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Administrative Law

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Introduction:

The most significant and outstanding development of the twentieth century is the rapid growth of administrative law. It raise important questions about some fundamental premises upon which the study and evaluation of administrative has been based. Today Administration is not concerned with only pure administrative function but also involved with a large number of quasi-legislative and quasi-judicial Functions. Democracy is preferred to any other system of governance because of its adherence to, rule of law, fair dealing of good administration. In Bangladesh application of administrative law is big challenges although it has some prospects. So we will try to discuss in this assignment what are the challenges faces the administrative law in Bangladesh as well as prospects of the administrative law.

Object of the assignment:

- The main object of the assignment to find out problem of administrative law in Bangladesh.
- What are the prospects of those problems?
- What are the problems created by the administrative and solutions?

Definition of administrative law:

According to Ivor Jennings:- Administrative law is the law relating to the administration. It determines the organization, powers and duties of the administrative authorities.

[The law and the constitution (1959) at p.217]

According to K. C Davis:- Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.

[Administrative law Text (1959) at p. 1]

According to Wade: - administrative law is the; relating to the control of governmental power. According to him, the primary object of administrative law is to keep powers of the government within their legal bounds so as to protect citizens against their abuse. The powerful engines of authority must be prevented from running amok.

[Wade & Forsyth, administrative law (2005) at pp.4-5]

According to Jain and Jain:- administrative law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.

[Principles of administrative law (vol. 1, 1966) at pp. 12- 13]

At last we can say that administrative law is the slaw governing the organization and operation of administrative agencies and relations of administrative agencies with the legislature, the executive, the judiciary and the public.

Constitution of Bangladesh and administrative law:

· Preamble Bangladesh constitution states that, nationalism, democracy, socialism and secularism shall be fundamental principles of the Constitution;

· Further pledging that it shall be a fundamental aim of the State to realize through the democratic process to socialist society, free from exploitation-a society in which the rule of law, fundamental Human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

· Article 14, states that, it shall be a fundamental responsibility of the State to emancipate the toiling masses the peasants and workers and backward sections of the people from all forms and exploitation.

· Article 16 states that, it shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens-

(a) The provision of the basic necessities of life, including food, clothing, shelter, education and medical care.

· Article 17 states that, the State shall adopt effective measures for the purpose of –

(a) Establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law ;

(b) Relating education to the needs of society and producing properly trained and motivated citizens to serve those needs; removing illiteracy within such time as may be determined by law.

· Article 19 states that, the State shall endeavor to ensure equality of opportunity to all citizens.

The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

· Article (26-47) all fundamental rights.

All of these above articles are regarding the administrative law.

Rule of law in Bangladesh reality and prospects:

The term 'Rule of Law' is derived from the French phrase 'La Principe the legality' (the principle of legality) which refers to a government based on principles of law and not of men. In this sense the concept of 'La Principe the Legality' was opposed to arbitrary powers.

The rule of law is old origin. In thirteenth century Bracton, a judge in the reign of Henry III wrote-

"The king himself ought to be subject to God
and the law, because law makes him king."

Edward Coke is said to be the originator of this concept, when he said that the king must be under God and law and thus vindicated the supremacy of law over the pretensions of the executives. Professor A.V. Dicey later developed on this concept in his classic book 'The Law Of The Constitution.' published in the year 1885. Dicey's concept of the rule of law contemplated the absence of wide powers in the hands of government officials. According to him wherever there is desecration there is room for arbitrariness.
The rule of law is a viable and dynamic concept and like many other such concepts, is not capable of any exact definition. Its simplest meaning is that everything must be done according to law, but in that sense it gives little comfort unless it also means that the law must not give the government too much power. The rule of law is opposed to the rule of arbitrary power. The primary meaning of rule of law is that the ruler and the ruled must be subject to law and no one is above the law and hence accountable under the law. It implies the supremacy of law and the recognition that the law to be law cannot be capricious.

DICEY'S THEORY OF RULE OF LAW

According to Dicey, the rule of law is one of the fundamental principles of the English constitution he gave three meanings of the concept of rule of law.

1. **Absence of Arbitrary Power or Supremacy of Law**
Explain the first principle, Dicey states that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. According to him Englishmen were ruled by the law and by the law alone; a man with us may be punished for breach of law, but can be punished for nothing els.6 In this sense the rule of

law is contrasted with every system of government based on the exercise by person in authority of wide arbitrary or discretionary powers of constraint.

2. Equality Before Law

Rule of law, in the second principle, means the equality of law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. In this sense rule of law conveys that no man is above the law; that officials like private citizens are under a duty to obey the same law, and there can be no Special court or administrative tribunal for the state officials.

3. Constitution is the result of the ordinary law of the land

The rule of law lastly means that the general principles of the constitution are the result of judicial decision of the courts in England. In many countries right such as right to personal liberty, freedom from arrest, freedom to hold public meeting are guaranteed by a written constitution; in England, it is not so. Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties. The constitution is not the source but the consequence of the rights of the individuals. Thus, dicey emphasized the role of the courts of law as grantors of liberty.

RULE OF LAW AND THE CONSTITUTION OF BANGLADESH

The rule of law is a basic feature of the constitution of Bangladesh. It has been pledged in the preamble to the constitution of Bangladesh that –

"It shall be fundamental aim of the state to realize through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens."

In accordance with this pledge the following positive provisions for rule of law have been incorporated in the constitution:
Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law. Article 31 guarantees that to enjoy the protection of the law, and to be treated in accordance with law, is the inalienable right of every citizen, wherever he may be and of every other person for the time being with in Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with Law.18 fundamental rights have been guaranteed in the constitutional arrangement for their effective enforcement has been ensured in Articles 44 and 102. Article 7 and 26 impose limitation on the legislature that no law which is inconsistent with any provision of the constitution can be passed. In accordance with Article 7, 26 and 102(2) of the constitution the supreme court exercise the power of judicial review whereby it can examine the extent and legality of the actions of both executive and legislative and con declare any of their actions void if they do anything beyond their constitutional limits. Right to be governed by a representative body answerable to the people have been ensured under Articles 7(1), 11, 55, 56,
57 and 65(2) of the constitution.18 All these provisions of constitution are effective for ensuring rule of law in Bangladesh. But facts on the ground tell a different s a different story altogether.

RULE OF LAW IN BANGLADESH

Laws, rules and procedures framed under them exist to cover every walk of our national life, though there may be parities in number and shortcomings in scope. Our constitution contain plethora of laws while institutions like courts, ministries and departments have been set up to dispense justice and decisions in accordance with the present state of the rule of law revels the riddle of having a body of law and at the same time not having it. It is like a person who is brain dead. Some aspects of the rule of law in our society and polity should be mentioned as under:

First, access to law as well as equality before it, are reserved for only those who are privileged. For the rest of the population, more or less the Hobbsian law of nature prevails. They are the helpless victims of as unjust society that sets great story by privileges.

Second, all government in this country since the fall of Ershad have claimed that there is independence of judiciary. The claim is only partially true, while the higher courts enjoy a certain measure of independence; the lower courts are under the direct control of the law ministry. The judges look up to the Ministry for everything infect they are obliged to. The principle of separation of judiciary from executive is being violated in two ways -
1. Magistrates are performing dual function of both executive and judiciary which is not desirable in the interest of justice.
2. The service of district and session judges, their transfer, promotion etc. are controlled not by the supreme court but by the law ministry.

Third, The government of Bangladesh continued to use the Special Power Act of 1974 and section 54 of the criminal code which allow for arbitrary arrest and preventive detention, to harass political opponents and other citizens by detaining them without formal charges.

Fourth, The very principle that law should take its own course requires that in investigation and preparation and submission of the charge sheet, the investigating agency should be free from, encumbrances influences and threats of all kinds. Unfortunately, that situation does not obtain in today's Bangladesh. In recent years a large number of political killings have taken place. The national dailies have carried the stories of all the gruesome murders and the whole nation has been out raged. What is however deplorable is that in most of these highly publicized cases the culprits have not been brought to justice. The reason is not far to seek. It is the interference by high ups in the political ladder.

Fifth, Another aspect of rule of law relates to the limits of law making
power of the parliament itself. Our constitution quite rightly declares the people as the repository of all power and they use it through their elected representatives. However, the question arises whether the parliament can make laws curbing the democratic rights the people, which are generally considered as unreasonable. The special power Act of 1974 the public safety
Act passed former Awami Liege Government etc. which are used to put
political opponents behind the bars, deserve special mention, so, the question arises can such pieces of legislation promote rule of law? Obviously, not. One the other hand the government

always with a view to avoiding debates make laws by ordinances and later gets them appointed under the sweeping power of article 70 of the constitution.

Sixth, Rule of law postulates intelligence without passion and reason free from desire in any decision regarding matters concerned with governance. In our society, the principle is being ignored on many grounds as quotas for political activists by the name of honor to freedom fighters, special provision for individual security etc.

Seventh, Police is no doubt a very powerful institution for the endorsement of the rule of law. But in Bangladesh, the police has never been friendly with the public. The police serve the government and enjoys, in exchanges, the freedom to act arbitrarily and in the material interests of its own members.

Eighth, Ordinance making power can be supported only in emergency
situation like national crisis, national calamity severe economic deflection etc. demanding for immediate legislative actions. But article 93 of the constitution allows the president to promulgate ordinances anytime during the recesses of parliament session.
On the other hand Article 141(A) empowers the president to declare emergency whenever he wishes. By declaring emergency in peace time the government can suspend fundamental rights and suppress the opposition movement. This mounts to avowed arbitrary exercise of power on the part of the government which is contradictory to the concept of rule of law.

Ninth, Another disgusting aspect of our judicial system is that there is the charge of corruption against our judiciary. Moreover, justices oftener than not, a costly commodity in our country. The poor people could not reach before the judges only because of mobility to meet the charge required for going through the complicated process of litigation. Thus, they prefer injustice than fatigue.

Tenth, In order to provide quick relief and avoid lengthy proceedings of litigation providing for the creation of Administrative Tribunal particularly for service matters which needs special treatment and experience is not undemocratic something.
But this tribunal has been kept outside the writ jurisdiction of the High Court Division under article 102(5). Also it has been kept out of the supervisory jurisdiction of the High Court Division. This provision has therefore, been contradictory to the concept of integrated judicial system and also contrary to the concept.

OBSERVATION

The above discussion makes it clear that though there are some positive
provisions for ensuring rule of law in Bangladesh Constitution, they are being outweighed by the negative provisions. Though our constitution provides for 18 fundamentals rights for citizens, these remain meaningless version to the masses because due to poverty and absence of proper legal aid the poor people cannot realize them .22 It also clear that the application of the principle of the rule of law is merely a farce in our country. However, prospects for establishing society purely based on the democratic principle of the rule of law is not totally absent from the polity.

We have a constitutional government elected through a free and fair election. But what is needed for the very cause of the principle of democratic rule of law is-

To separate the judiciary immediately from the executive ;

To appoint an ombudsman for the sakve of transparency and democratic accountability ;

To make the parliament effective and to let the law making body to do its due business in cooperation with each other government and
opposition;

To reform the law enforcing agencies and police force to rid them out of corruption and to free them from political influence so that they could truly maintain the rule of law;

To forge national unity and politics of consensus built around the basic values of the constitution, namely democracy, respect for each others human rights, tolerance, communal harmony etc.

Ombudsman for Bangladesh theory, reality and prospects:

The term Ombudsman was derived from the Germanic language and has its roots from the early days of Germanic tribes. The person who was chosen from a neutral group to collect blood money (Wergild) on behalf of the wrongdoer was called Ombudsman (Chowdhury, 1996: 7). But the modern office of Ombudsman was first conceived in Sweden by the Swedish Constitution Act 1and09, over 193 year ago. It has an even earlier prototype, the King's Chancellor of Justice, which extends far back into Swedish history (Rowat, 1967: 135). Today, however, the experienced persons having authority to inquire into and pronounce upon grievances of citizens against public authority are entitled as Ombudsman. The Swedish word "ombuds" means "officer" or "spokesman" or "representative" (Wade, 1967:12) It also connotes "attorney, solicitor, deputy, proxy, delegate and representative agent."

Many scholars defined Ombudsman in different perspective. Now, I give some important definitions given by famous writers and scholars. According to Davis Ombudsman "-- occupies a position of high prestige in the Government and his job is to handle complaints from any citizen who displeased with the action or in action of any administration or civil servant." (Davis, 1961 : 1057-1076). Justice report defined Ombudsman as "an officer of parliament be appointed who has as his primary function the duty of acting, as an agent for parliament for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executives." (1961; Para:2). According to Bernard Frank, "Ombudsman means an office established by constitution or statute headed by an independent, high level public official who is responsible to the legislature, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and has power to investigate, recommend corrective action and issue reports". (Frank, 1986:11)

According to oxford dictionary "Ombudsman is an official appointed by a government to investigate and report on complains made by citizens against public authorities".

Professor Rowat in his famous book "The Ombudsman: Citizen's Defender" wrote that,"Ombudsman is an independent and politically neutral officer of the legislature who receives and investigates complains from the public against administrative action and who has the power to criticize and publicize but not the reverse such action." (Rowat, 1986:1X).

According to Loewenstein, "Ombudsman is an independent official chosen by Parliament to watch over the administrative services in whose practices the general public is interested."(Loewenstein, 1965:403).

Professor Cutchin Defined Ombudsman as," a respected, a political individual outside the bureaucracy who is empowered to investigate citizen's complaints about government services and recommend rectification. Usually he has the power to investigate, criticize and publicize administrative actions, but can't reverse them". (Cutchin, 1981:68).

According to professor Garner, "Ombudsman is an officer of parliament, having as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive."(Garner, 1981:92)

Reviewing the above-mentioned definitions, it can be ascertained that Ombudsman is an independent and nonpartisan officer of the legislature, provided for by law, who an experienced person is having authoring to inquire into pronounce upon grievances of citizens against public authorities.

Constitutional Provision On Ombudsman:

After the independence of Bangladesh the framers of the constitution adopted in 1972 the concept of Ombudsman or Naypal (Islam, 1994:208). Article 77 of the constitution provides:

(i) Parliament may, by law, provide for the establishment of Ombudsman.
(ii) The Ombudsman shall exercise such powers and perform such functions as parliament may by law, determine, including the power to investigate any action taken by ministry, a public officer or a statutory public authority.
(iii) The Ombudsman shall prepare an annual report concerning the discharge of function and such report shall be laid before parliament (Constitution, 1972). Being persuaded by the fact that an institution like the Ombudsman would be essential for safeguarding the interest and rights of the public in Bangladesh from mal administration or administrative excesses.

Ombudsman Act' 1980

The main characteristics of Ombudsman Act 1980 are:
(a) There shall be an Ombudsman who shall be appointed by the president on the recommendation of the parliament.

(b) Parliament shall recommend for appointment as Ombudsman a person if known legal or administrative ability and conspicuous integrity.
(c) It shall come into force on such date as the Govt. may, by notification in the official Gazette, appoint.
(d) The Ombudsman shall, subject this section, hold office for a term of three years from the date on which he enters upon his office, and shall be eligible for reappointment for one further term.
(e) The Ombudsman shall not be removed from his office except by an order of the president passed pursuant to a resolution of parliament supported by majority of not less than two thirds of the total numbers of parliament on the ground of proved misconduct or physical incapacity.
(f) The Ombudsman may investigate action taken by a ministry, a statutory public authority, or a public officer in case where a complaint in respect of such action is made to him by a person.
(g) Ombudsman shall have the power to punish any person who, without lawful excuse obstructs him in the performance of his functions with simple imprisonment, which may extend to three months, or with fine which may extend to two thousand taka, or with both.
In the following discussions, an attempt has been taken to critically assess the various provisions of the act and for success full efficient functioning of the system, some proposal have also been put forward.

Appointment of the Ombudsman:

Theoretically there are three available modes of appointment of Ombudsman in the world:
1. Appointment by the National Assembly or Legislature;
2. Appointment by the Head of the State;
3. Appointment by the Head of the State on the recommendation of Parliament.

In Bangladesh, the Ombudsman Act 1980 provides for the third type of appointment, which sounds logical and rational, because the political system based on the parliamentary spirit is yet to develop in our country. But in the Act, nothing is mentioned regarding the role of the opposition parties in molding the recommendations to be sent to the President. In such a situation, the Ombudsman would certainly be recommended by the ruling party, which, in the long run ruin the independence, accountability and impartiality of the institution. Therefore, in the context of Bangladesh polities Ombudsman should be appointed by the President on the consensus of all parties in parliament to ensure acceptability of the Ombudsman to all.

Qualification of the Ombudsman

As regards the qualifications of the Ombudsman, the Act only states that, "the Ombudsman shall be a person of known legal or administrative ability and conspicuous integrity." But a person with legal capability may not have the requisite administrative ability and similarly a person with administrative capability may not have the legal ability, which is more essential for the post of Ombudsman (Ahmed, 1993:48).
But only law is not enough. The Ombudsman also requires substantive experiences and insight into public administration. Thus the provision regarding qualification requires little modification. Another defect with the act of 1980 is that it is completely silent regarding the age of the Ombudsman, which is an integral aspect of its qualification. Besides, the term 'conspicuous integrity' should be defined precisely within the Act.

Tenure of the Ombudsman:
According to the provision of the act, "the Ombudsman shall hold office for a term of three years from the date on which he enters upon his office and shall be eligible for reappointment for one further term." It seems that three years are not adequate to be efficient and successful in handling the affairs, which will fall within his domain. It is therefore desirable that the Ombudsman's tenure of office should also be equal to that of the President and parliament and be renewable for a further term depending upon his performance of the pervious term.

Privileges of Ombudsman

The remuneration, privileges and other conditions of service of the Ombudsman shall be the same as are admissible to a judge of the Appellate Division of the Supreme Court. The conditions of the service of a judge of the Appellate Division of the Supreme Court have been enumerated into the Constitution of the People's Republic of Bangladesh.

Functions of the Ombudsman

Generally, an Ombudsman may receive complaints from three sources:
i. Complaints sent to him by the members of the people (MPs);
ii. Complaints made to him by any person; and
iii. The Ombudsman may, on the basis of the newspaper comment or otherwise, proceed suo motu. (Halim, 1998:291)
Besides these, the Ombudsman can undertake periodic tours of inspection in various regions of the country to see for himself the state of affairs. The act of 1980 is not very clear regarding the Ombudsman's procedure of work in our country. In a populous country like ours, whatever method may be used, there will be numerous cases to investigate. Thus, identifying a particular one or two is not desirable. Because, one or two may have 'in-built' shortcomings with them.
The Ombudsman can also act as an agency to suggest administrative and law reforms. He may assume the role of a legislative advisor. He may call attention of the legislature to the desirability of reconsidering any law he believes has produced unreasonable, unjust, oppressive or discretionary results. (Ahmed, 1993:59).

Jurisdictions of the Ombudsman

The Ombudsman Act 1980, narrows down the Jurisdictions of the Ombudsman in Bangladesh by precluding the President, Prime Minister, Judges of the Supreme Court including High Court, Magistrates, the Chairman and Members of the Public Service commission and the Comptroller and Auditor General from his supervision. But since independence, the charges of corruption against President, Prime Minister and Cabinet Ministers are higher than those of the administrative officials.
Therefore, for ensuring transparency of the administration everybody in the service of the Republic should be open to investigation by the Ombudsman in Bangladesh irrespective of his status and position.

Removal of the Ombudsman

The Ombudsman Act 1980, states that the Ombudsman shall not be removed from his office except by an order of the President pursuant to a resolution of the Parliament supported by a majority of not less then two- thirds of the total number of members of the Parliament on the ground of proved misconduct or psychological incapacity. Provided that on such resolution shall be passed until the Ombudsman has been given reasonable opportunity of being heard in person. He may resign his office by writing his hand addressed to the president.

Organizational Structure

Organizational structure of the office of the Ombudsman may be determined with reference to his functions and workload. But it can be predicted that in the land of 120 million people the workload is likely to be enormous. Therefore, there should be reasonable number of personnel within the office of Ombudsman. Six divisional Ombudsmen may also be appointed by the Ombudsman s his deputy with sufficient staff under them to deal primarily with their respective divisional complaints. They will make preliminary checks on the physical existence of the complaint and the bonafide of the case for investigation and forward the complaint with their preliminary comments to the Ombudsman. However, the personnel required to carry out the functions of the Ombudsman should not be too large in number.
At the initial stage an organizational framework containing 35 personnel have been recommended by PARC for the Office of the Ombudsman which is showed by the following organ gram:

Source : Public Administration for 21st Century, Report of the Public Administration Reform Commission (PARC) vol-2, June-2000.

Conclusion

The above discussion reveals that the working of the Tribunal since the last five years and the approach of the Supreme Court do not support the arguments that the Tribunal does not/cannot have power to issue any orders, directions or writs under Articles 226 and 227 of the Constitution. Theoretically also, it cannot be convincingly argued that the Tribunal has no power under Articles 226 and 227. It is submitted that the Tribunal has been contemplated by the Constitution as a substitute and not as supplemental to the High Courts; and it would be a retrograde step to say that the Tribunal has no power under Articles 226 and 227; and the High Courts still continue to have this power with respect to service matters. In fact the Tribunal has been exercising this power by quashing the impugned administrative action, or by directing, ordering/or commanding the parties to do certain things or abstain from doing certain things, or by declaring certain things. Writs have also been issued by the Tribunal, but in a very few cases. The practice of the Tribunal, to issue writs in a very few cases, does not, however, affect the actual working of the Tribunal, because writs are in essence certain forms of orders, directions etc., which have significance mainly from historical point of view. The orders/directions of the Tribunal though not expressed in the form of writs are binding on the parties and disobedience of these may result in a punishment for contempt of the Tribunal.

There is thus no doubt about the existence of power/jurisdiction of the Tribunal derived from Articles 226 and 227 of the Constitution with respect to service matters. However, the questions may be raised now, about the extent of these powers. It is submitted that while deciding the questions about the extent of power, the Tribunal should avoid making very broad or general statements about the existence of powers of the Tribunal, which are unnecessary in the factual context because, any broad or general statement, if read out of context may give rise to confusion in the settled position of law with respect to the existence of power.