

Corruption, administrative courts and the ombudsman*
by Masood Hasan

Faith, Unity and Discipline are three words with which all of us should be more than familiar. There can be no Unity without Discipline. Further, Discipline reinforces Faith.

In government processes administrative discipline is a requirement. When this discipline is thrown out of the window, corruption rears its head and gets progressively increasingly worse. Pakistan has been awarded the silver medal in this field. It appears we are well placed to go for the gold!

In a factory the production manager is never put in charge of quality control for obvious reasons. The quality controller reports to top-most management so that if preventive action is required it is taken before the system goes down, as it may not only involve the production department but the purchase and stock control departments also. Likewise, when we consider our Armed Forces the Chiefs do not wait for matters to go wrong and then take action. The Chief takes preventive action because he has the power to do within his organizations.

We need to understand the difference between prevention and cure in order to treat an individual case of malaria the clinical/curative approach is simple, to dose the person with quinins or its synthetic derivatives. However, over a period of time malarial parasites can become immune to curative measures. If we act preventively it may mean looking into the flood control system, water supply and drainage systems, the organization or disorganization of the health departments, and so forth. An ounce of prevention is certainly worth a pound of cure!

Our courts of law have to wait for something to go wrong and then be involved in say, embezzlement or murder cases. Further, if the body isn't found the murder was not committed. The law therefore, has to wait for a sin of commission before coming into action. Court actions deal with past occurrences.

Administrators or managers when they make decisions invariably concern the future, hence their approach is not the same as that of a court of law. They are aware that their only accountability is judicial hence they ensure the evidence is not there by the time an investigation takes place or do things in a 100 per cent correct procedural fashion but wrongs are committed. The courts are then helpless. However, we need to be careful of the innovative process in courts. Courts should restrict themselves to precedent and make small adjustment at a time. If this does not happen just consider what happened to Pakistan when the innovative "law of necessity" was introduced.

In administration the task is not to apply a formula but to decide, in accordance with the procedure, issues on a case-to-case basis and no fixed inflexible rule can ever substitute a sound basis for administrative-cum-commercial issues in the decision-making process.

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Our Provisional Constitution of 1972 laid the basis of Administrative Courts, Article 216 as reproduced below:

“(1) Notwithstanding anything herein 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 punishment;
- (b) matters relating to the imposition, levy and collection of any tax, duty, cess or impost;
- (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) matters 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 or enemy property under the law.

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

Most unfortunately, it never made it in our current Constitution. Given the complete failure to cope with corruption we must expect more of the same will give us much more of yet the same. A qualitatively different approach is required.

It needs to be understood that there has been a tremendous expansion over the past few years in the range, complexity and power of the state, and this process will most surely continue. It devolves upon the civil servant to man and run the administrative process so as to ensure smooth and free flow of activities with the proviso that in the exercise of administrative discretion there should be not arbitrariness or insolent use of the powers so delegated to him.

The present position regarding redressal of the 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 does not amount to delegation of authority but abdication! This is one main reason for rising corruption.

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 continuously required to be made from time to time to suit 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, to enable corrective action, ie the exercise of control, in good time. 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 governance. There can be no let-up, the world is moving far too fast to permit the luxury of taking things easily and making attempts at evaluation every third or fifth year or even annually.

Everybody knows how all attempts to achieve desirable results have failed eg, 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 kind or another not to talk of commissions and task forces have all achieved precious little. Even the setting up of organization and methods (O&M) units with a view to promoting efficiency in 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 no the gospel of despair? Are we not told: "Verily we have created man into toil and struggle" (XC-4) and "If ye 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 consciously study our problems and devise solutions to suit our genius, it will never be possible for us to achieve balanced progress. Knowledge is everyone's lost she-camel. Those who labour make it a part of themselves. 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 citizens' grievances? The Swedish Constitution (1809) created the office of the Justeieto-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.

Usually an ombudsman is generally elected by parliament for a fixed tenure and his annual report is submitted to parliament. The ombudsman gives no executive order but can prosecute judicially a delinquent official. He can initiate enquires himself or look into matters brought up to him and has unlimited access to files. He advises administrators to give reason for decisions. Generally, whatever administrative remedies for relief exist must be exhausted before the ombudsman steps in. The ombudsman listens to complaints brought to him by government servants also concerning such matters as the services tribunal is concerned with here.

However, because the ombudsman cannot always redress grievances arising out of harsh and unreasonable exercise of administrative discretion the need for inadequate 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. 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 his hierarchy of courts. In France the main features of the methodology of the Administrative Courts are as follows:

- 1) Their procedure is inquisitorial ie administrative court 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 the citizens to engage expensive lawyers, or in getting relevant information from government Departments.
- 2) Their judicial review is comprehensive---ie the court not only goes into the facts and law, but also into the motive, be it personal, political or social. The onus of proving the bona fides lies 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 fearless even though it is constituted within the Civil Service Structure.
- 6) The Conseil can award 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 Garde des Sceaux (Ministry 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 few years we realise that the procedures (in all their glorious detail) are by and large not defined because by the time one gets round to a 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 imposes tight 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.

In short, we need to go in for a retrofit of our concept of administrative accountability. It is only through such an approach, given our ways of working, to provide the good administrator or manager with service security by ensuring administrative accountability.

/Corruption/administrative