

ADMINISTRATIVE CONTROLS

A. Intra-departmental controls over the Administration

All powers of Government should be exercised fairly - but "principles of openness and impartiality must be maintained with especial care whenever Parliament leaves it to the department to make its decision in a manner it thinks best"¹. Good administration and a honest or bona fide decision require not merely bringing one's mind to bear on the problem but of acting fairly as well. The prime motive of this section is to highlight those principles that any decision-making body ought to be kept in mind. The efficacy of the 'right of appeal' granted to individuals by Statute is also considered.

In Malaysia, subsidiary legislation exists that contains provisions for the procedure to be followed in disciplinary proceedings. Such proceedings could be regarded as attempts to impose checks on the administration from the 'inside'. Most significant of them is the Public Officers (Conduct & Discipline) (General Orders) Regulations, 1968. Jayakumar² has questioned the effect of these Regulations - "Assuming that the provisions are consistent with Article 135, are the provisions mandatory or are only those provisions which complement Article 135 mandatory?". In Sambasivam v P.S.C.³, the Privy Council affirmed the lower court

1 Wade & Bradley: "Constitutional Law" 8th Edition 1970 (Longman) P.692.

2 S.Jayakumar "Protection of Civil Servants: The scope of A 135 (1) & (2) of the Malaysian Constitution as developed through the cases" 1969 Mal. L.R. 1

3 1971 2 MLJ 181.

decision of Justice Raja Azlam Shah that "these procedural provisions must be strictly construed"⁴.

The guiding principle of decision-makers should be that the decision be reflective of "fairness" eventhough the courts do not apply the "fairness-test" in every case. Every individual is entitled to have an impartial adjudication which makes it necessary, in public interest, that the Minister should retain responsibility for the final decision. The taking of evidence in the presence of the party concerned and to bring to his notice all evidence against him is important so that he has the opportunity to correct and contradict such findings. There are, of course, exceptions to this. In R v Gaming Board⁵ Lord Denning drew the perimeters within which disclosure should be made. Generally speaking, a broad idea of the main issues should be given. Another aspect of natural justice is the duty to avoid bias in a decision. The standard is what a reasonable man would think. It is not the actual presence of bias alone that matters, but that there should be no real likelihood of bias. These principles were conclusively laid down in Metropolitan Properties v Lannon⁶. In this case, the plaintiff's son was a solicitor and he drafted letters to the landlord company. The dispute over a block of flats had gone to arbitration and the plaintiff's son was also the Chairman of the Tribunal. The Court of Appeal held that there was a likelihood of bias, that is, a right-minded man will not regard it as an objective adjudication.

4 [1969] 1 MLJ 219.

5 [1970] 2 Q.B.417.

6 (1868) 3 ALLER 364.

A further form of internal restrictions which departments have to adhere concerns the right of appeal that is given to aggrieved individuals.

Appeals may be to tribunals or quasi-judicial bodies or may be merely administrative in nature. It is proposed now to consider such provisions in some Statutes. In this Chapter only the appeals to higher officials are dealt with. Chapter 4 deals with the intervention of tribunals in these matters.

I. Section 15 (1) of the Control of Rent Act, 1966 provides

that:

"Any person aggrieved by the decision of the Tribunal (meaning the Rent Tribunal) may within twenty-one days of the making of such decision, appeal against it to an Appeal Board constituted in a manner provided under sub-sections (2) & (3), and any decisions made thereon by the Appeal Board shall be final and shall not be questioned in any court".

II. Similarly, Section 6 (1) of the Control of Imported Publications Act, 1958 (Revised - 1972) provides for appeals from the decision of the Chief Controller to the Minister. Section 6 (2):

"Any appeal to the Minister under sub-section (1) shall be presented, considered and disposed of in the manner prescribed".

And by Section 6 (3):

The Minister may after considering such appeal:

- (a) confirm the decision of the Chief Controller;
- (b) order the Chief Controller to issue a licence upon such conditions as the Minister may specify;
- (c) reverse the decision of the Chief Controller;

- (d) make such other order or give such other direction (including any direction as to the costs of appeal) as to him seem just and necessary".

Under the Internal Security Act, 1960 (A 82), Section 41 (C)

(3) provides that any person who has been refused a certificate of suitability for admission to any institution of higher education may "at any time within the period beginning with the date on which he is notified of the decision, appeal against it to the Minister; and on any such appeal, the Minister -

- (a) if he is satisfied of the existence of the grounds referred to in sub-section (2), shall confirm the decision, and
- (b) in any other case, shall direct the issue of a certificate".

As in the other situations S 41 (C) (4) stipulates that the decision of the Minister on any appeal under Sub-section (3) shall be final and shall not be called into question in any court.

III. In certain cases, the Statute provides for appeals from the decision of the Minister to the Yang di-Pertuan Agong. The exact effect and repercussions of this are that the Agong acts on the advice of the Cabinet or of Minister acting under the general authority of the Cabinet⁷. For example, S 41 B of the Internal Security Act deals with the power of the Minister of Education to close down schools or educational institutions if he is satisfied that they are at any time being used for unlawful purposes or purposes detrimental to the interests of the public etc.

7 Article 40 of the Federal Constitution deals with the functions of the Yang di-Pertuan Agong in such a case.

S 41 B (2) then stipulates:

"The Board of Managers or Governors or other authority in charge of any school or educational institution, aggrieved by any order made under Sub-section (1), may within one month of the date of the order, make an objection against the order of the Yang di-Pertuan Agong whose decision shall be final and shall not be called into question in any court".

Thus we have seen 3 different situations in which an appeal lies for an individual aggrieved by it.

- I. From the decision of 'inspectors' or from Tribunals to other regulatory bodies such as the Appeals Board, Advisory Committees⁸;
- II. From the decision of Heads of Department to the Minister, and
- III. From the decision of the Minister to the Yang di-Pertuan Agong.

Elaborate as this set-up may seem, by and large, this so-called right accorded to the individual to appeal cannot be safely regarded as efficacious to any extent. An objective review of a departmental decision is difficult. Once a decision is taken by an officer (however junior), it is usually supported by his brethren higher up the ladder of bureaucracy who will perhaps add a few more grounds to support the decision and save the department's reputation. These loop-holes in the system are particularly wide in areas where there is no right of appeal to a court or tribunal.

8 In S 53 of the Internal Security Act, 1960 (A 82) dealing with the power of Minister to take possession of land or building in the interest of public security, Sub-section (6) provides for appeal to an advisory committee appointed by the Minister under Sub-section (5). In such a case, the Committee merely make a recommendation to the Minister who shall direct as he thinks fit.

The point thus remains that the individual stands to gain little or no redress via these built-in intra-departmental 'controls' - except the postponement of the decision of his problem. Here, I submit that the word "redress" should not be narrowly defined or limited to monetary compensation. It may be in the form of a change in departmental policy or procedure. Fresh Circulars carrying new recommendations may be issued and implemented or the department itself could elect a body of persons to look into current grievances lodged against it.

B: EXTRA-DEPARTMENTAL ADMINISTRATIVE CONTROL

THE PUBLIC COMPLAINTS BUREAU

In 1967, Sir Guy Powles, New Zealand's Ombudsman was asked to make a feasibility study of the introduction of the Ombudsman in Malaysia. The Government, however, considered the reorganised Anti Corruption Agency which dealt with individual cases of inefficiency, delay and nepotism, as working satisfactorily¹ and did not implement Sir Powles recommendation for an Ombudsman in Malaysia².

The Public Complaints Bureau was only brought into existence on 26th July 1971 and it became operational in August the same year. This is Malaysia's complaint - handling mechanism. The authorities distinguished it from the Ombudsman

1 American Bar Association Committee Development Report 1.7.73 - 30.6.74, page 13, para. 81.

(a) Ibid para 82: A Special Committee known as the Efficiency Good Relationship and Complaints Committee has been appointed by the State Govt. of Penang. But see page

(b) Ibid para 83: There has been a proposal for the Ombudsman in Perak but nothing further has developed.

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in the Western countries and hoped it would serve as a catalyst for the redress of grievances about administrative deficiencies and provide a feedback to the Government on such matters. It is understood that the Bureau was to serve to bring the people into closer liaison with the Government by establishing a channel through which the people could present their grievances.

The Bureau is now an administrative division of the General Planning Unit of the Prime Minister's Department under the Minister without Portfolio, Tan Sri Chong Hon Nyan. It is headed by the Chief Secretary to Government, Tan Sri Kadir Shamsuddin. An essential feature of the organisational set up is the appointment of Bureau representatives in local areas to receive complaints and refer them to the Bureau. The Bureau receives complaints of administrative acts done or omitted relating to a matter of public administration by a Federal Department - including all Federal Statutory Bodies. According to the Director-General of the Bureau (who is, in fact, the Administrative Head) Mr. G.K.Rama Iyer: "Although the Bureau is part of the executive, it has agents³ in various States. Kedah and Penang have even set up their own Public Complaints Bureaus"⁴.

3 In addition to Liaison Officers in the various Ministries and Departments, Bureau representatives also include:

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|-------------------------------------|-----------------------------|
| (i) Members of Parliament | (ii) District Officers |
| (iii) State Legislative Assemblymen | (iv) Police Officers |
| (v) Penghulus | (vi) Headmasters of Schools |
| (vii) Information Officers. | |

4 These are separate set ups altogether. In effect, there is only one officer and a clerk. There are no Reports published or statistics maintained, the Director of the Bureau, Mr. Choong Ah Kong, later clarified.

The Director-General also said that the Bureau was set up in preference to the Ombudsman because of peculiar conditions in Malaysia - the rate of literacy, racial composition, the Federal structure and problems relating to the constitutional amendment of sensitive issues. Also, there is a feeling that without an Ombudsman there will be no fear of partisan interests or of Opposition Members being excluded from the operation of the system.

When questioned on the low-key publicity afforded to the Bureau, Mr. Iyer was quick to rebut that this was not true. In the initial stages "there were several lectures and regular statements in the press". He claims that the Bureau is well discussed in Parliament, the State Assembly Meets⁵, Meetings of State Secretaries and Meetings of Mentri Besars. The main factors outlined for the policy against publicity is the language problem and the inherent difficulties of interpretation (or misinterpretation) and the high rate of illiteracy. The fact that the democracy here is still young and that the majority of voters vote along racial lines is a matter to be reckoned with too. Hence the decision of the Cabinet on the secrecy of the Bureau. The law relating to the protection of secret documents is governed by the Official Secrets Act, 1972. The Annual Reports and Statistics of the Bureau are made available to the Cabinet, State Secretaries, Heads of Departments and the Heads of Statutory Bodies whenever complaints are directed against them.

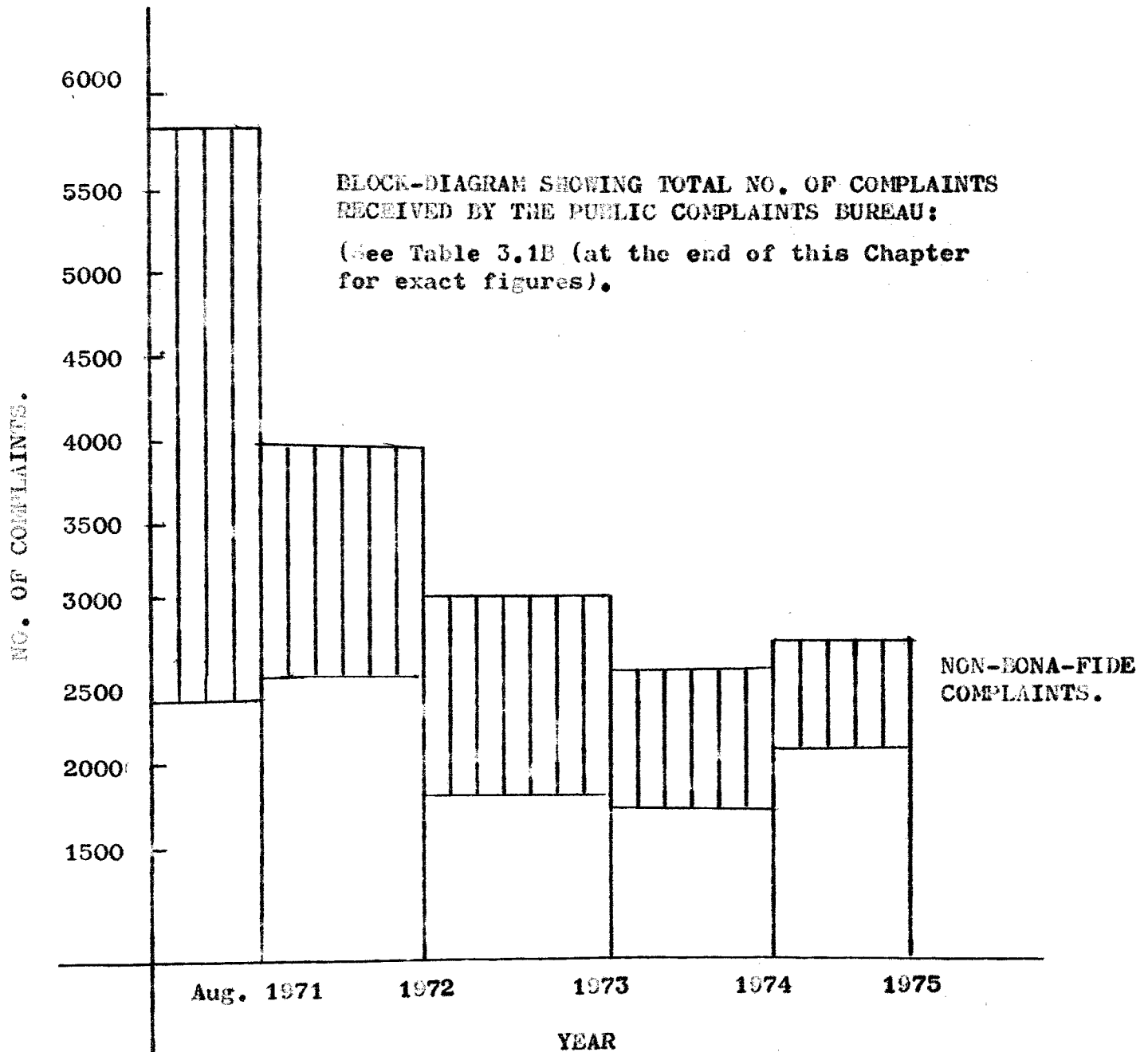
5 But in the course of a 'telephone interview', Yang Berhormat Mr. V.L.Kandan (NP), a Selangor State Assemblyman who had been in office since August 1974 said he had neither seen the

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In my own view, the Bureau has not reached out to the masses. This is a vital factor. This perhaps accounts for the decreasing number of complaints in 1974 compared to the time when the Bureau was set up in 1971. The Block Diagram below is a visual representation of this fact:



SCALE: 2 cm reps. 1 year (horizontal axis)
1/2 inch " 500 complaints (vertical axis)

From Table 3.1B and the diagram above, it seems that:

- (a) following the period of high publicity, the number of complaints reached a record level within five months;
- (b) the non-bona-fide complaints have reduced drastically;
- (c) even allowing for a levelling off period, the drop in 1974 poses a big question.

Pursuant to a discussion with Mr. Choong, the following comments were made by the Director on the statistics prepared by the Bureau itself. The non-bona-fide complaints have decreased because the people better understand the role and functions of the Bureau. The slight increase in 1975 is not substantial enough to warrant comment. The drop in 1974 shows that the "presence of the Bureau is felt".

The Director added that, in practice, despite the presence of agents, most of the complaints come via the post (P.O.Box 9000). In rural areas, Headmasters and Penghulus are actively involved. But in urban areas, much depends on the initiative of Members of Parliament and, of course, their accessibility to the public.

On 15th May 1976, Tan Sri Kadir Shamsudin, the Ketua Setia Usaha Negara, was reported commenting on the declining number of complaints. When asked to comment further, he merely directed me to Mr. Iyer, who then informed me that the Chief Secretary's remarks were made in Kuantan following a meeting between Bureau representatives, State Secretaries and Secretaries to Federal Ministries and Departments. "This is what we do all the time to get the feedback then we discuss the implications of such figures"

I do not think I am very far off the mark in my comment on the Bureau. The general feeling is that the Bureau is useful but is not functioning well enough.

It will be remembered that Yang Berhormat Tan Chee Khoon commented on this⁶. Yang Berhormat Lee Lam Thye, Opposition Democratic Action Party Member of Parliament for Kuala Lumpur Bandar, when asked what exactly provoked him to raise the issue of the Complaints Bureau on 8th April 1976 in the Dewan Rakyat, simply answered : "I feel the Bureau is not equipped with the requisite power and the necessary staff to carry out its functions effectively. I was not very much in favour of the Bureau, but it is useful, you know".

Q. Do you feel that the jurisdiction of the Bureau should be widened?

A. Yes, e.g. in my dealings with them in the Land Office⁷ recently, I found that even the Bureau's letters to the office were ignored and the Land Office did not reply the applicant.

"I do not think the Government is ready to follow the Western Ombudsman model to solve problems in this country. Perhaps in the long run But I am quite satisfied with the Prime Minister's reply in the Dewan Rakyat as to the setting up of a task force to review the Public Complaints Bureau".

The authorities concerned informed me that a Committee

6 Op Cit Pg 24.

7 Regarding this matter, Mr. Choong of the Bureau pointed out that in land problems several mitigating circumstances operate. "The normal procedure is that if there is undue delay, we take it up to the highest authorities..... the Menteri's Besar in State matters, or the Ketua Setia Usaha Negara, the Cabinet or Prime Minister in cases relating to Federal Ministries".

has already been set up consisting of a representative or representatives from each of the following Departments:-

- (i) The Public Services Division;
- (ii) The National Bureau of Investigation;
- (iii) The National Institute of Public Administration; (Intan)
- (iv) The Public Complaints Bureau.

The Committee has met for one preliminary meeting so far. The task force is the official body in Malaysia, to study the problems existing in this area of administrative law and to make suggestions for improvements therein. It is hoped that this task force undertakes a detailed study of the scope, power and functions of the Bureau by analysing individual cases and the extent to which redress has been offered in any particular case. To my mind, the very fact that a task force has had to be set up reflects:

- (a) The dire need for review of the System because of factors (b) and (c) perhaps;
- (b) Public outcry owing to faulty or inefficient process, or
- (c) Ineffectiveness because of limited capacity to implement the Bureau's decision on the Departments,
- (d) Other problems faced by the Bureau, e.g. shortage of staff, lack of experts, and so on.

The Director, Mr. Choong, on the other hand feels that when the idea of a task force was first mooted, the factors considered were:

- (a) The fact that the Bureau had achieved something and thereby proved its critics wrong had to be brought to public attention;

- (b) There was room for improvement particularly as regards staff and inter se communication between the Bureau and officers on the ground, e.g. District Officers and Penghulus.

He himself said he would suggest, therefore, better recruitment policies for the staff and more frequent dialogues between the people concerned.

There is truth in both schools of thought but with respect I submit that the problems enlisted by the Director are 'internal' problems of the Bureau. Its evaluation, however, should be based more on public response (it being a Public Complaints Bureau) and the extent to which individual cases have been redressed. For this, publicity of its Reports is crucial. In the absence of this, the Bureau may as well be called a Government Feedback Centre. Moreover, the fact that it is a part of the executive already casts suspicion that it is a bureaucracy upon a bureaucracy. The improvements should, therefore, in some respects at least, reflect the solutions to such matters.

TABLE 3.1BCOMPLAINTS RECEIVED BY THE PUBLIC COMPLAINTS BUREAUAUGUST 1971 - DECEMBER 1975.

	1.8.71 - 31.1.72	1.2.72 - 31.12.72	1.1.73 - 31.12.73	1.1.74 - 31.12.74	1.1.75 - 31.12.75
Federal Ministries	2019	2094	1732	1438	1839
State Departments	597	569	407	347	548
Total	2616	2663	2139	1785	2187
Non-bona-fide	2994	1291	902	588	377
GRAND TOTAL	5610	3954	3041	2373	2564