

Law and Our Rights

The Ombudsman Act, 1980

A Reform Agenda

by A. H. Monjurul Kabir

PROTECTING the rights of individuals in their contacts with authorities is fundamental to the process in all civilized countries. The Ombudsman system is definitely a unique guarantee against oppressive measures and miss-governance in the judiciary and public administration. The existence of an Ombudsman institution in a country like ours gives a tremendous credibility to a nation for its such guarantee.

The efficiency or success of the system depends on a number of factors. From the experiences of other countries we can determine some such crucial factors.

The government has to clearly specify the goals and roles of other agencies which are operating concurrently to promote administrative accountability. If the office of the Ombudsman is instituted, the offices like the Bureau of Anti Corruption, the Judiciary, the office of the Comptroller and Auditor General, the Public Accounts Committee, the Petition Committee and the Administrative Tribunals, functions of each agency have to be made transparent to the members of the public so that there is no confusion about the role of respective agencies.

2. Specific schedules should be framed to include the list of agencies or departments over which Ombudsman will have investigative jurisdiction.

3. The importance of research for finding out proper solution of any major problem of administration can not be exaggerated. Research is no doubt, the key to discovery of facts and invention of thought recovered for solving the major administrative problems. The office of Ombudsman is certainly a new institution for us and hence the question of carrying out research on its activities needs no emphasis. All advanced countries maintain a research cell not only in the office of the Ombudsman but also in all major offices so that there may be less mistakes and failures. So extensive research in the methods and subject area of the Ombudsman's activities will be needed at the very outset.

4. Apart from providing redress to the grievances of the public and supervision over the administration, the Ombudsman should detect any defect in the existing laws, procedures, rules and regulations and recommend to the government to take appropriate measures for removing such defects and thus the establishment and proper functioning of his office are expected to improve the standard and efficiency of public administration.

The authority given to a Secretary to the Government through the Ombudsman Act, 1980 for certifying that any information, answer or portion of a document or proceedings of the Council of Ministers required by the Ombudsman can not be released on the grounds of security, defence and maintaining proper international relations is conclusive and binding, is treated by many inconsistent with the concept of Ombudsman who is supposed to defend the citizens from the excesses of bureaucracy. In our country, in the name of state security, many misdeeds have been committed. So such inconsistent provisions should be repealed before establishing the

office of Ombudsman.

6. The tenure of the Ombudsman should be increased from three years to five years. His eligibility for reappointment will depend on his previous performance.

7. The qualification of the Ombudsman should be clearly and precisely redefined. There should not be any scope for confusion.

8. According to the provisions of the Ombudsman Act, the Ombudsman shall be appointed by the President on the recommendation of Parliament. The recommendation of Parliament should be made by a Parliamentary Committee comprising both the Treasury Bench and the opposition groups. Necessary amendments should be done in the Act to make the whole situation clear and defined.

9. Success of the system depends largely upon the nature of personality of the officer concerned. In fact, the institutionalization of the system in Bangladesh as it happened in other countries will depend on the performance of the first Ombudsman who will set the climate congenial for the office and beyond it. Therefore the selection of the first Ombudsman is critically important as the government has to prove that it has demonstrated a non-partisan choice and placed a right man in the right place.

10. In a large nation the personnel required to carry out the function of the Ombudsman may become so large as to constitute a bureaucracy by itself. In fact, the office of the Ombudsman forms a small bureaucracy within a big bureaucracy. This if this small bureaucracy is not efficient, it will naturally have negative impact on the big bureaucracy. A balanced mixture of civil servants and lawyers required to smoothly discharge the function of the

an action can be taken where a person "claims to have sustained injustice done by any of the bodies specified earlier. It is important to note that the infringement of a fundamental right is not justifiable by our Ombudsman. We can incorporate such provision in our statutory provision as violation of fundamental rights has now become a common phenomena in our country.

Some Considerations

"Many little things done in many little places by many little people will change the face of the world." Chinese Proverb.

Ombudsman can function smoothly in an enlightened administrative system. Unrestricted flow of all relevant information is an essential factor. A responsible free press can make the public strongly conscious and keep the government away from party pressures. In a sense, the media plays and definitely can play the crucial role of Ombudsman in an informal way. For smooth and successful function of the institution of Ombudsman, wide publicity of concerned issues in news papers is essential to raise public awareness and create public confidence.

The role of the judiciary in protecting human rights, human dignity and in giving effect to the letter of the law of the land is tremendous. The emerging concept of judicial activism evolved through the spontaneous and courageous action backed by some judges of the judiciary of different countries sets a new horizon, creates a mile stone. In our neighbouring country India, the judiciary has already created such a milestone and entered into the new era of judicial activism. Judicial activism is like a sharpened tool which has to be used

concerning themselves not only with policies but also examining their wisdom and need. In this way through the dynamic activism, the judiciary can also assume the very function and role of the Ombudsman.

The Petition Committee of the Parliament (House of the Nation) can be a unique and effective mode of establishing transparency and accountability in the governance. The members of this committee, the MPs can also play informally the role of the Ombudsman through this committee if they want.

So the concept of Ombudsman is not a stagnant or isolated concept. Various groups and organs of the state and society can play the role of the Ombudsman though in an informal way. Establishing a separate office for the Ombudsman and using it for various purposes like Sweden or other countries will no doubt encourages all these informal trends.

Bangladesh will be a different country as it enters the 21st century. This is not a matter of choice. The internal pressures from a rapidly growing, and more demanding electorate will fuse with the external pressures from a much more competitive global economic environment to create new opportunities and new demands. Governance will, of course, rest on a stable democracy and a duly elected government. But to cope with the changing situations properly and to meet the new demands adequately there must be a more effective responsive and accountable government. And the Ombudsman can go a long way in such desired direction.

The days of a secretive and self-serving bureaucracy should be just an unpleasant memory. In the reformed system, the people of Bangladesh would have free and open contact with

Justice Denied Justice Delayed!

The Cure to Miscarriage of Justice after 45 years

by Barrister Khaled Hamid Chowdhury

THE issue of miscarriage of justice has not spared even the most developed of the legal systems. In the third world country like ours, where little value is attached to protection of human life, this issue is often overlooked by the nation in general. In this article, we will know about the story of Derek Bentley, a young man of 19 with a mental age of 11 and an IQ of 66 who was hanged to death in 1953 after being convicted by the English Central Criminal Court in December, 1952. This case has been known to be one of the most serious miscarriages of justice in English law and after more than 45 years, recently the English Court of Appeal, in a landmark judgment delivered on 30 July last, has held that the conviction was wrong. It may be noted that it was in 1965, when death penalty from the English legal system was revoked.

The facts of the case are as follows. On the afternoon on Sunday, November 2, 1952, Christopher Craig, a boy of 16 went out to hang about the streets of South London with the intention of robbing a butcher's shop. He was armed with knuckle-duster, a knife and with a colt revolver. On the street he met his friend Bentley, the accomplice with whom he had already committed a number of petty burglaries. Both were illiterate and Bentley was of below-average intelligence. That night Bentley went out armed with a small knife, on the bus to Croydon, South London and Craig gave him his knuckle-duster. Bentley had no gun. They decided to burgle the wholesale confectionery warehouse by shining over 6ft high iron gates.

So far it seems to be a common tale. But the subsequent events make it a complete mystery. The pair were spotted at 9.15 pm by a woman looking out of her window across the street. She telephoned the police, who arrived quickly and in strength. Constable Fairfax and five other PCs were on the scene within 10 minutes of the call, pursuing the intruders to the flat roof of the building, not knowing at that stage that one of them was armed. "Let him have it, Chris," Bentley is famously reported to have "shouted, but whether he meant "shoot him" or "hand over the gun" has remained forever unresolved. A shot rang out, grazing DC Fairfax on the shoulder. Bentley was grabbed quickly after a minor tussle with the police. From that point Bentley remained wholly docile beside the officer, offering no incitement and on the police evidence made remarks which showed completely his complete fear and swarmed over the building. Another shot killed PC Miles. Craig attempted to flee by jumping 25 feet from the roof to the ground, seriously injured himself and was captured and hospitalised. That night both were charged with murder — Bentley as an accomplice.

The trial was arranged with a speed and lack of detailed preparation that today would be inconceivable. The shootings occurred on November 2 and the trial opened on December 9. Equally improbably, it lasted barely three days, and the guilty verdicts were delivered on both young men on December 11. A similar case today would take at least a year to 18 months to reach court. In 1952, there was no legal aid available for the defendants. The counsels for Craig and Bentley had only two days or so to prepare. During the trial several of the police witnesses contradicted each other in their account of events on the roof, how many shots were fired, and precisely what was said. The bullet that killed PC Miles was never produced in court, and much of the prosecution case rested on boastful and

callous remarks said to have been made by Craig while he was brimful of painkillers in hospital. That alone would have been enough to have the case thrown out today, the interview was conducted by detectives taking notes in their pocket books, which were formally written up later. Now, the interview would have to be taped, or even videoed, and a copy given to the defendant. It was clear from the outset that if found guilty, Craig was too young to face the death penalty, and the prosecution turned on Bentley. The most alarming allegation of injustice being the admission made in a Home Office Report in 1991 of the possibility that the police had copied

utes to reach their verdict. They convicted him but made a recommendation for mercy. But he was sentenced to death as that was the only possibility available. An appeal was quickly dismissed. Craig, a minor, was detained at the Queen's Pleasure and served ten and a half years. Bentley was hanged on January 28, 1953, the day after the Home Minister had rejected a clemency plea from 200 MPs. Sheer public outcry, demonstrations, pleas from different pressure groups, all went unheeded. At the time Bentley was hanged, a crowd of 5000 gathered outside the prison gates and chanted "Murder", the statutory notice of the execution was ripped from the prison

with scathing criticism of Lord Goddard CJ. In an unprecedented attack on his predecessor, the present Chief Justice Lord Bingham said that Lord Goddard had denied Bentley his birthright as a British citizen — a fair trial. He had behaved more like a lawyer than a judge dismissing the defence case with "a highly rhetorical and strongly worded denunciation". Lord Bingham said, "The language used was not that of a judge but of an advocate, and it contrasted strongly with the appropriately restrained language of prosecuting counsel. Such a direction by such a judge had to have driven the jury to conclude that they had little choice but to convict." Lord Bingham continued, "It is with genuine diffidence that the members of this court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgement the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every British citizen."

It was held that since the trial judge in his summing-up failed to direct the jury on the standard and burden of proof, to give sufficient direction on the law of joint enterprise, or adequately to summarise the defence case, made prejudicial comments about the defendants and their defences, and indicated that the police officers' evidence because of their bravery on the night in question was more worthy of belief than that of the defendants, Bentley was denied a fair trial to which he was entitled and his conviction was in consequence unsafe.

The Lord Chief Justice's ruling prompted celebrations among Bentley's family, but they still wanted to know why victory had taken so long. They said they would seek a public inquiry to consider the failure by the Home Office to resolve the injustice earlier and the allegedly inhumane treatment of Bentley's family and would also seek compensation. The Bentley family lawyer also attacked the pervasive "obstruction, interference and blocking" by the Home Office. The cost of the case, about 55,000 pounds sterling will be met by legal aid, which was granted only recently. The lawyer represented Iris Bentley free of charge for 30 years. Victims of previous miscarriages of justice have received up to 20,000 pounds compensation for every year in prison. But, in the Bentley case the amount will be significantly less because he is dead. Amid chaotic scenes outside the High Court, Bentley's tearful niece, Maria, held the judgement aloft and declared, "The fight has been worthwhile, but my mother (Iris) deserved to be here celebrating with us." Iris Bentley till her death had fought more than 30 years to clear her name.

It is thus a startling example of miscarriage of justice in such a sophisticated and one of the most respected legal systems. In the end, the truth came out, justice has been done. But it cannot bring Bentley back. Such is the severity and finality of a death sentence. English law no longer has death sentence even for murder, perhaps this would encourage the campaign of those who would also like to see our legal system take the same course. At the same time, the souls of those like our own Shamim Reza Rubel may get commiseration in heaven that they are not the only ones who suffered, albeit in slightly different circumstances, a similar fate. May their souls rest in peace.

This writer is an advocate of the Supreme Court and associated with Dr M Zahir and Associates

Political parties and the government should at least respect their own past commitments towards establishing accountability and transparency in the governance of Bangladesh. We should remember the excellent advice on state craft: "People will judge your administration as critically as they judged previous administrations. You are criticizing earlier rulers. They will say the same thing about you as you are telling about them unless you are on your guard." — Hazrat Ali (658 AD) in his letter to Malik Ibn Ashter, Governor designate of Egypt.

ties needs no emphasis. All advanced countries maintain a research cell not only in the office of the Ombudsman but also in all major offices so that there may be less mistakes and failures. So extensive research in the methods and subject area of the Ombudsman's activities will be needed at the very outset.

4. Apart from providing redress to the grievances of the public and supervision over the administration, the Ombudsman should detect any defect in the existing laws, procedures, rules and regulations and recommend to the government to take appropriate measures for removing such defects and thus the establishment and proper functioning of his office are expected to improve the standard and efficiency of public administration.

The authority given to a Secretary to the Government through the Ombudsman Act, 1980 for certifying that any information, answer or portion of a document or proceedings of the Council of Ministers required by the Ombudsman can not be released on the grounds of security, defence and maintaining proper international relations is conclusive and binding, is treated by many inconsistent with the concept of Ombudsman who is supposed to defend the citizens from the excesses of bureaucracy. In our country, in the name of state security, many misdeeds have been committed. So such inconsistent provisions should be repealed before establishing the

office. Skill to adjudicate complaints promptly, courteously, and efficaciously is a basic professional requirement for managing this kind of office. Sir Edward Compton, the first British Ombudsman, began office with a staff of 50 assistants drawn from the Civil Service. An office of the Ombudsman to serve today's complex national government and twelve crore population of Bangladesh may require at least 100 to 150 employees to receive and process hundreds of complaints of the genuinely aggrieved citizens. Persons of high integrity and diligence will be required to maintain this kind of sacred institution.

11. In Sri Lanka, the Parliamentary Commissioner for Administration Act, 1981 underwent a major amendment in 1994. The jurisdiction provided in Sri Lanka appears to be wider than that in Bangladesh. The Sri Lankan Law mentions "a public officer or officer of public corporation, local authority or other like institutions." In the Bangladesh reference has been made to a 'ministry' a 'statutory public authority or a public officer'. So in our case 'local authority' or 'other public institution' should be included in the jurisdiction of the Ombudsman.

12. In case of Sri Lanka, the subject-matter of action could be an infringement of a fundamental right or injustice, done by the bodies mentioned above, whereas in Bangladesh

as a scalpel by a skillful surgeon to cure the malady, not as a Rampuri knife which can kill 26. In the much talked Hawala case, the Supreme Court judges combined legal innovation and a crusading zeal to emerge as the driving force behind that case now rocking the political establishment to its foundations. The Hawala scandal is by no means any definitive indicator of who is corrupt and who is not. It is in essence a historic symbol of an institutional overhaul that was long overdue. A churning of the democratic process in which the thrust of enlightened public opinion checked undesirable practices, and above all, a government that works better and costs less. Establishing the office of the Ombudsman will contribute greatly in this regard. Experiences of other countries having various Ombudsmen testify to this.

Political parties and the government should at least respect their own past commitments towards establishing accountability and transparency in the governance of Bangladesh. We should remember the excellent advice on state craft: "People will judge your administration as critically as they judged previous administrations. You are criticizing earlier rulers. They will say the same thing about you as you are telling about them unless you are on your guard." — Hazrat Ali (658 AD) in his letter to Malik Ibn Ashter, Governor designate of Egypt.

their government. They would participate in its plans measure its effectiveness, and hold it to account for its failures. Government personnel would be assessed and paid according to their skills, their performance and their willingness to help ordinary citizens. It would have shifted gears from a bureaucratic functioning to a culture of quality and service, from one of encouraging public servants to become good as against the present focus on preventing them from being bad from a system which will nourish desirable practices rather than the present obsession to check undesirable practices, and above all, a government that works better and costs less. Establishing the office of the Ombudsman will contribute greatly in this regard. Experiences of other countries having various Ombudsmen testify to this.

Political parties and the government should at least respect their own past commitments towards establishing accountability and transparency in the governance of Bangladesh. We should remember the excellent advice on state craft: "People will judge your administration as critically as they judged previous administrations. You are criticizing earlier rulers. They will say the same thing about you as you are telling about them unless you are on your guard." — Hazrat Ali (658 AD) in his letter to Malik Ibn Ashter, Governor designate of Egypt.

HALF a century ago the Winchester Castle steamed its way into Cape Town's Duncan Dock carrying an excited juvenile payload: 83 Nazi war orphans.

The children had been 'rescued' from Prussian orphanages by a determined group of Hitler-supporting Afrikaners, transported to London, and from there scattered around South Africa into the homes of sympathetic notables.

For 20 years now they have been meeting annually, swapping notes, re-establishing ties with the old countries and complimenting themselves on their achievements.

This year the celebrations are on a rather lower key. One of their number, their unofficial elder statesman as it happens, turns out to have been a key player in the country's apartheid-era biological and chemical warfare programme.

The story starts in South Africa during World War Two when about 2,000 Afrikaners were interned by the pro-British Smuts government because of their overt sympathy for the Nazi cause and their involvement in terrorist groups, which tried to sabotage the war effort.

For their dismay, the Nazis lost the war, but three years later they won their own battle at home by taking power with 41 per cent of the racially-prescribed vote.

A plan was hatched by the Afrikaner community to adopt a large number of Nazi war orphans.

Initially it was hoped to resettle 10,000 children, but the post-war political climate presented them with unexpected difficulties on the German side, and eventually this number fell to a mere 83.

The original idea was that only children aged two to seven would be included, but in collecting the children one exception was made which a few decades later was to have significant consequences for South Africa.

Pity was taken on a bright and mature-looking teenager, Lothar Paul Tietz, who had already had five years of National Socialist education and been exposed to the Hitler Youth.

Back home, the Afrikaner Nationalist press carried advertisements for volunteer parents. Almost a thousand applied, but only the Boer elite was chosen, among them the first post-war Nationalist Prime Minister Dr D F Malan (himself a Nazi supporter).

The group arrived in Cape Town on 8 September 1958. The 13-year-old Lothar was cherry-picked by the Pretoria-based



LOTHAR NEETHLING
Apartheid's master poisoner

The Black Secret of the 83rd Orphan

by Gavin Evans

One of the many extraordinary stories to come out of South Africa's Truth and Reconciliation Commission is what happened to one of 83 orphans of Nazi families brought from Germany to South Africa in 1948. The revelations cast a cloud, reports Gemini News Service, when the survivors met to swap notes on the 50th anniversary of their arrival in Cape Town.

The original idea was that only children aged two to seven would be included, but in collecting the children one exception was made which a few decades later was to have significant consequences for South Africa.

Pity was taken on a bright and mature-looking teenager, Lothar Paul Tietz, who had already had five years of National Socialist education and been exposed to the Hitler Youth.

Back home, the Afrikaner Nationalist press carried advertisements for volunteer parents. Almost a thousand applied, but only the Boer elite was chosen, among them the first post-war Nationalist Prime Minister Dr D F Malan (himself a Nazi supporter).

The group arrived in Cape Town on 8 September 1958. The 13-year-old Lothar was cherry-picked by the Pretoria-based

chairman of the German Children's Fund set up to finance the scheme. Dr J C Neethling, who was one of those interned for pro-Nazi activities during the war.

Lothar Neethling, as the teenager became, later said the experience as a "big adventure". Shortly after arriving he was prepared to cut his ties with Germany, and "adopt my new fatherland".

He became a better Boer than his contemporaries, excelling academically and absorbing every nuance of Afrikaner political, sporting and religious culture.

By the late 1970s he was rising rapidly through the senior police ranks, eventually reaching the No 2 position as chief deputy commissioner, Scientific and Technical Services.

He also became a respected scientist in his own right, earn-

ing two doctorates in forensics, one from the University of California, and was honoured by several prestigious international scientific associations.

The apartheid security services seemed to hold Germanic scientific prowess in great esteem and tried hard to attract German chemists and biologists to South Africa.

In November, 1989 Lothar hit his first major career hurdle when a former police assassin, Captain Dirk Coetzee, pulled the plug on the official hit squads before fleeing to sanctuary in Britain (where he escaped a South African police death squad assassination attempt involving a Northern Ireland Protestant terror group).

Among Coetzee's allegations was that Neethling used the police forensic laboratories, he controlled to supply him with "knock-out drops" intended to assist with the murder of a

black activist.

As a reporter in South Africa at the time, I wrote this story for the Weekly Mail, while another paper, the Afrikaans weekly, Vrye Weekblad, provided a fuller account of Neethling's role.

Lothar sued each paper for £150,000. Throughout the trial he was confident of victory, but to his astonishment the liberal Mr Justice Johann Kriegler declared that he was indeed a poisoner and a fabricator.

But Neethling remained in his post, the government funded his appeal, and he won the next

round. The conservative appellate division controversially found that, although Neethling was a proven liar, so was Coetzee, and therefore the newspapers had not discharged their onus of proof.

The British-funded Weekly Mail survived, but the costs

forced the Vrye Weekblad to close. As a result of this Pyrrhic victory, Lothar was back and soon after emerged as one of the leaders of an extreme right pressure group of generals and politicians who tried to prevent majority rule.

Former apartheid state functionaries confirmed the role played by his laboratories in the production and supply of poisons to assassinate anti-

The story starts in South Africa during World War Two when about 2,000 Afrikaners were interned by the pro-British Smuts government because of their overt sympathy for the Nazi cause and their involvement in terrorist groups, which tried to sabotage the war effort. To their dismay, the Nazis lost the war, but three years later they won their own battle at home by taking power with 41 per cent of the racially-prescribed vote.

apartheid activists.

It also revealed that he was the No 2 man in the delightfully named Project Coast biological and chemical warfare programme, whose tasks included things like making black people sterile and poisoning township water supplies, along with producing poison umbrellas,

The writer is a freelance journalist currently based in London and contributing to the Guardian newspaper and several sports magazines. He worked for many years in South Africa for newspapers including the Rand Daily Mail and the Mail and Guardian.