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Ombudsman in khyber pakhtunkhwa Pakistan - Legal analysis of critics

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Abstract

The paper addresses the question of legitimacy of Ombudsman in Khyber Pakhtunkhwa whereas the institution of ombudsman is criticized for some *raison d'être*. The research is based on Hypothesis that a huge amount (35 million) is allocated each year by the government of Khyber Pakhtunkhwa to Ombudsman institution. Whether, it is legitimate investment for improving transparency or burden on government exchequer? For the purpose, various books, journals research papers, annual reports of Ombudsman were taken into account moreover, discussions with the employees of Ombudsman Khyber Pakhtunkhwa were held for finding out the facts. The study basically followed the content analysis & discourse analysis technique so as to reach a rationale point. It has been concluded that it is a unique institution providing free, fair & expeditious relief to the public in all those genuine complaints arising out of malpractices, maladministration and negligence by the government employees, departments and functionaries, during the interaction of people with government departments, albeit there are certain difficulties, challenges to the ombudsman institution in terms of law, especially the amendment in 2013 in the Khyber Pakhtunkhwa Provincial Ombudsman Act, 2010. Additionally, noncooperation of bureaucracy and government reluctance to be truly democratic.

Keywords: The legitimacy of ombudsman KP, critical evaluation of ombudsman KP

Introduction

Various accountability institutions are functional in Pakistan as well as in the Province of Khyber Pakhtunkhwa; (Qadeer, M. A. (2014) nevertheless, the institution of Ombudsman Khyber Pakhtunkhwa has incomparable characteristics, which probably distinguished it from the rest of other functional accountability institutions in the KP. This institution aims at protecting the rights of general masses in case of administrative excesses, deceit, neglect, unrestrained behaviors, uncertainty, and ineffectiveness of Government Department & its functionaries including corporations and attached departments. The main purpose of the Ombudsman institution is to provide fair, free, and speedy relief in all those legitimate cases /complaints, related to maladministration ^[1] (IM Sciences, 2014) that arose during the interaction of public with government's organizations and its functionaries. It aims at achieving amalgamation of judicial neutrality, independence, transparency, flexibility, ease in procedures and insight into administrative processes. To be more specific, Ombudsman institution aim at resolving public complaints expeditiously, which, arise out of maladministration. (KP Ombudsman Annual Report 2013) The institution of Ombudsman primarily focuses over maladministration. (Corrie, P. 2008) Nevertheless, the theory of administrative accountability makes logic under an organism whereas the relationship is perceived not to be between the rulers and the subject rather between common people and government functionaries An Ombudsman can thus function in a true spirit, redressing inequality, injustice, unfairness and enforcing administrative accountability only in an independent and democratic environment. The interaction of people with the government functionaries might result in malpractices and arising of various cases of injustices, which

¹ a decision, process, recommendation, act or omission of a holder of a public office which-

- a) is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is bonafide and for valid reasons; or
- (b) is perverse (contrary to that which is accepted or expected), arbitrary or unreasonable, unjust, biased, oppressive (harsh), or discriminatory; or
- (c) is based on irrelevant grounds.

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may be different in nature. Some of them may be petty and some may be bigger in nature. Keeping in view these injustices and unfairness, there should be a check and effective protection mechanism over the administrative affairs which may protect the people from uncertainty and injustices as the gap between legality and justice has increasingly been widened. (Ombudsman KP, Annual Report, 2016) Hence in this state of affairs a mechanism for administrative accountability is imperative for confidence building in general public, enabling them to receive a fair deal. (IM Sciences, 2014) However, in Pakistan, after a considerable delay, the Presidential Order No.1 of 1983 paved way for the establishment of Wafaqi Mohtasib^[2] for ensuring good governance and administrative accountability, followed by Sindh, Punjab, Balochistan and Khyber Pakhtunkhwa in 1991, 1996, 2001 & 2010 respectively for curbing malpractices, maladministration and ensuring good governance through administrative accountability in respective provinces. The instant study analyzed the chronological development of this institution in Khyber Pakhtunkhwa. (Extract Ombudsmen official websites)

Objections & critical evaluation

Invisible?

The Ombudsman Institutions are inaccessible to general masses albeit they prevail, as there are limited resources to understand the functions, working procedure and how to lodge complaints? The different Ombudsmen for and in different sectors creates ambiguity and uncertainty among the general masses. Very limited people are familiar about the role, functions and how to lodge and pursue their complaints, in various kind of Ombudsman. The most vulnerable are those who even not know about the existence of Ombudsman thus facing trouble in lodging his/her complaint. The visibility of Ombudsman assumed to be the drawback of Ombudsman Institution and most probably the Ombudsman Khyber Pakhtunkhwa function in reactive manner i.e waiting for complaint to be lodged by the complainant rather functions on his own motion. (R.A Bukhari, 2005).

Hereinabove, two different issues have been raised by the writer on behalf of public; that Ombudsman is invisible^[3] to general masses. Admitted to the extent that majority of the people are not aware of the role of Ombudsman Khyber Pakhtunkhwa and other Ombudsman institution function in Pakistan, nevertheless, it could not reduce the legitimacy and significance of ombudsman. There are many other contributing factors responsible for unawareness amongst the general masses about the role and function of Ombudsman scheme. Such as vulnerable literacy rate, and lack of interest in interfering in bureaucratic or government's affairs. Ombudsman Khyber Pakhtunkhwa in his capacity in collaboration of World Bank conducted number of awareness campaigns in all districts and far flung areas in Khyber Pakhtunkhwa (KP) but was attended by very short number of people and mass media didn't gave the

due coverage as such, the Ombudsman is still invisible to general masses.

Dr. H. Alpay Karasoy well answered the question of accessibility, that public can lodge a complaint to the Ombudsman without engaging a lawyer without any hesitation, Moreover, citizen can lodge their complaint either electronically; by post or by hand. This feature distinguishes the Ombudsman scheme from other prevailed methods. (Karasoy H.A, 2015) To the second question, assuming that Ombudsman KP is reactive Ombudsman type becomes void while there are number of issues of maladministration in which the Ombudsman KP have taken cognizance on his own motion (suo moto). In 2016 the Ombudsman Khyber Pakhtunkhwa has taken notice of 05 major issues of malpractices by the administrative authorities including Phase-V flyover. (Ombudsman KP, Annual Report, 2016).

No need of ombudsman at all?

Several parallel organization already functions for example Anti-corruption, Services Tribunal, Auditor General as such there is no need for Ombudsman Institution. So the existing functional organizations should be strengthened through reforms instead of establishing Ombudsman institution. Which obviously increase burden on government treasury. Supporting his arguments reiterated that "State Audit Board" in Turkey and in Pakistan in the Federal Government the Auditor General exists with similar function to watch the financial activities of various departments which ultimately create confusion among the two institution (Karasoy H.A, 2015).

The Ombudsman institution is neither a parallel nor hostile to any other accountability organization rather it supplement the struggle for transparency (Annual Report-2013) further it is to clarify that Ombudsman institution solve the complaint of the public emerging from the dealing between the public and government function while Audit institutions only looking after the financial issues (corrupt practices). Keeping in view the existing scenario, it can safely be concluded that Ombudsman institution solve the problems of the public and audit institutions safe government from financial corruption. The Ombudsman Institution is a compulsory institution which guaranteed the rights of public moreover securing general masses from administrative unrestrained behavior, neglect and oversight. In the result portion of his work, Karasoy H.A admitted the significance of Ombudsman institution in Turkey that Ombudsman institution is independent institution and at best protecting the rights of general masses against malpractice done by Administrative department or its official. Unfortunately, the independence of Ombudsman KP, is in question, especially after the 2013 amendment, namely Khyber Pakhtunkhwa Provincial Ombudsman (amendment) Act, 2013 which had badly affected the independence of Ombudsman Khyber Pakhtunkhwa.

Personality?

"The ombudsman office is also criticized on the ground that its efficiency tends to depend upon the personality of the ombudsman officer(s) themselves rather than the system as a whole". "Regardless of their organizational framework they are a highly personalized institution and success demands an

² Wafaqi Mohtasib (Federal Ombudsman) starts at function in 1983 after presidential Order No. 1 of 1983, the Wafaqi Mohtasib can't intervene in the Provincial Departments or can't hear complaints against Provincial Departments.

³ Here Invisible means, not accessible or there are number of institution which confused the public.

individual or team, who are perceived as independent and impartial, with relevant qualifications and in-depth knowledge of the sector, and can command respect and trust from all parties. Of course, such individuals are hard to find". (S.A Bukhari, 2005, p-20)

The critics is very much legitimate that it is a cult personality institution if an Ombudsman or his team gains the confidence of Provincial Government, the more better they/ he can deliver and receive more positive response from administrative organs and government; and if the Ombudsman and his team lost the trust of government then various hurdles are created in the way of independence. As in the case of the then Ombudsman, "the Provincial Ombudsman Act 2010" was amended. Amendment in section-4 reduced the age limit to 62 with the intensions to vacate the post of the then Ombudsman who have been restored to his own position after Supreme Court of Pakistan declared while heard the case set aside the judgment of High Court Peshawar, and also gave a verdict that declared the two notifications of KP establishment department null and void i.e one the appointment of new ombudsman namely Mr. Khurshid Anwar ^[4] and second removal of Badshah Gul Wazir ^[5], whereas the said Ombudsman has enjoyed the trust of previous government which remained cooperative and supportive to him. (Discussion with Staff Members of Ombudsman office dated 11-04-2017).

Lack of Accountability?

The Ombudsman institution is criticized on the ground that there is lack of accountability ^[6]. That the design and mechanism itself lack of accountability. That the decisions of Ombudsman cannot be challenged at any forum of law and the provision for review in the Ombudsman law is only a rubber stamp and paying no heed to the complainant in the review petitions thus providing no route for appeal of the substantive decision of Ombudsman (Creutzfeldt, N., & Gill, C. 2015).

The claim of the writer is true to some extent nevertheless, in the case of Ombudsman KP almost in all the decision it has been clearly mentioned in the last para after recommendation that the aggrieved (both the complaint/ agency) may lodge representation before the Governor KP. In case of the complainant or agency not satisfied with the decision / recommendation of Ombudsman he/she may appeal the governor. The governor at his discretionary powers can review, set aside, and modify the decision of Ombudsman as the case may be. Nevertheless, till now only one decision of the Ombudsman KP has been set aside by the Governor KP and in most of the cases, the aggrieved is directed to avail the remedy of review in the Ombudsman office. (Muhammad Asif, dated 11-04-2017) ^[7].

⁴ Mr. Khurshid Anwar, former ambassador Austria, Retired from Ministry of Foreign Affairs, appointed as Provincial Ombudsman after 2013 amendment.

⁵ Mr. Badshah Gul Wazir retired as Secretary Law Department KP, and appointed as 1st Ombudsman KP took his oath and enter office in January 2011.

⁶ That there is no check on Ombudsman.

⁷ Muhammad Asif, Assistant Director (investigation & implementation), in the Provincial Ombudsman Secretariat KP.

Whereas Complaint Assistant shared that one complainant namely Shah Nawaz was granted relief by the Ombudsman in complaint No. 329 of 2016 but the agency (Education Department) didn't implement the decision. A complaint defy the position of Ombudsman in High Court Abbottabad Bench in Writ Petition No. 18-A /2017, contended; what is the need of Ombudsman if it can't implement its decisions? Which reflects two different aspects of Ombudsman office; one that accountability exists in terms of appellat authorities, second it reveals that the decision of Ombudsman are too formal and sympathetic. Perhaps public is losing confidence in this mechanism, whereby a complainant has to wait till the decision of Ombudsman and after the decision nothing he gains in terms of speedy justice. He further mentioned that One complainant namely Habib-ur-Rehman in complaint No.397 of 2014 been granted relief but in vain, He lodged W.P No.350/2014 in High Court Abbottabad Bench prayed that his case may be decided on the same grounds as Ombudsman has decided.

Moreover, the Ombudsman law has erroneously been assumed that the aggrieved can appeal to the Governor only. There are number of aggrieved (complainant / agencies) who filed writ petition in High Court Peshawar against the decision of Ombudsman KP and been accepted by the Court for hearing. Hence the decisions of Ombudsman are not full and final; are subject to accountability be the various appellat authorities e.g Governor, High Court and Supreme Court. Additionally there are sufficient opportunities to the aggrieved complainant. The decision of Ombudsman can be challenged under section 31 of "the Provincial Ombudsman Act 2010" by filing representation before the Governor KP whereas the agency aggrieved of finding Provincial Ombudsman can file review before Ombudsman KP however agency is not satisfied with the review can file a writ petition in High Court. (Personal discussion with Consultant dated 24-05-2017) ^[8].

Implementation of orders

The scheme of Ombudsman is criticized for the decisions they make, that the decisions of ombudsman are not binding. The Ombudsman can only issue recommendations and cannot enforce his decisions. It is for the administrative organs to implement the decision of Ombudsman or not. Further it is criticized on the ground that the findings/recommendations of Ombudsman are too formal and sympathetic to the administrative rationale. The only available public document issued by Ombudsman is Annual Report – obviously a scarce instrument to counter maladministration at administrative level and cannot influence the administrative course of action. Furthermore the Ombudsman cannot issue injunction to stop, reverse or change the ongoing process. (S.A Bukhari, 2005).

The question of implementation of order was put before staff of the Ombudsman office, Mr. Mumtaz Ahmed Consultant reveals during discussion that no harsh action had been taken against government agencies even contempt of court powers still exists in Provincial Ombudsman Act nevertheless, to keep good relation with the agencies the Ombudsman Secretariat avoiding to take stern action against the agencies for non-implementation of their findings; or not

⁸ Mumtaz Ahmed Consultant Provincial Ombudsman Secretariat. He has been retired from Federal Government as Joint Secretary BPS-20.

responding to the notice within the specified time.

Answering to a question regarding punishment in contempt of court, he reveals that in case of non-compliance or not responding to the notices of Provincial Ombudsman Secretariat the powers of Civil Procedure Code, 1908 can be invoked. Section 11(6) of the Ombudsman Act ^[9], empower the Ombudsman to initiate defiance proceedings whereas section 12 provides that Ombudsman shall refer the case of non-compliance to the government to direct the respective agency to implement the decision. Moreover Section 12(2) provides that in case of Defiance the report become the part of personal file / service book of the official or character roll of the official which obviously condense the chances of the concerned official for further promotion or to be posted valued offices. Moreover the ombudsman can summon, record statement of a person on oath, force attendance (Section 14) as well as can award costs and compensation to both the agency and complainant under section 21 whereas it is mentioned in aforementioned section that Ombudsman shall serve a show cause to the official or complainant as the case may be. If the reply found unsatisfactory the Ombudsman can award compensation. He referred to a complaint against Excise & Taxation Department who during investigation taken the original documents of vehicle and subsequently lost those documents. The concerned inspector was served with a show cause and after due official procedure and fulfillment of codal formalities the concerned Inspector Excise who lost the documents of vehicle, was directed to pay Rs. 200000/- to the complainant as compensation. (Discussion dated 14-04-2016 11:00 AM) Mr. Muhammad Asif Wazir, Assistant Director Implementation/investigation in his written reply opined that “decision or recommendations of the Provincial Ombudsman are usually implemented. In some cases reasons for non-compliance are considered by the Provincial Ombudsman and the recommendations are amended on reasonable grounds. The instituted complaints are not decided on sympathetic grounds rather facts and evidence are considered.” he acknowledged that “Khyber Pakhtunkhwa Provincial Ombudsman (Amendment) Act, 2013”, has curtailed the legal powers of the Ombudsman institution, such as implementation of recommendations / contempt powers” (written reply to an open ended question on 13-04-2017).

Whereas Hanif Khan ^[10], answered an open ended question wrote: “in my opinion investigation are carried out on the basis of basic principles of transparency, fairness, accountability and openness etc. decisions are made keeping in view all the aforementioned principles and no leniency is observed for blue eyed. The decisions taken by Ombudsman are no way sympathetic or flexible, but in accordance with rules/law. Difficulties have been observed in implementing the decisions of POKP because of the fact that we have no such powers.” (13-04-2017, 12:00pm).

Muhammad Kamran, & Zahid Khan ^[11] opined that to some extent it is right that the decision of Ombudsman are not binding but they cannot be ignored unless presenting cogent

reasons for non-compliance else the Ombudsman Khyber Pakhtunkhwa can initiate defiance proceeding against the administrative secretary or head of the respective department that may lead to contempt of Court. Whereas, regarding the issue of Implementation he expressed that power of implementation of order with ombudsman might create confusion and may create rifts between the Ombudsman and other accountability institutions. He further briefed that it is great achievement of Ombudsman that he put forward certain faults in administrative mechanism while presenting Annual Report to the “Governor Khyber Pakhtunkhwa” and Member of Provincial Assembly who may initiate actions or framing new strategies for better service delivery which is assumed to be the primary function and objective of Ombudsman institution. Mr. Zahid also reiterated same stance that Provincial Ombudsman has power to punish for contempt, mutatis mutandis as Peshawar High Court as reflected in Section 16 of the KPPOA, moreover under section 12 of the Act Ombudsman KP can initiate defiance proceeding and can refer the matter to Government to direct the respective department to implement the decision of Ombudsman and intimate the Ombudsman accordingly. (Discussion dated 12-04-2017, 12:00pm) however, observed during the study of both the Act, 2010 and amendment Act, 2013 of Ombudsman office it can be concluded that albeit section 11,12,14,16, and 21 exists but the deletion of clause-(e) of section 14 i.e “Implementation of order” during 2013 amendment in Ombudsman Act, has badly affected the functions of Ombudsman in terms of implementing his order. Now it became a lengthy procedure to consult the government for awarding some kind of punishment to any agency or official, which seems to be very difficult especially in developing countries. It has also been observed during the discussion with the team of Ombudsman office that after withdrawal of “implementation powers” by the government the several agencies seems reluctant to implement the findings of the Ombudsman. There are number of findings which are still not implemented by agencies.

“The Khyber Pakhtunkhwa Provincial Ombudsman Act, 2010” was amended known as “Provincial Ombudsman (Amendment) Act 2013” which had snatched the independent powers of Ombudsman in defending human rights together with women & Children. The deletion of paragraph 3 in the preamble and the word “women & children” in section 2 (Amendment Act 2013) of the Act affected two vulnerable segments of our society i.e Women and Children. 2013 amendment omit Women & Child Section in Provincial Ombudsman Secretariat which was headed by Director (W&C) under the supervision of Ombudsman. Primary function of the said Section was to protect the rights of women in children against abuse and harassment at work places, whereas, guaranteeing all those rights to children which are guaranteed internationally to children through various protocols albeit Pakistan is the signatory of those protocols.

The smooth functions of the office have been badly affected with the amendment in Section 4 of the act which provides that “the said section provides that

“The Provincial Ombudsman shall hold office for a period of four years or till the age of sixty- two years, whichever is earlier and shall not be eligible for any

⁹ Khyber Pakhtunkhwa, Provincial Ombudsman Act, 2010

¹⁰ Mr. Hanif Khan is Assistant Director Media & Research in the Provincial Ombudsman Secretariat KP.

¹¹ Mr. Kamran Khan is Programmer in Provincial Ombudsman Secretariat KP & Zahid Khan is Compliant Assistant in the said Department.

extension in his tenure or for re-appointment as Provincial Ombudsman under any” (Amendment Act, 2013) whereas the previous section-4 provided that “hold office for a period of four years and shall not be eligible for any extension in his tenure or for re-appointment as Provincial Ombudsman under any circumstances” (Act, 2010).

The appointment of Ombudsman is a lengthy procedure and complicated procedure i.e initiation of summary by the Law, parliamentary and human Rights Department in consultation with Government reflecting the names of persons of well integrity preferably a serving judge of High Court or having qualification to be eligible for the position of judge of high court or a person of well integrity. The term integrity refers to a person who rendered services as Administrative Secretary or other senior posts in Provincial or Federal Government. Now the problem emerged here that a setting Judge of High Court will never accept the post of Provincial Ombudsman owing to colossal difference in perk & privileges; secondly the retire judge couldn't be appointed after amendment in section 4 because the retiring age of the judge of High Court is 63 years whereas the Act provides that a person above the age of 62 can't be appointed as Ombudsman. The only option left with the government is to appoint a person of well integrity who rendered unparallel services nevertheless, the retiring age of civil servant is 60 years, so in this case an Ombudsman can hold his office for only two years or less. (Consultant-II, 10-03-2017).

The deletion of sub section 3 & 4 of Section 9 of the Act not only stopped the way in protecting the rights of women and child but stopped to carry out research for eradication of the root causes of discriminations etc. in easy sense research in ombuds system has been stopped permanently albeit research is the main pillar for improving the functions of any organization or public entity.

In section 14 clause (e) have been deleted which snatched the powers of Ombudsman to implement his orders through legal means while the implementation is the most important pillar in adjudicating the cases under hand. Section 14 (2) have been deleted i.e *“The Provincial Ombudsman shall have power to grant injunction, to restrain any Agency or employee thereof, from any act or making any order, till disposal of the complaint or till further orders”*. (Act, 2010) as such, the powers of stay order have been abolished.

Conclusion

The Ombudsman emerged as important pillar for improving transparency through administrative accountability which obviously helps in improving public confidence. Ombudsman aims at providing free, fair & expeditious relief to the complainant against government, at the proverbial doorsteps. The procedures of Ombudsman for lodging and pursuing complaints are too simplistic, nonetheless, the ombudsman KP faces certain challenges & difficulties in discharging his duties in terms of law complications, noncooperation of government functionaries and the reluctance of government to be truly democratic yet the Ombudsman achieve its goal of providing justice to the complainants.

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