The need for administrative courts**

By Masood Hasan

There has been a tremendous expansion over the years in the range, complexity and power of the state and this process continues. It devolves upon the civil servant to man and run the administrative process so as to allow with, the proviso that in the exercise of administrative discretion, there should be no arbitrariness or insolent use of delegated powers.

The present position regarding redress of a citizen's grievance against a decision made by a government functionary is to obtain legal 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 productivity have failed if only on account of the fact that it has never been appreciated that modifications of procedures or rules (not laws nor ordinances) are required to be made from time to time to suit the changed circumstances because of 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, ie 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 of fifty year or even annually.

Prior/existing curative measures:

Everybody knows how the Government Servants (Efficiency and Discipline) Rules 1962, failed to achieve desirable results, even though these provided for censure, for stopping increments, for demotions, for compulsory retirements, 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 of one variety or another. Results are nil. Even the setting up of Organisation and Methods (O&M) Units with the Management Services Division with a view to promoting efficiency in government business has not proved successful.

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"

**Frontier Post Nov 02, 1983

(XC-57) and "if ye turn away.... My lord will make another people to succeed you" (X-57).

The injunctions are clear: that unless we take action ourselves, unless there is tireless striving towards reducing disorder, unless we deliberately and 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. Pakistan did so in Ziaul Haq's time.

The Ombudsman is generally elected by the parliament (not so in Pakistan) for a fixed tenure and his annual report is submitted to parliament. The Ombudsman gives no orders but can prosecute in a court of law a delinquent official. He can initiate enquiries himself or look into matters brought up to him and has unlimited access to files. He advises administrators to give reasons for a decision. 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 out here.

Administrative Courts:

However, because of 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 lodged in the executive and not the judiciary. Whilst the judiciary is concerned with the proper implementation of defined procedures usually not up to date, it usually does not concern itself with the content of an administrative decision. 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. The six main features of the methodology of the administrative courts are as follows:

(1) Their procedure is inquisitorial ie the judges are not just umpires, they go into the propriety of the administrative decision and can collect information through their own rapporteures, if necessary, thereby reducing the possibility of injustice due to lack of resources on the part of citizens to engage expensive lawyers, or in obtaining relevant information from a government department.
(2) Their "judicial" review if comprehensive—ie 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. This

ensures the implementation of istehsan/equity as opposed to man defined justice/insaaf.

(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 therefore, 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) Such courts are marked for their independence and fearlessness even though they are constituted within the Civil Service structure ie executive. This is akin to the Quality Control function reporting to the Chief Executive Officer (CEO) and not the Production Manager in factory, or the CEOs of the Army, Navy and Air Force taking care of matters proactively before the applecart is overturned ie the executive is controlled within the executive itself. This is prevention, not cure. This approach runs contrary to the judicial approach which is curative/penal. This is why discipline is better in such systems. Discipline helps unity and helpful in reinforcing faith.

(6) Damages can and have been frequently awarded against the state, which is the defendant.

The success of this system lies in the fact that the administrative court is part of the executive, because it comes directly under the prime minister. Where doubts are 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 procedures (in all their glorious detail) are by and large not be adequately defined because by the time one gets round to definition, modifications are required. It would appear that we just simply cannot catch up with ourselves.

The concept of continuous (as opposed to periodic) evaluation has not been accepted because continuous evaluation imposes a certain administrative discipline on individuals running organizations. This discipline can never ever be enforced by a court of law. This discipline can only be brought in by a branch of the executive armed with the authority to penalize the offending officials in good time ie expeditiously .

The judgements of the administrative court are enforced like declaratory decrees of the judiciary. If an official does not take cognizance and acts accordingly, his decision may be declared null and void. What is more important: if he persists he can be found guilty or personal fault and damages be awarded against him or the state or both.

State as defendant:

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.

Executive agency:

There can be no doubt in the wisdom of the prime minister's statement when he not so long ago spoke of the need for administrative reform and need for an agency to contain corruption. The organization required to be 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 its 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 current lacking. This makes it impossible in very many cases to forecast the hierarchical 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 noting, 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 succor. With the establishment of independent Administrative Courts such frustration will disappear by permitting effective protection of the citizen against encroachments of the State.

Internal accountability:

Internal accountability was recognized in the Provisional Constitution of 1972 which laid the basis for Administrative courts. Article 216 (which was later mutilated beyond description in Article 212) reads as follows:

1. Notwithstanding anything here in before contained, the Federal Legislature may by Act establish, one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of
   (a) Matters relating to the terms and conditions of persons in the service of Pakistan, including the award of penalties and punishments.
   (b) Matters relating to the imposition, levy and collection of any tax, duty, cess or impose;
   (c) Matters relating to claims arising from tortious action of government, any person in the service of Pakistan, any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant;
   (d) Maters relating to industrial and labour disputes, and

(e) Matters relating to the acquisition, administration and disposal of any property which is deemed to be evacuee property of enemy property under any law.

2. Where any administrative court or tribunal is established under clause (1), no other court, including the Supreme Court and the High Courts, shall grant an injunction, make any order or entertain any proceeding in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends."

We need such an institution to help protect the bureaucracy by ensuring service conditions. It makes outside interference more difficult, though not impossible but certainly increasingly difficult over a period of time. Our constitution needs incorporation of the above mentioned Article 216. After all, is there any right-minded person who is not ashamed and appalled to what is being witnessed generally nowadays—at the bureaucratic level, at the political level and at the judicial level.

There has to be a qualitative shift in our thinking. More of the same will only yield much more of exactly the same. So let us not keep harping on "proven" ineffective traditional remedies. The government's functions need sympathetic and humanitarian improvement. The brand of accountability through administrative courts is a dire necessity to take care of administrative dysfunction. It must never be forgotten that an executive, manager or administrator worth his salt should always attempt to make a decision, -- the approximately correct decision at the right time rather than the correct at the wrong—there is no benefit of hindsight which post-mortems are concerned with, which are the delight of those who prefer to use audit or a judicial approach to sit in on judgement!

Protection of the government servant comes through an understanding that the sins of commission form the basis for training for high appointments. This approach looks severely on the sin of omission—a truly preventive approach and that is what is required.

Masood Hasan is former Chairman Federal Management Development and Inspection Commission.

/need for courts