrongful assault, battery, false arrest, malicious prosecution or interference in contracted rights. The above is very much in keeping with Islamic injunctions and in any case is certainly more Islamic than the procedurally correct and drearily dilatory methods of obtaining justice as of today. The judge listens to the advocates, the litigants talk to them and justice in large measure depends on the skill of the advocate. The procedure in this system is of necessity all important, and that is at it should be. Whether justice is dispensed or not is not the point but that the *Interpretation* of law be correct.

It is insufficient, rather inadvisable, to attack any complex problem piecemeal and in keeping with this approach (who can disagree with it?) the necessity for various administrative support activities currently non-existent in our various ministries rear their head.

Without such support activities, no method of controlling the executive from within can succeed and that is what we need to address ourselves to. The support activities or staff functions arise out of the inflexible dictates of science and technology and their repercussions on the administrative process. Do not people, demand, in the world of today, satisfaction in quicker and quicker time along with decreasing frustration tolerance. It doesn't matter whether we talk of voltage fluctuations or clouds of smoke emanating from vehicles or the telephone going dead yet clocking up hefty bills or retired officials retiring from the world without fully processed pension papers or airport facilities lagging well behind increased jet travel.... The old world is familiar with the direct management of things---stone, wood, iron and that too in small quantities. The new world is characterized by the need first to understand complexity and second to manage it. The method becomes more important than the problem itself. Yet our approach continues to attack the multi-specifics leading to "disjointed incrementalism".

The proper approach is that of using the scientific (empirical or inductive) method, a method first popularised by Islam in big way. In order to take care of ever increasing complexities, our methods of formally evaluating human performance requires revision so as to lead to more effective merit rating (for rewards) and performance appraisal (to make good any deficiencies). Of necessity it must lead to new methods of moving information. At present, by and large, the subordinate in his wisdom decides what his boss wants, for him to make decisions to discharge his responsibilities upwards. Giving the subordinate the best of intensions, how can it be decided? But this is established procedure. That is why it is said when the section officer has recorded his viewpoint very few dare to challenge it. Altering information flows call for new methods of training.

There are basically two types of training, on-the-job and off-the-job. In each there are two divisions. The first of functional training and the other of general, control, co-ordinative training. We have three types in Pakistan the fourth, on-the-job general, control, coordinative training, is conspicuous by its absence. It is this training that brings home the fact in a systematic fashion that administrators, managers, executives are only doing two things – handling information and making decisions and nothing else. Our institutional weaknesses derive out of lack of recognizing this basic fact. After all, man for man, a Pakistani can hold his own with anyone in the international sphere and is much more productive in an alien environment. So technological competence has little to do with the low productivity levels in the country. It is the “non-technological” or management aspects that require our respectful attention. Without singling out any Ministry, most of them require the support (staff) functions of work study, systems and procedures, electric data processing, operations research, personnel administration and where there is plenty of purchasing, contract administration and economic analysis.... This will in no way duplicate any other Ministry’s functions but provide the necessary reflection at the point where physical transactions take place. The chief executive officer at each level to be truly effective needs these aids. Without this bridge, each Ministry will continue to function in splendid isolation in accordance with established practice.

All this and more needs to be introduced to ensure that administrative accountability is not confused with legal or audit accountability.

It would not be out of place to quote from the U.S. Panel on Technology Assessment in regard to internal and external evaluation. “Implicit in much of this report has been the discretion between internalized assessment (ie assessment built into the inventive structure, the decision-making process in question) and externalized assessment (ie assessment conducted by an institution deliberately separated from the front-line decision maker). There has been general agreement in the panel that internalized assessment whenever it can be applied, is far preferable essentially because self-regulating close-loop systems are best able to adjust to net variations within the system itself. Externalised assessment separates authority from responsibility while internalized assessment tends to re-define responsibility without separating it from authority (any further). However, self-regulating systems may be insensitive to externalities and may have to be substituted by externalized open-loop systems. Thus although there are advantages in being on the scene, proximity and commitment tend to generate blind spots. In sum, any scheme devised for improving the assessment and management of technological change should make maximum possible use of the internal decision making process and should proceed by making these processes more sensitive rather than by imposing external constraints, but it should recognize the necessity for some external assessment and supervision to make the system function properly. Ideally, the effort should be made to modify goals and criteria of success without dictating the means of achieving them”.

Is it not a pity that living in this world is becoming more complex? Man is creating the complexities and man alone must put it right.

Va al-laisa lil insaana illa ma sa-aa. (The Holy Quran, 53:39).

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/ The Ombudsman