POWERS AND FUNCTIONS OF OMBUDSMAN IN CONTROLLING ACTIONS OF ADMINISTRATIVE AGENCY

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Introduction

This paper entitled as "powers and functions of ombudsman in controlling actions of administrative agency" mainly focuses on legal aspect of the institution of ombudsman, in respect to the powers and function. This office, among the institution which established for the purpose of checking administrative action, has a great role in the sustainable development of the country in legal aspects. Even though Ethiopia has established this institution in recent years many countries began to develop such institution before century.

The main purpose of this institution is just making administrative authorities to act in line with constitutional as well as other legislations principles. The establishment of this institution in 2000 has contributed for the Ethiopian people in good governance as well as democratization process towards their development. Of course it serves for the equality of citizens, respect for their rights and sustainable development in all respects.

The main purpose of this thesis, is just to make awareness towards those people who ask what is "ombudsman's role in controlling agencies action" based on the proclamation, and some comparison with other senior ombudsman office is also tried to be dealt to criticize or appreciate the new born Ethiopian ombudsman.

This thesis contains three chapters. chapters one of this thesis tried to address mechanisms of controlling administrative agencies power other than ombudsman, and such controlling mechanisms, according to some writers, they call it traditional controlling mechanism includes (judicial control and parliamentary control) and also human right

commission. Under this topic, how courts review action of administrative agencies, their procedures, their limitation and other related issues are dealt in short of detail manner.

Chapter two tries to address, experiences of some other countries office of ombudsman. This part mainly focuses itself with countries ombudsman office in relation to their independence, powers and functions; of course there are other issues included. The selection is based itself on the most developed countries in relation to the office and length of their life after their establishment including, the creator Sweden.

Chapter three and final part of this thesis, tried to raise issue in exhaustive manner in relation to the Ethiopian establishing proclamation. Its independence, length of appointment, powers and functions, criteria of appointment, its accountability are some of the issues that are raised with this chapter. At the end of the thesis conclusion and some recommendations are given towards the efficient and effectiveness of the institution.

CHAPTER – ONE

Administrative Agency & Controlling Mechanisms

1.1. Definition

Many writers of Administrative law, usually tries to define the term administrative agency, in such away that, some of them are interested to list down some institutions and left the other, while others try to define in general manner but whatever the case is, the term is not left undefined. This is mainly because Administrative agency is the subject matter of administrative. When it comes to the definition, scholars (different) define it as it fits the subject. Among this, one, Administrative agency is a term that stands to describe an agency exercising some significant combination of executive , legislative and judicial powers.[1] while the other definition given by blacks law dictionary is, an agency is governmental body charged with administering and implementing particular legislation.[2] And the other definition given by the US states federal administration procedure act section 2(a),U.S.C, which has some wide acceptance than the other definition is that administrative agency means each authority of the government of the united states other than congress and the court . According to this definition except courts and congress, are Administrative agencies and beyond these administrative agencies which have direct relation with private rights as well as obligation are categorized under administrative agency.

But whatever the case is, the definitions given above are not free

from criticism, each definition is criticized. When we come to the Ethiopian case, which is of course from the draft proclamation, defines the term administrative agency as authorities of the FDRE including the Addis Ababa and Dire Dawa cities Administration, competent to render administrative decisions and exercising regulatory or supervisory function .So in Ethiopian for administrative agency to be called in full sense administrative agency regulatory and supervision, as well as administrative decisions are some how mandatory.(3)

1.2. Powers and functions of Administrative Agencies

Administrative agencies do have a great role in the sustainable development of a country. So to perform their role they are some what required to have power. Administrative agency by their very nature expected to execute laws, which passed by the legislative. But for various reason they do have power of settling disputes as well as issue rules and regulation. In other words Administrative agencies are expected to perform not only executing laws but do have the power of judicial and leg islative, which is of course through delegation, not inherent like administration. Having saying this, there are some common denominator functions that are done by agency, among this regulation of private conduct, supplement of goods and services are the prominent.(4)

1.3. Administrative Control

Control of administrative action is a function that can be shared among many institutions or types of decision – maker's law and bodies entrusted with law application and creation are primarily candidates for organizing control. However a plurality of independent modes, bodies and

procedural regimes that reflect the diverse nature of the control function.[5]

Amount of power, discretionary power and nature of the power that delegated to them makes administrative agencies to be controlled. Unless, there is a mechanism to control agencies, the consequence that resulted from this abuse of power makes things to go to unwanted situation. Discretionary power in the hands of public authority always posses a potential threat to citizens right. As this power is indispensable to discharge official responsibilities, it can also turn out to be detrimental to individuals.

1.3.1 Judicial control

Judicial control is a legislative power to control administrative actions by the court. It is through the process of controlling that they play their role for the good administration. They (court) are powered to see administrative action whether it follows its legal base, free or discriminatory and also deal its reasonableness. courts of different country follow different mechanisms but what makes them one and the same is that, they all deal with decisions of administrative organs and do have the capacity to give judgment on it .We can divide judicial review based on its practice in two.[6] 1- judicial review

2- Appeal

But for the sake of convenience and purpose of the thesis, the writer is forced to write only on the concept of judicial review.

1.3. 1. 1 . Judicial Review

Judicial review is merely the most formal and lawyerly of controls that may be brought to bear on administrative action. Judicial review usually occurs after the fact, and in any event is limited to assessing the legality of particular action rather than the appropriateness, direction or distribution of policy effort.(7) Judicial review in a simple language, it is the power of courts of a given country to examine whether action of the executive are consonant with the provisions of the country's constitution.(8)

The system of judicial review of administrative action has been inherited from Britain. It is on this foundation that the Indian courts have built the super structure of control mechanism. The whole law of judicial review of administrative action has been developed by judges on case- to case bases.(9)

Judicial review mainly focuses to cheek, that an authority (public) performs its duty within the limit given; it also has the power to cheek the legality as well as the validity of action of administrative body. Judicial review in the United States is derived directly from judicial review in Britain. The American courts have succeeded to the historical positions of the court of kings Bench, exercising its supervisory control over inferior tribunals and officers.(10) American courts have constantly, "deal with matters of supreme consequence" and done so with an ease and regularity which has as founded and perplexed continental critics.(11)

The willingness of American courts to grant relief in cases where British judges might hesitate is even more apparent at the state than at the federal level. The states have their own systems of administrative law

and often tend to allow their courts to exercise even broader reviewing authority than that possessed by the federal judges. for example, the New York courts exercise wide discretion in reviewing the extent of any penalty imposed by an administrative agency, even where the administrative decisions is upheld on the merits, the reviewing court may reduce the penalty as excessive. This is the kind of scrutinizing authority that would be exercised by a hierarchical superior and permits the New York court to play an even more direct role in judicial review of administration action than do the federal courts. (12)

Because of the very concept of rule of law, the parliament by itself is under control of the court. The courts get the power of controlling the parliament by the very fact that it is inherent power to them. So it is not surprising that even in a country where there is supremacy of parliament that the parliament is under control. One thing that we have to take in to consideration is that, as it previously said it is the most successful mechanism to control actions of agencies. for example if we take parliament as a controlling body, even if it has its own good side, practically it is not a such convincing, this is mainly reflected in case where there individual complaint, in such case, it is not possible as it is needed.

Most of the time, the question that comes in to mind is that which court have the power to entertain the case, the issue is not of course burning in case where there is separate administrative court just like France. In France since there is separate administrative court, which is so known in its independence, matter of judicial review is under its jurisdiction. In France it is prohibited even by law that courts (formal) are not allowed to see decisions of administrative agencies. But the case is different is both England and USA, where there is no administrative tribunals. In these countries decisions of these bodies are even can be

seen by courts (formal). The other thing that, we have to take in to consideration is that, it is not only the legislative bodies (body which enacts law in the administrative agencies) action that can be review but also adjucatory power of administrative agencies that can be controlled, and at the same time there is also principle that courts do have even power to control administrative activity of administrative agencies.(13)

There are of course grounds for judicial review, it does not be taken simply, and among the grounds error of law, ultra vires act, and principles of natural law takes the lead. By error of law it is to mean manifest error based on clear ignorance or disregard of the law or on a wrong proposition of the law, or on clear inconsistency between facts and the law and the decisions. Pursuant to this principle for a judicial review to take place it is mandatory, the existence of error of law, unless there is, of course, error of law it is not possible to deal judicial review. In a simple language ultra vires is acting beyond the power, actually we do have procedural and substantive ultra- vires. In substantive ultra- virus the administrative agencies power is beyond the given power given to it. In substantive legislation, unlike the procedural ultra vires, which bases itself on procedural matter. Fairness, reasonableness equity and equality are among the elements of natural justice and serves as aground for judicial review to take place.(14)

When we return to, that of the limits of judicial review, question of availability is the first question which must be answered by the court in any case of judicial review, unless the answer is in the affirmative, the case is at an end. No matter how blatntly illegal the administrative act, no matter how drastic its impact upon private rights and obligation if judicial review is not available over it, there is no legal remedy.(15)

To take American case as an example, American courts do not exercise review power unless there is an actual 'case' or 'controversy' before them brought by litigants with present interests at stake and where there are no other remedies available other wise, no matter how important the issue may be for the individuals concerned, it may not be dealt with by the court. (16)

With regard to exhaustion of remedies, the doctrine of primary administrative jurisdiction is the rule that available administrative remedies must be exhausted before resort may be held to the court. The affected individual is expected to take advantage of all remedies with in the administrative process before he can seek any judicial relief. Exhaustion of remedies with in the administration is a prerequisite for transferring from one step to another step, limitation on judicial review are some times based up on the view that courts should not intervene when there is an adequate remedy in some other forum . Whether particular administrative action is reviewable depends upon whether such action is "final" or, as it is often put "ripe for review". Agency action is not "final" in a given case if the private party has not complied with the rule, which requiring the exhaustion of administrative remedies. Ripeness is the other principle that limits judicial review, by ripeness it is to mean that, individual who seeks redress from administrative agency through the process of judicial review have to be threatened in actual. The Supreme Court (US) has said of the ripeness doctrine its basic rational is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative polices, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.(17)

1.3.2. Parliamentary Control

Every delegate is subject to the authority and control of the principal and the exercise of delegated power can always be directed, corrected or cancelled by the principal. Hence parliamentary control over delegated legislation should be a living continuity as a constitutional necessity. The fact is that due to the broad delegation of legislation powers and the generalized standard of control also being broad, the judicial control has shrunk, raising the desirability and the necessity of parliamentary control. (18) It is the proper function of the parliament to demand the government to make its actions public, to compare it to justify its acts when asked, to expose and demand the correction of executive's inefficiencies. (19)

In England, due to the concept of parliamentary sovereignty, the control exercised by parliament over administrative rule – making is very broad and effective. Parliamentary control mechanism operates through 'laying' techniques because under the provisions of the statutory instruments Act, 1946, all administrative rule- making is subject to the control of parliament through the select committee on statutory instruments. Parliamentary control in England is most effective because it is done in anon- political atmosphere and the three- line whip do not come into operation. (20)

But the case is different in USA, the control of congress over delegated legislation is limited because it is assumed as, that it is the duty of courts to review the legality of administration rule making but it does not mean that the technique of lying is non- existent.

As it was tried to indicate, the reason why the parliament control the executive body of the government, is one due to the fact that the parliament is a source of law and it is through the process of delegation that it gives its power to subordinate (lower in hierarchy) body so it is rational to control the power given to them, the second is, countries which follow parliamentary form of government, parliament is the highest body of government , so it is also advisable and convincing if the parliament control actions of administrative organs. parliament has more power, it can challenge action of administrative by any point it deems necessary, but still there is a fear since executives do have majority seat in the parliament, so there is a question on its great power.

There are different mechanisms of controlling administrative power. Some people call it informal, internal, or natural, while others said formal, external, but whatever the name is the ultimate goal is just to control the discretionary power of the agency. The basic constitutional power to create agency allows congress to become the sole architects through its enabling legislation of an agency's power structure.[16] But there are two arguments regarding the controlling mechanisms of agencies power , on the one hand there are individuals who argue in such away that the congress is expected to control the agencies power because of the above reason, while others do not accept the control of the congress, they support their argument by saying that, such control of agencies power disrupt the normal functions of administrative process.[21]

Despite frequent criticisms of the watchdog functions of congress probably the most effective external control over administrative agencies come from this source.[22] Legislators have adopted three general supervisory approaches, employing them as they deem appropriate. The

first in reactive monitoring is a passive approach; the legislators react only when some administrative wrongdoing is some how called to their attention, often through complaints. Reactive monitoring seems to work best for responding to specific charges of illegal administrative acts. The second is sampling monitoring; sampling monitoring is aimed at discovering through various sampling procedures the reasons for the poor administration of particular agency functions. Thus, to find out why welfare cases are being mishandled, congress may decide to sample a certain number of the cases administered randomly and periodically. The third is concentrated monitoring. Concentrated monitoring works well foreclose supervision of administration functions or programs that pose higher- than normal risks for corrupt or un ethical activities. [23]

Despite the existence of these monitoring approaches, the possibility is always present that congress may fail in its watchdog- role; in the first place, the supervisory methods may not be used when needed.[24] Three traditional congressional oversight powers are (1) the power to create and organize, (2) the power to control agency budgets and (3) the power to investigate agency activities. A fourth legislative oversight mechanism, the power to control agency performance through general guidance legislation (the administrative procedure act is an example). [25]

Both the house and senate have autonomous standing committees that specialize in substantive policy areas. most of the legislative work in congress is done by authorization committees, but their primary tasks center on establishing initial programs and agencies to run them and assuring, through subsequent statutory review that the programs and agencies are being run up to expectations.[21] Authorization committees have at least six specific watch dog powers to (1) authorize (2) reauthorize(3) amend (4) confirm appointments (5) conduct investigatory

research, and (6) veto proposed administration actions.[26]

1.3.3 Human Right commission

The other external body which stands for the rights of individuals that are mostly violated by administrative agencies is the Human Right commission. Even if Human Rights role in controlling actions of agency is not as much influential, they do have place mainly when actions of those agencies have connection with the violations of human rights.

Many states established such institution with the view to tackle violation of Human Right, and among places where violations are mostly occurred are in administrative agencies. Agencies action that makes them to be held liable are, for example discrimination based on their sex, religion, race and the like are among some lists, and that is why we call Human Right commission as one organ to control actions of agencies.

Human Right institution, which established in different countries with different name, has a general role of protecting violations of Human Right, if one state ratifies Human Right treaties, that state is expected to see its organs as there is no violation of this right. Actually states which ratified this right are not expected to establish the institution.[27] when the issue of Human Right commission raised, the point that should not be left undiscussed is the issue of Human Right NGO's. The functions Human Right NGO's perform differ depending up on the purpose fore which they were established, their resources the geographic regions in which they operate and the nature of their membership. there are NGO's which are interested in the world- wide promotion of Human Rights, while others limit their activities to human right problems in specific regions or sub regions (eg. Africa, Asia) or to specific countries or

issues[28]. The methods NGO's adopt to reach their goals differ from group to group. Some groups employ preparation of reports, the filling of complaints with international organization, and the promotion of international lobbying before national and international bodies and so on. Some NGO's limit themselves to the protection of specific groups or to specific concerns, fore example, concern in administrative agencies. All major human right NGO have consultative status of one form or another with the UN, the councils of Europe, the organization of American states, UNESCO and other regional or specialized inter governmental organizations.[29]

But whatever the case is, their ultimate goal is to preach for avoidance of violation of Human Rights in region as well as on the world wide. When we see countries experience they established the institution by different legislation, fore example, Ethiopia by proclamation NO 210/ 2000 established the Human Right commission with the following vast duty. Ensuring human rights and freedoms provided for under the constitution, ensuring laws, regulation and directives as well as government decisions, provision of consultancy service on matters of Human Right and investigation up on complaint in respect of Human Right violations are some lists from the establishing proclamation. when we see Australian case, the Human Right commission do have a power of considering consistency of laws with the international human right instruments.[30] generally what we can conclude from this short note is that the Human Right commission which established in different countries do have a role in avoiding maladministration in administrative action, because they are not confined themselves only to other body.

Discussion in relation to Human Right commission and office of ombudsman, mainly on jurisdiction will gone be discussed in chapter three in a detail way.

END NOTES

CHAPTER ONE

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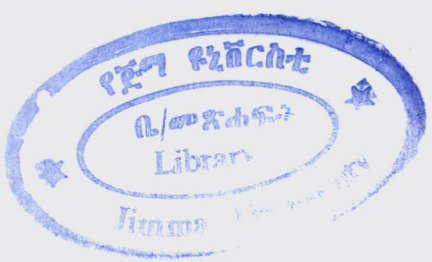
CHAPTER – TWO

Office of ombudsman in different countries

2.1. Types of ombudsman

Based on their accountability the institution of ombudsman can be classified as legislative and executive. By legislative or parliamentary, it is to mean that the office is accountable to the parliament, whether it is established by the legislative body or by the constitution, where as by executive it is to mean that the office is accountable to the executive body of the government. One thing that surprisingly arose with such arrangement is, most African countries follow the executive form of office, unlike most European countries, which adopt the legislative form, and ours is also categorized under those countries, which follow the legislative form. The Swedish ombudsman by itself adopts the legislative body and accountable to it. But one thing that, should be taken in to consideration is that, such classification (legislative and executive) is not without purpose, this is mainly because of the fact that executive body of government, do not have a clear and free hand in the operation of government, in one way or another way there is some influence from the government actually this view was the 1971 bar association recommendation.[1]



2.2. Evolution of the institution in different countries

The office of ombudsman, has get its origin in Sweden in the 18th century with the view to control grievances of individuals, actually the idea get its origin from Turkey, with a view to manage or control Muslims from non – Muslim's but the idea changed when the Swedish king change the idea in to the other concept and after that, the idea began to spread to other country, mainly to the Scandinavians countries. The office of ombudsman has a great role in protecting individual's right to bring good governance.

The office of ombudsman is so much important with regard to monitoring and correcting negligence, error, injustice and abuses committed by administrative agencies, not only this, the institution has been established in order to give individual citizens an opportunity in addition to existing institution, such as parliament the judiciary and internal complaints procedure to place complaints about the administration, practice of government before an independent and export body. As far as the institution of ombudsman is concerned, it is independent, impartial, statutory and accountable to the parliament. This unique feature of the institution of ombudsman makes so important for most developing countries so as to bring good governance and development in all sectors.

The following countries experience, which established such institution so early, as much as possible, tries to give a clear picture as to the institutions function as well as its powers in different countries.

2.2.1. Sweden

The idea for the creation of the office of ombudsman was as early as in 1807, in other words, Sweden can be regarded as the mother for the institution of ombudsman, and after that the institution started to spread to other countries, originally it was spread to most Scandinavian countries, and it was after that other countries began to establish this office. Even though Sweden regarded the incredible source for the establishment of the institution, Turkey has also her own share, it was in 1709 that Charles XII fled to Turkey that he got such concept, which was originally there, by the name of chief justice, which was established to prove whether officials of the government are followers of Islam or not. The Swedish ombudsman has a vast power to investigate cases and to ensure that every governmental organs and individuals are ruled by Law.[2] Protection of the rights and freedoms of the individual as well as safeguarding the principle of rule of Law are the main objective of the Swedish constitution and that is why the Swedish ombudsman has a vast power.

There are special factors that necessitates for the establishment of the ombudsman. The first is the historical importance of the rule of Law in the Swedish administration and the second is the accountability under criminal law of every official for his actions when exercising public powers. [3] With regard to their independence and impartiality, the Swedish ombudsman do not function as all instance of appeal and they cannot change decisions made by a court or an authority to act in certain way. They are regarded as an extra-ordinary institution, which means, the ombudsman do not supplement the regular supervisory institution with the public administration. The term independence indicates, performing of certain activities without fear and confidentially

or freedom from rule or influence of other organs except, the law so requires.[4]

One of the ombudsman's is head of the ombudsman's office, he cannot however, interfere in the supervisionary activities of other ombudsman. Each ombudsman is responsible for different areas of administration. In relation to regulatory mechanisms, all of them are elected by parliament and accountable to the parliament with regard to their job description, for instance, there is justice ombudsman, who is appointed by the parliament and he control the practical application of laws in public sector. Also there are other ombudsman's like consumer ombudsman, the equal opportunities ombudsman, children's ombudsman and religious discrimination ombudsman.[5]

The ombudsman has no power to change any administrative action, his only powers and functions are to investigate citizen, recommended, and publicize, and his power rests heavily on his individual prestige. The ombudsman can investigate on his own motion or by the petition of any aggrieved party or other person, who believes that the complaint to be justified or government has acted outside the scope of law or there has no fair handling of the case according to the handling of administrative affairs or general principle of good governance.

2.2.2. England

Countries like England do not specifically call the institution, office of ombudsman; rather they call parliamentary commissioner for administration. The practice, actually, is also exercised in other countries for example Tanzanian ombudsman named as parliament commission of Inquiry.

In 1960, the British Branch of the international commission of jurists, commissioned a special research study of the machinery for investigating complaints against administrative acts or decisions in areas where there was no existing statutory procedure for dealing with them, and to consider possible reforms, with special reference to the Scandinavian ombudsman.[6]

As the title itself indicates, the issues that will be covered under this topic is, only in relation to central government, not the local commission for administration, this is because unlike other countries, England has both central and local ombudsman. Redress of citizen grievances in local government is provided by the appointment of local commissioner for administration under the local government act 1974 following the influential justice report in 1969 on the creation of a local government ombudsman.[7]

The parliamentary commissioner for administration (PCA) must be considered, not a replacement of the parliamentary system and ministerial accountability but as a supplement.[8] The (PCA) terms of reference are to investigate complaints by individual and bodies corporate (other than local authorities and other public corporations) who claim to have "sustained injustice in consequence of mal administration" while they were in the united kingdom, at the hands of scheduled central government departments or persons or bodies acting on their behalf, performing or failing to perform administrative functions.[9] The 1967 Act gave the PCA jurisdiction over central government department schedule 243 of the act, lists departments, which are inside and outside the jurisdiction of the PCA. Accordingly matters of foreign affairs conduct of civil or criminal proceeding and prerogative of mercy are some lists that are outside the jurisdiction of

PCA.[10]

Complaints have been rejected as not falling within the jurisdiction of the PCA such as parole Board, local authorities, the courts, the police and nationalized industries. Provided the body to be investigated falls with in the PCA's jurisdiction then an investigation may be undertaken but it is assumed that the investigation may only concern the administrative functions of the department. This appears to exclude the department's legislative role. [11]

He cannot act on his own initiative, nor can he be approached directly by a member of the public, he can act only in pursuance of a written complaint to an M.P forwarded to him by an M.P with the consent of the complaint, this investigations must be conducted in private, and the official head of the departments concerned and any other official implicated in the complaint must be notified and given the opportunity for commenting on the allegations.[12]

There is no rule that the complaints must be a British citizen but there is under section 6(4) of the 1967 Act a requirement of residence. There is also a time limit, section 6(3) provides that the PCA must be informed of the complaint with in 12 months from the date when the citizen had notice of the matter complained of, and special circumstances may permit an extension of time.

The remedies available to the PCA are first under section 10 of the 1967 Act to make a report, which is normally sent to the M.P who raised the complaint. A copy of the report is sent to the principal officer of the department concerned. An annual report is prepared by the PCA and laid before parliament. That report details the PCA's activities the PCA's activities for the year. In detailing his findings departments are subject to

scrutiny by parliament and this provides a major source of the PCA's influence. PCA has no power to alter or rescind decisions. His statutory powers are confined to making reports on his investigations, or giving to M.P who referred the complaint his reasons for not investigating.[13]

2.2.3. Denmark

Denmark has constitutional and legal basis to establish the institution of ombudsman. According to this, the constitution of 1953 explicitly opened the possibility for the creation of both an ombudsman and general competent administration courts intending to work along side each other. The institution was established upon recommendation of the constitutional committee of 1946, which took the Swedish system as its model. However at several points in particular with respect to the jurisdiction of the ombudsman, the Danish office differs. [14]

According to Danish ombudsman Act No .473 of 12 June 1996, Art 3 the appointment of ombudsman office in Denmark is by the parliament. As to its qualification he/she has to be a lawyer, not the member of the parliament. The term in the office is four years subject to re- election and the parliament can elect the ombudsman and may also has the power to dismiss.

The Danish ombudsman is accountable to the parliament and during the institution function; it cannot interfere in the daily activities of the parliament. The ombudsman is also expected to report to the parliament. According to article of 13 of Danish ombudsmen Act (Act No 473 of 12 June 1996) any person may lodge a complaint and article 17 adds that the ombudsman may take up a matter for investigation on his own initiative. Here investigation can both be the consequence of

complaints and be conducted (ex officio). In Denmark, any person who is displeased with action or inaction of any administrator or civil servant may complaint to the ombudsman, usually by means of an informal letter or with out any complicated procedure. (15)

The main powers and functions of the institution of ombudsman are to investigate on his/her own motion or the petition of aggrieved party, and on the basis of investigation he/she may criticize, recommend and publicize his opinion to the general public. In certain exceptional cases for instance, for the worst governmental offences he/she has the power to institute prosecutions in the court. (16)

2.2.4. The European Ombudsman

The masheate treaty established the office of European ombudsman to fight maladministration in the activities of community institution and bodies. By promoting good administration, the ombudsman should help enhance relations between the European Union and its citizens. (17)

Since the beginning of the ombudsman office in September 1995, there has been a lot of work, based on the case law of the court of justice and the principles of European administrative law, to draft a code of good administration Behavior, now adopted by the European parliament .The code is addressed to European citizens and civil servants; it tells citizens what they have the right to expect from the administration and civil servants what principles to observe in their activities. (18)

On 6 September 2001, the European parliament adopted a resolution approving a code of good administrative behavior, which

European union institution and bodies, their administration and their officials should respect in their relations with the public. (19)

The idea of a code was first proposed by RAY PERRY MEP in 1988, the European ombudsman drafting the text, following on own initiative inquiry and presented it to the European parliament as a special report. The parliament's resolution on the code is based on the ombudsman's proposal with some changes introduced by Mr. Perry as reporter for the committee on petitions of the European parliament.The European ombudsman investigates possible case of misadministration in the actions of union institution and bodies, in accordance with article, 195 of the ECT treaty and the statue of the ombudsman. The ombudsman's definition of misadministration in the 1997 annual report is that "misadministration occurs when a public fail to act in accordance with a rule or principle which is binding upon it. This definition has been approved by the European parliament.(20)

Any citizen of the union and any natural or legal person residing or having its registered office in a member state has the right to refer to the ombudsman of the union cases of misadministration in the activities of the community institution or bodies, with the exception of the court of justice and the court of first instance acting in their judicial role.

2.2.5. Norway

After along debate with public society, in 1962 the officer of ombudsman comes in to effect. This institution was established when the commission which was established in 1951 come up with the idea that, the institution which have to be established just to safeguard citizens from public administration.

In many countries an ombudsman system has been established to safeguard the enforcement of Human Rights. In no way, one of the ombudsman most important tasks is to play apart in safeguarding and promoting the observance of Human Rights in Norwegian legal practice.

Like any other country, the Norwegian ombudsman is much more influenced by the Danish and Swedish ombudsman; its main duty is "Endeavor to ensure that the public administration does not commit any Injustice against any citizen and that civil servant and others in the service of the administration does not commit errors or neglect their duties. In Norway the term ombudsman has been used in a number of institutions with different areas of operation. The consumer ombudsman, the ombudsman for equal status and the ombudsman for children are examples of this diversity. These ombudsmen are expected to work independently but still they are part of public administration.(21)

Jurisdiction covers government administrative organs, cabinet ministers as heads of minister, civil servant and others in the service of the government, as well as local government (Since January 1, 1960) but excludes cabinet decisions, the courts, the auditor or public accounts and matter which come with in the province of the military ombudsman. (22)

Complaints must be in writing and signed (But with a one year statute of limitation) from some one personally wronged, has discretion to dismiss a complaints obviously unfounded: since the ombudsman can investigate on own initiative can take up cases which lack the necessary personal interest which are state. Regarding investigation it has power to investigate the right to obtain information from all officials and access to documents and records (but not internal work paper) concerning its

remedies the only sanction is expression of opinion with no power to compel compliance of the change or make an administrative decision. [23]

The ombudsman is instructed to express a personal viewpoint in all cases. As to its qualification, the Norway ombudsman has to be a law graduate and over thirty years of age and term in office is 4 years.

The ombudsman carries out his control of the administration primarily on the basis of complaints from the public sometimes he can take the initiative to raise issues. To proceed with the case the ombudsman emphasis with the individual constitutional rights. The ombudsman cannot carry out statements from the parties involved or from public officials. This written form of procedure makes its possible for the ombudsman to deal with a large number of complaints, but it also imposes limitations on the possibility of clarifying the actual circumstances.[24]

END- NOTES

CHAPTER TWO

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CHAPTER – THREE

Powers and functions of the office

3.1. General background

The constitution under article 55(15) authorizes the house of peoples representative to establish the institution of ombudsman elects, its members and determine by law the power and function of the institution Accordingly the house of peoples representative issued a proclamation No 211/200 to provide the establishment of the institution of the ombudsman.

The powers and functions of the ombudsman are defined in the establishing proclamation. In relation to legal foundation, in our case both constitution and the establishing proclamation provide the establishment of the institution of ombudsman.

The constitution says "it shall establish the institution of the ombudsman, and elect, and appoints its members it shall define by law the powers and functions of the institution" it does not go on listing the powers and other things, rather it confine itself only as the institution will going to be established, unlike other countries like Namibian constitution which provide for the details of the institution of the office. The Namibian constitution beyond providing for the establishment of the office, defines the jurisdiction, power, function, model of operation etc.

The constitution doesnot talk about the detailed powers and function of the institution of ombudsman. However under the office proclamation the detailed powers and functions as well as others are

included in the institution. The proclamation applies the constitutional regulations and determines the organization and function of the office.

3.2. Importance of the institution

Basically the office of ombudsman is established to protect individual's right and to bring good governance. At present many countries established this institution, including Ethiopia, even if it is a recent phenomenon. Generally to operate in public sector and has the main function of investigating complains made by individuals concerning grievance made by government agency.

This office is so much important, with regard to monitoring and correcting negligence, errors, injustice and abuses committed by administrative agencies. This institution strength individual citizen's participation in sustaining the democratic process by showing the weakness of state organs. The possibility of changing government if it is voted is what makes democracy the most strong and enduring than other forms of government. (1)

With an eye to function in relation to individual citizens the national ombudsman Act deliberately elects to make a single person, the national ombudsman representation institution in the eyes of the outside world; as a counter balance to another faceless bureaucracy. (2) Since it has suffered access to bureaucracy, it can conduct adequate investigations and it has power to publicize its findings, however embarrassing they might be to the public bureaucracy, the government, and the "establishment". (3)

When courts work at their best level, they seem to be the most suitable form for the protection and enforcement of the rights of individual's citizens. However practices shown that courts in most countries are crowded, slow by their procedure. And this entire thing makes the office of ombudsman to complement (work together) the work of the courts. The institution of ombudsman has been established in order to give Individual citizens an opportunity to the existing institution, such as parliament, the judiciary, and internal complaints procedure to place complaints about the administrative practice of government before an independent and expert body. Doing so may result immediate steps being taken in their particular cases, and, more widely help to restore damaged faith.

As far as the institution of ombudsman is concerned, it is independent, impartial, statutory and accountable to the parliament (especially in our case). This unique feature of the institution of ombudsman makes so important for most developing countries, so as to bring good governance and development in all sectors. The provisions of service and the observance of administrative justice is the main function of ombudsman and this duty is not thinkable in a court system. This is because, in courtroom once a case is decided the loser is only expected to learn from the judgment given, but the case is different in the institution of ombudsman. To assess supervision in administrative agencies so that administrative justice be served well.

So the important function that makes this office advantageous over the court system is giving recommendation on the corrective measure be taken, when there exists mal administration. Promotion and education are most often effective than the protection given by traditional court system conducting research function of the office is more advantageous than that of the court system. Cost of litigation may be unbearable to the

significant proportions of the citizen. As it is known, especially in our case, most individuals are not capable of being paying expenses of court litigation unlike the office.

One thing that we have to take in to consideration is that, parliamentary control is not completely convincing, it has limitation, one is that the parliament become overburden, if it investigate complaints against maladministration, to take an example, if the Ethiopian parliament devotes its time to such activities (individual complaint) rather than mass complaints, the parliament may not have genuine data to decide up on a case so the result of such activity may endanger even the rights of individual.

Therefore, we see the need for simply speed, and cheep means of redressing administrative caused grievances. We also see the need for an impartial and powerful body to cut across complete bureaucratic procedures to secure a remedy for truly injured individuals. There has to be, in a democratic system, body, which opens it doors to help the poor, the ignorant, citizens. The socially disadvantaged, need a body that speaks in their stead, make them able to catch- up and defend their interests through the bureaucratic route, which is full of hardness and complications. These people need the help of some one. Who has greater power than lawyer or politician to investigate their complaints, if they seem to merit investigations and try to negotiate a remedy for them?

The ombudsman is such help... "One can easily imagine the resentment that may be growing against authorities where there are more and more individuals whose cases couldnot be addressed by the traditional formal and some times remote means of grievance reducing mechanisms. The ombudsman should step in between the citizenry and the administrative to reduce inevitable friction between the two unless

such gap is filled it builds a sheer resentment against the administrative system, which in effect is adverse to the development of society." [4]

For the individual affected, the possibility that complain to the ombudsman will be investigated is of great value. Even if the complain should be rejected, it is an advantage for the complainant to be able to get an impartial, independent body to look in to his or her case. Some people may be disappointed if the ombudsman finds no ground to proceed any further with a case, but the investigation conducted by the ombudsman and his staff will often be of value to the person involved.

3.3. Nature of the Office

The establishing proclamation, defines the term "mal administration" as it includes acts committed, or decision given, by executive government organs, in contravention of administrative law, the labour law or other laws relating to administration. The definition given by the establishing proclamation is slightly different from other definitions given by different countries, for example, the Lesotho ombudsman is given a power to investigate degradation, depletion, destruction and pollution of national resources. Generally destruction of ecosystem is mal administration. [5] Which is not actually included in the Ethiopian ombudsman. Countries like Uganda, India, Papua New Guinea, and Lesotho have jurisdiction on corruption on their respective ombudsman.

According to the establishing proclamation the executive organ, includes a government office or a public enterprise as well as organs rendering administration or related services within the judiciary or the legislature as per article 2 of (13). With regard to its establishment, it is

an autonomous organ of the federal government having its own judicial responsibility.

The institution has the objective to see to bringing about good governance that is of high quality, efficient and transparent and are based on the rule of law, by way of ensuring that citizens rights and benefits provided for by law are respected by organs of the executive, when we see the objective of the institution, it has almost similar objective with other countries ombudsman. As far as its scope of application is concerned, this proclamation shall also apply to maladministration committed by the executive organs, and officials there of, a regional government.

From the above paragraphs what we can infer is that, the Ethiopian ombudsman is confined itself to the public sectors, there is no way to look private matters; However this is not the case for example in Zambia, by which the office power extend to private sector, like private factory, public auditors, public notary or private enterprise, or in general private sector which contracted administrative contract are to fall with in the jurisdiction of the office of ombudsman.

3.3.1. Appointment

The establishing proclamation provides for the appointment of the ombudsman under article 10. Accordingly, article 10 and 11, the house of people's representative is authorized to appoint them through nomination committee. The ombudsman's nomination committee is fully parliamentary one. The nomination committee shall have the speaker of the house; the speaker of the house of federation, five members elected by the house from among members, two members of the house to be elected by joint agreement of opposition parties having seats in the

house, the president of the federal Supreme Court as per article 11 of the proclamation.

Actually there was a disagreement between participants during discussion on the issue of appointment. Some participants argue that it should be single body ombudsman, while others argue in such away that it should be a multi- member body, to make this argument strong they sight the provision of the constitution which says ".... Leading members..." according to the second argument, since the constitution by itself uses the term in plural form; it has to be a multi- member body, which is of course aright argument, according to the writer. The nominee(s) appointed only when supported at least by two third majority of the nomination committee and approved by two third majority of the house of peoples representative. The ombudsman should be a person who can be accepted and ultimately appointed by two- third majority of the parliament. Appointment under the legislative body helps in ensuring its independence. However this is not always true in the parliamentary system of government like ours. (6) The prime minister as the leader of the executive and the ruling party will have a lot of influence in the nomination of the ombudsman. (7) The exclusion of executives from the nomination of the ombudsman will contribute in building the public confidence. (8)

The Ethiopian system seems as it is rightly followed, because it is parliamentary format unlike other countries like Guyana, Zambia and Zimbabwe appointment is made by the president. (9) But this does not mean that it is good enough, because the problem that sighted above should be solved.

Loyalty to the constitution of the federal democratic republic of Ethiopia, training in law, administration or other relevant discipline or

has acquired adequate knowledge through experience, who is reputed for his diligence, honesty and good conduct, the one who has not been convicted for a criminal offence other than petty offence, who is Ethiopian national, who is enough good health to assume the post, and who is above thirty – five years of age, are all the criteria's for appointment of the office of the ombudsman, according to article 12 of the proclamation.

3.3.2. Length of appointment (Term of office)

According to article 15 of the establishing proclamation, term of the office is 5(five) years, which is renewable fixed year and he/ she can also re- appointed. Even if a single term office might prove too short for newly appointed officials to come get used to the working of their office as well as the administration, whose mistakes they are expected to correct and its ills to heal. Has a disadvantageous. [10] It is more convincing to follow renewable fixed number of years because of the following reasons; a five year term of office has the advantage of coinciding with the terms of office of the house of people's representative. This can allow every new house to appoint the person (s) it deems fit to carry out the task of controlling the administration under the new situation created by the voting in a new government. And it is also advantageous; to create and maintain a viable ombudsman office implies the formation of all effective links, both formal and informal, with government officials. An ombudsman in his/ her first term of office may only have managed to lay down the necessary background for later work. a renewal of the term of office would, therefore, enable his/her feel more at home and carryout his tasks in amore productive way .[11]

Experience of other countries also shows as the term of the office is fixed one for example the Norwegian ombudsman, its term of office is 4(four) years., According to Norwegian ombudsman Act.

3.3.3. Removal

When we come to the issue of removal, as there is appointment procedure there is also removal procedure, which is not something done. The establishing proclamation in its article 15 lists grounds for removal of all appointee, accordingly the factors are, resignation (subject of 3 month prior written notice) incapacity mainly due to illness, corruption or have committed other unlawful act, manifestation of incompetence upon termination of his terms of office. The removal of an appointee come into picture, when the special inquiry tribunal report (recommendation) gets two- third majority vote as per article 16 of the proclamation.

The special inquiry tribunal according to article 17 will have the following members. Deputy speaker of the house, the deputy speaker of the house of federation, three members to be elected by the house, member of the house to be elected by joint agreement of opposition parties having seats in the house, the vice president of the federal supreme court.

3.3.4. Prohibition and Budget allocation

For the sake of convenience and better administration, an appointee shall not be allowed to engage in other gainful, public or

private employment during his term of office according to article 18 (1) of the proclamation but this is not without exception, there is possibility for an appointee to engage in other gainful, public or private employment during his term of office, if the house believe that the appointee is required to make contribution. When we see other countries experience, for example Indian ombudsman canot hold any other official posts or be linked with any political party or practice any trade or profession. (12)

The establishing proclamation states in its article 36, that the budget of the institution shall be drawn from one, budgetary subsidiary to be allocated by the government, second assistance grant and any other source. In relation to allocation procedure sub (2) of the same article says the budget allocated to the institution an amount equivalent to a quarterly portion of its recurrent budget shall, in advance, be deposited at the National Bank of Ethiopia, or at another bank designate by Bank, and shall be utilized in accordance with financial regulations of the government for purposes of implementing the objective of the institution.

Different countries adopt different mechanism for their budget allocation, for example Namibian ombudsman is supported by officials in the public service. (13)

3.3.5. Independence, Impartiality and Accountability

The ombudsman office to accomplish its tasks effectively it needs the nature of independence and impartiality. When we say independence, it is to mean that to be free from influence or control of other bodies, and to perform its activities freely. And when we see the term impartial and

Accountability, it is a state of being impartial, equitable and just too every party and a state of being responsible for one's action respectively.[14] having defined the term let us see this concept under the establishing proclamation. To have a good attitude of the general public the office of ombudsman must function independently and impartially. Budgetary, administration and functional autonomy is also crucial for its independence and impartiality.

The proclamation indicates that the office will exercise its function with administration and budgetary autonomy under the supreme direction of the house of people's representative. The institution of ombudsman is an autonomous person accountable to the parliament. Submission of reports to the parliament is also one kind.

In Ethiopia, the great executive power is rested with prime ministered ministerial office; also they are members of ruling party. In addition, the executive are very influential in decision making process in the parliament, because they have both executive and legislative capacity this implies in existing situation the parliament lacks effective power against executive. Furthermore, the independence of the institution would be doubtful so as a solution member of executive who have seat in the parliament have to be excluded from the appointment of the office.

The establishing proclamation authorizes the office to be accountable to the parliament. Unlike other countries which makes the office to be accountable to the executive body. Making the office of ombudsman accountable to executive is not a such good enough it has its own limitation just like for example it will lead to politically oriented institution therefore, from this what we can understand is independence goes hand is hand with its accountability.

For example, in Mauritius, the foundation for independence and impartiality are the national constitution of Mauritius. Under the Mauritius constitution the ombudsman shall not be subject to the direction and control of any other person or authorities and that proceeding of the ombudsman shall not be called in question in any court of law. [15] Except in the case of allegations of fraud and corruption.[16] So generally ombudsman linked to the legislative are more effective than that of executives.

3.4. Powers and Functions of the Office

The constitution under article 55(15) authorizes the house of peoples representative to establish the institution of ombudsman, elects, its members and determine by law the power and function of the institution. Accordingly the house of people's representative issued a proclamation No 211/200 to provide the establishment of the institution of the ombudsman.

The constitution says " it shall establish the institution of the ombudsman, and elect, and appoints its members it shall define by law the powers and function of the institution " it does not go on listing the powers and other things, rather it confine itself only as the institution will going to be established unlike other countries like Namibian constitution which provides for the details of the institution of the officer [17]. The Namibian constitution beyond providing for the establishment of the office, defines the jurisdiction , power, function, model of operation etc.

The powers and functions of the ombudsman are defined in the establishing proclamation. In relation to legal foundation, in our case

both constitution and the enabling proclamation provide the establishment of the institution of ombudsman. This proclamation applies the constitutional regulations and determines the organizations and function of the office. This sub title as much as possible tries to address issue concerning the powers and functions of the institution of ombudsman in detail fashion, with the comparison of other countries.

Article 6 of the proclamation lists the powers and specific duties that the institution shall have and for better understanding it is better to deal one by one.

3.4.1. Supervision

According to article 6(1) of the proclamation, the institution have the duty to supervise administrative directives issued, and decisions given by executive organs and practices there of as it doesn't contravene the constitutional rights of citizens. So according to this article the institution of ombudsman has a supervision role. By this it is to mean that supervision do not only limited to decision given as some individuals perceive, rather supervision role also extend to directives issued (from the beginning). By administrative directive we mean that acts which are useful to implement policies for a given activity of administrative authorities.

But the question that comes here is that, on what basis that the institution supervises administrative actions? it is simply that the institution conducts its supervision on the basis of complaints and investigation conducted by the institution itself, this is due to the fact that receiving complaints and conducting investigation by itself is a duty given by the proclamation. Therefore the office conducts supervision for the purpose of checking whether such directives, decision, and practices

comply with the rights of citizens as enshrined under the constitution as well as other laws. Forwarding proposal to competent bodies so that laws, polices, regulations directions or practices to be amended are some lists which is expected from the institution. The institution can even propose the adoption of new directives, if it deems necessary.

Cumulative readings of article 6(1) and 19(2) (b) gives us a picture that, during the existence of defective directives, the chief ombudsman prepare and submit draft administrative legislations, give his opinion on those prepared otherwise. So the institution and its experts are in a better position to identify the administrative problems for the study and conducting research on the administrative. With regard to supervisory power, its jurisdiction extends to national level, which is almost similar to most countries, which have such institution. For example the Sweden ombudsman, its power extends to government agencies and regional government as well as the individual member of the staff. [18] The same is true with the Colombian public protection, it is a nation wide, and its duties extend to in any part of the territory.[19]

In general, during supervision, the ombudsman acts as a watchdog on the actions of executive organs. And the office may challenge the constitutionality of any legislation or action or conduct of public sector if it is unreasonable other wise ultra vires. [20] And advising the state on its administrative function and recommending corrective measures to be taken by legislating new laws or improving the existing ones, formulating policies and advising on the lack of administrative practices.

3.4.2. Investigation

Article 6 (2) of the establishing proclamation states that the institution shall have powers and duties to receive and investigate

complaints in respect of maladministration. The way the Ethiopian ombudsman adopts is so much wise, in respect of investigation process, this is because it is a two way mechanism, one the aggrieved partiys by him/her self come and give his/her complaint. The other is investigation can be held by the institution itself pursuant to article 24. Investigation conducted only by receiving complaints has the following disadvantage. One many disadvantaged groups may neither be aware of their rights nor the means of enforcing them and this can be addressed if the ombudsman is empowered to initiate inquires him self / herself. Two certain categories of people such as prisoners held incommunicative, children persons in mental asylums etc. Third, people may not dare make complaints for fear of retaliation. Four, remoteness of place couple with lack of the means to travel may make it impossible for a person to lodge complaint expeditiously. [21] So to save from all the above danger it is better to follow the two-way mechanisms.

With regard to the method of handling the complaint article 41(2) of the proclamation states any person who causes harm to wittiness before the institution or the persons having produced a document before it shall be punishable with imprisonment from three to five years or with a fine from six thousand to ten thousand Birr or both, unless punishable with more severe penalty under the penal law.

As far as lodging complaint concerned, a complaint may be lodged with the institution orally, in writing, or in any other manner and Complaints shall, to the extent possible be submitted together with supporting evidence. According to article 23(1) and (2) the investigation which the office conducts leads it to get remedies according to article 6 of sub 4. Seeking remedies is necessarily demands communicating and negotiating with the appropriate minister, departments or body, which caused the lodging of the complaint. [22]

Experiences of other countries show us, for example in Norway when complaint is lodged to the office of ombudsman, who is responsible for assessing whether the complaint meets the procedural requirements for treatment by ombudsman; that is, whether the case falls under the jurisdiction of ombudsman, whether it is justifiable, whether it has been lodged with in the time limit and whether other available remedies are exhausted by the complaint before his case considered by ombudsman[23]

The requirement of exhaustion of remedies, like Ethiopian ombudsman are also available in case of Zimbabwe, and Zambian ombudsman. Inspector General of government of Uganda has a power to seize document, Conduct search and subpoena wittiness and unlike ours (Ethiopian ombudsman) it had the power to issue an arrest warrant for failure to comply. [24] In Relation to time requirement for bringing action, the Ethiopian ombudsman does not say any thing like the Swedish counter part.

3.4.3. Report and Recommendation

Article 6(6) and 39 of the establishing proclamation talk about what expected from the institution. Accordingly after the issue of investigation exhausted the next step, as per article 39, is the institution shall issue an official report, as may be necessary and also exercise transparency in respect of its mode of operation, including issuance of regular reports.

Public confidence on the institution can be developed if the institution as much as possible transparent to the people and one way to be transparent is reporting in due time. But this does not mean that, reporting to be taken as the institution feels there is of course limitation,

among this one is pursuant to the same article in sub 3, which states that if endangers the national security and well- being or to protecting individual lives, the institution should not be transparent in respect of its mode of operation, including issuance of regular report, which means the institution power to publicize must only be conditional.

In relation to recommendation, the institution recommends for the revision of existing laws, practices or directives and for the enactment of new laws and formulation of policies, with a view to bringing about better governance. Therefore, the final report of the ombudsman is accompanied by a recommendation, and the institution cannot take any sanction based on the finding of its investigations, rather than making possible recommendations to the concerned authorities, furthermore, the ombudsman only has power to express criticism and issue recommendation.

When we see experiences of some countries, the Uganda inspector general government has power to investigate or cause prosecution in respect of cases involving corruption, abuse of authority of pubic office.[25] The Slovenian ombudsman, for example in its remedies, propose the respective body should compensate that particular individual for the damage that he/she has suffered due to the violation or mal administration. [26] The ombudsman also propose that the respective body make apologies to the aggrieved person for the maladministration and in his final report the institution may propose the instituting of disciplinary proceedings against the responsible official of the respective body [27] (A single case decided by the office is given at the back of this thesis). Generally, even if it differs from country to country, the ruling or its recommendation is not binding. Finally the institution of ombudsman even if it has all the above powers and duties (function) in the following 4(four) cases, the office lacks the power to investigate.

1 Decisions given by councils established by election in their legislative capacity.
2 Cases pending in courts of law of any level.
3 Matters under investigation by the office of Auditor general
4 Decisions given by security forces and units of the defense forces, in respect of matter of national security or defense.

In relation to decisions given by the council, the office of ombudsman do not have a power to investigate but this doesnot mean that they are (elected council) also immune from investigation when they are not in their legislative capacity. When these elected council function in the administrative purpose and if they commit or done maladministration they fall with the jurisdiction of the institution.

When we come to cases pending in court of law, judicial power is vested with courts only according to article 79 of the constitution. So as much as possible they have to be free from any control and have to be independent but the same argument also applies to courts of law, means if the judiciary as an independent body, when there is maladministration, like delaying the case there is no way that the office of ombudsman keeps silent, when we see experience of some other countries the same kind of procedure is followed.

As far as auditor general and security forces are concerned, both are out of the jurisdiction of the institution, this is mainly because of the fact that, top secret needed to the national interest, but here there is also situation like the above case, when there exists ombudsman jurisdiction.

3.4.4. Research

The establishing proclamation in its article 6(5) states that the office of ombudsman undertake studies and research on ways and means of curbing maladministration. The research activities, which the office launches, may give it a batter insight to propose for the making of new laws and formulation of better policies towards the desired end. The idea of conducting research has its own advantage just to bring good governance as well as to avoid maladministration. So conducting more research helps to solve future as well as existing problems, and at the same time enables one to know the very beginning cause of a problem. Cumulative readings of article 19(2)(d) and 6(5) makes clear that, the chief ombudsman is expected to undertake study of recurrent cases of maladministration and forward together with remedial proposals to the house.

3.5. Jurisdiction

There are times that people ask, to which body or which body is appropriate enough for their grievance, Human right commission, office of ombudsman, anti- corruption commission.

From the reading of article 29, we can understand that there is a possibility of overlap of jurisdiction between Human Right commission and the office of ombudsman. This is because the establishing proclamation devotes some place, and this fear comes in to picture due to the fact that both institutions are advocators of Human Rights.

So to avoid such overlapping jurisdiction, article 29 in sub (1) forward the possible remedy pursuant to this article, where cases falling

both under the jurisdiction of the institution and the Human Right commission shall be determined up on their mutual consultation and the second solution, if the first option fails, the organ before which the case is lodged shall undertake the investigation. Therefore as the proclamation clearly states it is through the mechanisms of mutual consent that the jurisdiction will going to be solved, but the issue is during mutual consent as much as possible issue related with human right have to go to the commission because of the fact that the rights that are given are by internal as well as international instrument.

Issues related with maladministration, even if in the practice of maladministration, there also exist violation of Human Rights, and this has to go to the office of ombudsman. This is the possible expectation in countries where there exists different institution.

With respect to anti- corruption commission, the commission have the power to investigate corruption and when we examine the definition of the corruption according to the establishing proclamation, there is a term "Maladministration" and it is during this time, that the fear of overlap of jurisdiction comes into picture and the establishing proclamation (in both cases) keeps silent. So what will be the fate? The possible remedy is to forward the case to anti corruption commission this is because one, the binding effect of the office (ombudsman) is not a such comparable with that of the commission (anti- corruption) and leaving one without any remedy is not advisable so the commission has to have the power to see the case as said earlier.

Experience of other country shows that, like the Ethiopian ombudsman, national security are not under the jurisdiction of the office in case of Colombia. [28] In United Kingdom ombudsman (PCA) designate government department, which come under the jurisdiction of the

office.[29] In case of Australia state ombudsman, courts and judges, the cabinet and minister, the police and action of Auditor –General is excluded from the ambit of the office. [30]

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CONCLUSION AND RECOMMENDATION

At this final Stage of this paper I will try to conclude what I have already discussed in the previous three chapters and I will look at some foreseeable problems in practical application of this institution and I tried to recommend on some important issues.

The institution of ombudsman, which has its origin in Sweden, has a great impact on the avoidance of mal administration and good governance. This institution has contributed a lot, in controlling the executive body of government when they act beyond their power and without good reason. The institution of ombudsman can also be said that it is one of the method by which Human Rights be protected as well as it supplement courts and administrative agencies in addressing the grievances of citizens.

Apart from, judicial control, parliamentary control (which are most of the time known as traditional safe guards) the institution of ombudsman has gap-filling role. In other words gaps that are created by such institutions (Judicial control and parliamentary control) are more likely be filled by the office of ombudsman

Based on the relevance of this institution to the world, Ethiopia has also accepted this institution to be included to fight mal administration and to develop the concept of good governance, which is of course based its existence pursuant to article 55(15) of the FDRE constitution. It aims at avoiding Maladministration and redressing individual grievances resulted by the executive officials.

In order to do what aimed to be done, obstacles should be avoided. These obstacles either are from the nature of the establishing legislations or from practical application of the legislations. So foreseeable problems and some recommendation will be necessary to form the aimed institution.

With regard to its independence, as it was included in the body part, there are some doubtful issues. Appointment of officials by the parliament and at the same time accountability to the legislature (parliament) has its own advantage with respect to its independence. But the case, get another picture when the parliament is much more influenced by the executive in the appointment of the institution. This is mainly due to the reason that in the parliament most seats are left for the ruling party and executive members are also members of the parliament. So the possible solution to avoid such gray area, it is better to exclude executive bodies in the appointment process.

The other point that needs some recommendation is the issue of criteria to be appointed as an ombudsman, pursuant to article 12 sub (2) of the establishing proclamation, to be appointed as an ombudsman, the following more than three criteria's are set, even if they are not cumulative, and it is expected from an individual to get the office, among this criteria's according to the proclamation, one is, a person who trained (indifferent) relevant discipline, other than law, but this criteria, even if it needs interpretation, which fields can fit this " relevant discipline" as to the writer, it is some thing that do not have acceptance, this is because when we see other countries experience and even the functions of the office under the proclamation, it doesn't seems convincing. What is meant in general is, it has to be a law graduate that should hold the position, not other graduate pursuant to the establishing proclamation, the chief ombudsman, for example, is expected to prepare and submit

draft administrative legislation; give opinion on those prepared other wise. So how can one, for example, management or degree holder if we consider this fields as "other relevant discipline" prepare administrative legislation and even those person who get knowledge through experience, how can they draft or other wise issues that have strong connection with law. So with out prejudice to other staff members whether chief ombudsman or deputy chief ombudsman has to be a lawyer, even with along work experience because it is sensitive area.

The other is in relation to jurisdiction, both Human Right commission and anti – corruption commission. As it was stated in the body part there is of course overlapping jurisdiction with these institution. Actually in relation to Human Right commission, since there is such fear, the proclamation states some possible solution, by saying if there is overlapping of jurisdiction, the question of which of them would investigate shall be determined upon their mutual consultation or organ before which the case is lodged shall undertake the investigation but here what have to be considered is that not only mutual consultation solve the problem, as much as possible maladministration in relation to violation of Human Right has to go the commission, but other can be entertained by the office of ombudsman.

Still there is a question which organ take the initiation in case of maladministration, this is because the proclamation states in sub two of article 29, the organ before which the case is lodged shall undertake the investigation, here initiation is taken by the aggrieved organ not from the institution, so the question is if the complain is not lodged to the institution, which institution will take the responsibility, because both institution do not only have the power of receiving complaint but also the power of supervision , by themselves. So the possible solution as to this writer is, in case of supervision, as it stated in the proclamation to

investigation, mutual consultation of the two institutions has to be mandatory, as the only way out to tackle the problem.

The other, of course with the same issue, is jurisdiction in relation to the anti- corruption commission even if it is not such burning issue in relation to Human Right commission still there is some gray area with the office of ombudsman. As it was tried to be recommended in the body part, since there is a fear that when some maladministration is occurred both institution may tried to give their opinion on the issue, because they do have jurisdiction, the possible way out is to give priority to the anti corruption commission because its ruling is binding unlike the office of ombudsman which is not binding.

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A single Decided Case

It was repeatedly mentioned that, the Ethiopian ombudsman office is so young institution in relation to other countries office, which established before centuries, it can be possible to say that, there was no a such concrete effort to establish such institution, which is of course seems mandatory when we see its great impact on the development of good governance and avoidance of maladministration.

So the Ethiopia government because of its relevance to the Ethiopian legal system established the institution in the year 2000. But this institution come to exercise its function surprisingly after some years, it was only on the paper that individuals knew the office, but after some years it starts to work and, during visits to this office in different time, the institution is still do not stand on its two legs due to various reasons, entertaining a single case, is one indication for this matter. For the sake of giving more picture of this institution to the people who ask "what are functions of this institution", the single case that was entertained by the office is attached to this thesis and a very short summery of this case is also given, the case reads as follows.

As it was told from the office, because of the fact that the person who writes complaint to the office and the office to which complaint is made should not be disclosed, the writer is forced to discuss on the issue without naming participants in the litigation.

As the case at hand stipulates, the person who come up with the complaint to the office, states that since he was fired from some government office due to the reason that during his stay in the office for Some 2 years, he was held to be liable on three maters civil, criminal and

discipline. By the judgment held is some years, the person who was accused of such offence, was released free from the court both on civil and criminal liability but he was held to be liable on discipline, but the office denied to back him again and it was due to the above fact that the "Aggrieved" person come up with his complaint, to the office to get back him to his original place.

The office of ombudsman as it was given the power to receive complains, started to investigate the case, and during its investigation, the office, mainly focuses on two issues i.e. did the person fired with the correct procedure or not and did the action of the office (which fired the person) correct or not after the person be free both on civil and criminal liability by the court. of course there are different issues that the office deal on the process of solving the case, among this, it raises issues with the proclamation that sighted by the office (Labor proclamation) during firing the person, members of committee for discipline or disciplinary committee that was established by the office to assess the case of the person, decisions of the federal civil service commission and administrative courts, finally the office come up with the conclusion that there is mal administration on the person.

So the office of ombudsman gives the following recommendation

. The person is expected to back to his job.
. Wage and rank of the person has to be given had it been on the job
. Annual leave, if it was not used, has to be given
So what it means is the office in its final judgment give positive response to the aggrieved person.

የመዝገብ ቁጥር አቢአ1/59
ቀን መስከረም 22/1999 ዓ.ም.

አቤቱታ አቅራቢ፡
ተጠሪ መ/ቤት፡

መ ግ ቢ ያ

ከላይ በአቤቱታ አቅራቢነት የተጠቀሱት ግለሰብ በ17/09/98 ዓ.ም. ለተቋማችን ባቀረቡት አቤቱታ መሰረት ግለሰቡ የመጠባበቂያ ምግብ ክምችት አስተዳደር በሻሸመኔ የምግብ ክምችት አስተዳዳሪ ሆነው ከጥቅምት 6/1986 ዓ.ም. እስከ ግንቦት 1988 ዓ.ም. በሚያገለግሉበት ወቅት የመስሪያ ቤቱን ንብረት አጉድለሃል ተብለው በሰኔ 30/1989 ዓ.ም. በቁጥር ሠአ17/12/21 በተፃፈ ደብዳቤ ከስራና ከደሞዝ ታግደዋል፡፡ በተጠሪ መ/ቤት በኩል በዲሲፕሊን ፣ በወንጀል እና ብፍትሐብሄር ክስ ተመስርቶባቸዋል፡፡ በዲሲፕሊን ክስ በነሐሴ 19/89 ዓ.ም. በቁጥር ሠአ17/12/25 በተፃፈ ደብዳቤ ከስራ ተሰናብተዋል፡፡ ሆኖም በወንጀልና በፍትሐብሄር በተመሠረተባቸው የእምነት ማጉደል ክሶች ከወንጀሉና ከፍትሐብሄሩ ክሶዎች በፍ/ቤት ነፃ ቢወጡም ወደስራቸው ለመመለስ በተደጋጋሚ ለመስራያ ቤቱ አመልክተው ወደ ስራ ገበታቸው ለመመለስ እንዳልቻሉና አስተዳደራዊ በደል ተፈፅሞብኛል ሲሉ አቤቱታቸውን አቅርበዋል፡፡

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እኛም መዝገቡን መርምረናል፡፡

ት ን ታ ኔ

መዝገቡን እንደመረመርነው ጉዳዩን ለሁለት ከፈለን በሚከተሉት ነጥቦች ላይ ማተኮር ተገቢ እንደሆነ ተረድተናል፡፡

1. አቤት ባይ ከስራ የተሰናበቱት ህጉ የሚያዘው ስነ-ስረዓት ሁሉ ተከብሮ ነው ወይ?

2. ከስራ ከተሠናበቱ በኋላ ለስንብቱ ምክንያት የሆነውን የንብርት ማጉደል በፍርድ ቤት ውሳኔ አቤት ባይ ከተጠያቂነት ነፃ ከወጡ ወደስራ እንዳይመለሱ መከልከሉ አግባብ ነው ወይ?

የመጀመሪያውን ነጥብ ስንመለከት ተጠሪ መ/ቤት ለአቤቱታ አቅራቢው በሰጠው መልስ አቤት ባይ ከስራ የተሰናበቱት ህግና ስርዓቱን ጠብቆ በመንግስት ሰራተኞች አዋጅ ቁጥር 262/94 አንቀጽ 67/2/ እና በመንግስት ሰራተኞች ደንብ ቁጥር 1/1967 አንቀፅ 88/2/ በሚያዘው መሠረት የአፈፃፀም ሂደትን ተከትሎ የተከናወነ በመሆኑ መመለስ እንደማይቻል በመጋቢት 9/1997 ዓ.ም. በቁጥር ዘ1/ሠአ17/15/72 በተጠሪ መስሪያ ቤት የተፃፈው ደብዳቤ ይገልፃል።

ወደ ተጠሪ መ/ቤት መልስ በጥልቀት ከመግባታችን በፊት አቤት ባይ ከስራ የተሰናበቱት በነሐሴ 19/1989 ሆኖ ሣለ ከ1994 ዓ.ም. ጀምሮ ስራ ላይ የዋለውን የመንግስት ሰራተኞች አዋጅ ቁጥር 262/94 አዋጁ ከታወጀበት ቀን በኋላ ያሉትን ጉዳዮች እንደሚገዛ እየታወቀ ከአምስት አመት በፊት ለተከናወነ የሰራተኛ ስንብት መጠቀሱ አግባብ እንዳልሆነ ተቋማችን ይገነዘባል።

ስለዚህ የአቤት ባይ የስራ ስንብት በተፈፀመበት ወቅት በስራ ላይ የነበረውን ደንብ ቁጥር 1/1967 አግባብነት ስላለው የተጠሪ መ/ቤት በአቤት ባይ ላይ የወሰነውን የስራ ስንብት አካሄድና ስነ-ስርዓት ለመገምገም እንጠቀምበታለን። ደንብ ቁጥር 1/1967 አንቀፅ 88/2/ የሚደነግገውን እንጠቅሳለን፡-

> ***"በዲሲፕሊን ምክንያት የሚወሰነው ቅጣት ማናቸውም ፍ/ቤት የሚሠጠውን የቅጣት ውሣኔ ሳይከተል ሲፈፀም ይቾላል"***

የዚህ ድነጋጌ አላማ አንድ የመንግስት ሠራተኛ የተሰጠውን ሃላፊነት በአግባቡ አልፈፀመም ተብሎ የዲሲፕሊን ክስ ወይም እንደነገሩ ሁኔታ የወንጀል ክስ ተመስርቶበት እያለ በስራ ላይ እንዲቀጥል ማድረግ ሌሎች ውስብስብ ሁኔታዎችን ሊፈጥር ስለሚችልና ሥራም ስለሚበደል ሠራተኛውን በአንቀፅ 88/1/ ላይ በተቀመጠው መሠረት ከሥራ አግዶ ማቆየት ተገቢ ነው። ከላይ የተጠቀሰውን ደንብ አንቀፅ 88/1/ እንጠቅሳለን፡-

> ***" - - - ስንድ የመንግስት ሰራተኛ በወንጀል ወይም በዲሲፕሊን ጥፋት በሕግ የተከሰሰ ስንደሆነና ሲመሰከርበት ጥፋቱ ከስራ የሚያስወጣው ሆኖ ሲገመት ከስራ ታግዶ መቆየት ይሰበት። "***

ከዚህ አንፃር አቤት ባይ በተጠሪ መ/ቤት የዲሲፕሊን ኮሚቴ ጉዳያቸው ተጣርቶ ውሣኔ እስኪያገኝ ድረስ በሰኔ 30/1989 ዓ.ም. በቁጥር ሠአ17/12/21 በተፃፈ ደብዳቤ መታገዳቸው ህግን የተከተለ መሆኑን ተቋማችን ይገነዘባል፡፡

የተጠሪ መ/ቤት የዲሲፕሊን ኮሚቴ በአቤት ባይ ላይ የተመሠረተውን የንብረት ማጉደል ክስ መርምሮ ለመስሪያ ቤቱ ስራ አስኪያጅ ባቀረበው የውሣኔ ሃሳብ መሠረት በነሐሴ 19/1989 ዓ.ም. በቁጥር ሠአ17/12/25 በተፃፈ ደብዳቤ አቤት ባይ ከስራ እንዲሰናበቱ ተደርጓል፡፡ አቤት ባይም በውሣኔው ቅር በመሠኘታቸው ለሲቪል ሰርቪስ ኮሚሽን የአስተዳደር ፍ/ቤት ይግባኝ ጠይቀው በተጠሪ መ/ቤቱ የዲሲፕሊን ኮሚቴ የተሰጠውን ውሣኔ በ01/08/90 ዓ.ም. በቁጥር 6005/4365/90 በተፃፈ ደብዳቤ ፀድቋል፡፡

ከዚህ ቀጥሎ በተጠሪ መ/ቤቱ የዲሲፕሊን ኮሚቴና የሰቪል ሰርቪስ ኮሚሽን የአስተዳደር ፍ/ቤት የሰጡትን ውሣኔዎች ከሕጉ አንፃር እንመረምራለን፡፡

የመንግስት ሰራተኞች የዲሲፕሊን ጥፋት አጥፍተዋል ተብለው ሲከሰሱ ጉደያቸው በየመሰሪያ ቤቱ በተቋቋሙ ነፃና ገለልተኛ የዲሲፕሊን ኮሚቴዎች ተመርምሮ ፍትሐዊ ውሣኔ ሊሰጣቸው እንደሚገባ ህግ ያዛል፡፡ ጉዳያቸው የሚታይላቸው የመንግስት ሰራተኞችም ከቀረበባቸው ክስ ራሣቸውን ባግባቡ እንዲከላከሉ እድል ሊሰጣቸው እንደሚገባ ህግ ይደነግጋል፡፡

ከላይ ከጠቀስነው መሰራታዊ መርሆች አንፃር የተጠሪ መ/ቤት የዲሲፕሊን ኮሚቴን ውሣኔ ስንመረምር በውሣኔው ውስጥ የተንፀባረቀ በርካታ ሕፀያች እንዳሉ ለመገንዘብ ችለናል፡፡

ለአብነት ያህል የዲሲፕሊን ኮሚቴውን አወቃቀር ስንገመግም አቤት ባይ በተጠሪ መ/ቤት ለተመሠረተባቸው ክስ ለዚሁ ዲሲፕሊን ኮሚቴ በሰጡት መልስ ላይ እንደጠቀሱት ለተከሰሱበት የፅምነት ማጉደል ክስ /የንብረት ማጉደል/ ምክንያት ናቸው ካሉት መካከል በየጊዜው የተሰጣቸው ህገወጥ የአለቆቻቸው ትዕዛዝ መሆኑን ጠቅሰው ከነዚህ አለቆቻቸው መካከል በወቅቱ የናዝሬት ማዕከላዊ መጋዘን አስተዳዳሪ የነበሩት **አቶ መና ደንዱን** ተጠያቂ እያደረጉ የዲሲፕሊን ኮሚቴው እኒሁ ግለሰብን በአባልነት አቅፎ ነው ውሣኔውን የሰጠው፡፡ ይህ ደግሞ ከላይ የጠቀስነውን በየመንግስት መስራያ ቤቱ የሚቋቋሙ የዲሲፕሊን ኮሚቴዎች ገለልተኛ መሆን ይገባቸዋል የሚለውን መርሕ የጣሰ ነው፡፡

ሌላው የዲሲፕሊን ኮሚቴው ስራውን በሚሰራበት ወቅት በተከሳሽና በከሳሽ መካከል የቀረቡትን ክስና መከላከያ ከመረመረ በኋላ ተከራካሪ ወገኖች ያልተስማሙበትን

/የተካካዱበትን/ ፍሬ ነገር እንደጭብጥ አስቀድሞ በማውጣት ማስረጃዎችንና መከራከሪያዎችን መመርመር እንደሚገባ በህግ ተደንግጓል፡፡ ከዚህ አንፃር የተጠሪ መ/ቤትን የዲሲፕሊን ኮሚቴ አሰራር ስናይ በወቅቱ ተከሳሽ /ያሁን አቤት ባይ/ እና ከሳሽ /ያሁን ተጠሪ መ/ቤት/ መካከል በነበረው የዲሲፕሊን ክስ ላይ ዳኝነት ሲሰጥ የጉዳዩን ፍሬ ነገር በጭብጥነት ሳያወጣ መሆኑ ትልቅ ህፀፅ ነው፡፡ ተከራካሪ የሆኑ ወገኖች የተለያዩበትን ወይም የተካካዱበትን ጭብጥ ሳይታወቅ ፍትሐዊ ውሣኔ ለመስጠት የሚያስችል ምርመራ ማድረግ አይቻልም፡፡ ይህን ህግ የሚያዘውን ሥነ-ስርዓት ሣይከተል በዲሲፕሊን ኮሚቴ የተሰጠውን ውሣኔ ተራ ቁጥር 2 ለአብነት እንጠቅሣለን፡-

> ***"እኔ በሲሰሁበት የሲሱች ሠፌተኞች በፌሣቸው የገቢ ደሰረኝ ሰሰ መሰፈያቢታችን ሆነው የተፈከቡትን ሰንዴ የቶር /TOR/ የሰነድ ሠፌተኛ ጉደሱ ሆኖ የገባውን ስህሰ ሙሱ ሶድርጉ ያሳሰገባውን ስህሰ ስንዳሰገባ ሶድርጉ በመቁፍና እኔ ስህሱን ስንዳተፈከብኩኝ ሆኜ ደሀንን ሰነድ በመሰፈያ ቢታችን በመትከሴ ሰደፈሰው ጉድሰት ተጠያቂ ሰሰሆንም ቢሱም፣***
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> ***ሀ. ማንም ሣያሰገድዳቸው በፌሳቸው የስጅ ጽሁፍ ሰነድን ያመፌረዱና ሰሰመረከባቸው የፈረሙ በመሆኑ፣***
>
> ***ሰ. ችግር የፈጠረባቸውና ያሳመኑበት ቢሆን ኖሮ ሰመ/ቢቱ ከሰሁን በፌት ያቀረቡት የቅፌታ ሰነድ ባሰመኖሩ፣"***

ከላይ በጥቅሱ የተቀመጠው የውሣኔ ሐሣብ ትንተናን ስንመለከተው አቤት ባይ በተጠሪ መ/ቤት የበላይ ሐላፊዎች ትዕዛዝ እሣቸው በሌሉበት የሌላ መ/ቤት ሰራተኞች ንብረት ተረክበው በሰነድ መወራረዱን ነው፡፡ የዲሲፕሊን ኮሚቴው ውሣኔ ህገወጥ የተጠሪ መ/ቤት የበላይ ኃላፊዎች ትዕዛዝ መኖሩን አምኖ በዚሁ ትዕዛዝ ምክንያት አቤት ባይ ጉድሏል የሚሉትን የመንግስት ንብረት አይቀበለውም፡፡ የማይቀበልበት ምክንያትም አቤት ባይ የሌላ መ/ቤት የንብረት እርክክብ ሰነድን ያለአንዳች ግዴታ በራሳቸው ፍቃድ በተጠሪ መ/ቤት የንብረት ርክክብ ሰነድ ላይ ተክለው በመፈረማቸው ነው፡፡ እዚህ ላይ አቤት ባይ በበላይ አለቆቻቸው ስለአለመገደዳቸው የዲሲፕሊን ኮሚቴው ያጣራው ነገር የለም፡፡ ታዲያ በሌላ መ/ቤት ሰነድ ተወራርዶ አቤት ባይ በሌሉበት እሣቸው በሚያሰተዳድሩት መጋዘን ውስጥ እንዲራገፍ ትዕዛዝ ከተሰጠ ርክክቡ ህጋዊ መልክ እንዲይዝ በተጠሪ መ/ቤት ሰነድ ላይ እንዲገለበጥ እና ተፈርሞ እንዲቀርብላቸው አያዙም ብሎ መገመት የሚያስችል አይደለም፡፡

በዚህ መልኩ ተመርምሮ የቀረበው የዲሲፕሊን ኮሚቴው የውሣኔ ሃሳብ ያለምንም ተቃውሞ በተጠሪ መ/ቤት ስራ አስኪያጅ ፀድቋል፡፡

ቀጥለን የፌዴራል ሲቪል ሰርቪስ ኮሚሽን ያስተዳደር ፍ/ቤት የተሰጠውን ውሣኔ እንመረምራለን፡፡

እዚህ ላይ ሊጠቀስ የሚገባው ነጥብ ያስተዳደር ፍ/ቤቶች የመደበኛ ፍ/ቤቶችን ተክተው ስለሚሠሩ እያንዳንዱ ያስተዳደር ፍ/ቤት ፍትሐዊ ውሣኔ ለመስጠት የሚያስችለውን ያሰራር ሥነ-ስርዓት (Procedures) መከተል ይገባዋል፡፡ በአሰራሩም እንደ መደበኛው ፍ/ቤት ነፃና ገለልተኛነቱን መጠበቅ አለበት፡፡

ከላይ ካነሳነው ሐሣብ ጋር የፌዴራል ሲቪል ሰርቪስ ኮሚሽን ያስተዳደር ፍ/ቤት ውሣኔን ስንመለከት አንዳንድ የሥነ-ስርዓት ጉድለቶች እንዳሉበት ለመገንዘብ ችለናል፡፡ ለአብነት ያህል የሚከተሉትን እንጠቅሳለን፡፡

ያስተዳደር ፍ/ቤቱ በተከሣሽ /አቤት ባይ/ እና በከሳሽ /ተጠሪ መ/ቤት/ መካከል በተደረገው ክርክር ተከሳሽ /ይግባኝ ባይ/ ተጠያቂ የሆኑበት የተጠሪ መ/ቤት የኦዲት ሪፖርትን ከመፈረማቸው በፊት ለንብረት ጉለቱ ምክንያት ነው ያሉአቸውን መግለጫዎች ከኣዲት ሪፖርቱ ጋር ያያያዙ ቢሆንም ይህን መግለጫ ኦዲተሩ ገንጥሎ ጉለት የሚያሣየውን የኦዲት ምርመራ ሪፖርት ብቻ ለተጠሪ መ/ቤት በማቅረቡ ይህን ማስረጃ ለፌዴራል ሲቪል ሰርቪስ ያስተዳደር ፍ/ቤት ሊያቀርቡ ቢሞክሩም ፍ/ቤቱ በስር ክርክር /የዲሲፕሊን ኮሚቴ/ ያላቀረብከውን ማስረጃ ማቅረብ አትችልም መባላቸውን አቤት ባይ በአቤቱታቸው ላይ ገልጸዋል ያስተዳደር ፍ/ቤቱም ውሣኔ ይህንኑ ያቤት ባይ ቅሬታ ይደግፋል፡፡

ያስተዳደር ፍ/ቤቱን ውሣኔ እንጠቅሣለን

> ***"የክርክር ነጥቦቹ ሰብዛኞቹ ከሥር በዲሲፕሊን ኮሚቴ ያልተነሱ ሰዲስ ጭብጥ የሚያስነሱ በመሆናቸው የፍ/ብ/ሥ/ሥ/ሕ.ቁ.329 ስና 345 መሠረት በማድረግ ተቀባይነት የሴላቸው ከመሆናቸውም በሳይ-----"***

ያስተዳደር ፍ/ቤቱ በአቤት ባይ ይግባኝ ላይ ውሣኔ ሲሰጥ የተጠሪ መ/ቤት /የመልስ ሰጭ / እና አቤት ባይ በሙግታቸው የተለያዩበትን ወይም የተካካዱበትን ጭብጥ ለይቶ ሣያወጣና ጉይዩን ከጭብጡ አንፃር ሣይመረምር ለይግባኝ ሰሚ ያስተዳደር ፍ/ቤት ያቀረብካቸው ክርክሮችና ማስረጃዎች በስር ክርክር ያላቀረብከውን ነው ትብሏል፡፡ የይግባኝ ክርክሩ ጭብጥ ተለይቶ ሣይወጣ የአቤት ባይን የክርክር ነጥብ በስር ክርክር አላቀረብክም ነበር ለማለት ከቶም የሚቻል ነገር እንዳልሆነ እና የፍትሐብሄር ሥነ-ስርዓት ህግ አንቀፅ 246/1/ን በግልፅ የጣሰ መሆኑን ለመገንዘብ ችለናል፡፡

በመሠረቱ ያስተዳደር ፍ/ቤት በየአስተዳደር መስሪያ ቤት ስላለው አሰራር የተሻለ ግንዛቤ እንዳላቸው ታምኖ ሲቋቋም ከመደበኛው ፍ/ቤቶች ይልቅ ስለየመስሪያቤታቸው ፍትሐዊ ውሣኔ ለመስጠት የሚያስችል ብቃት አላቸው ተብሎ ታምኖ ነው። ባሰራራቸውም ፈጣንና ቀልጣፋ እንዲሁም ፍትሐዊ ውሣኔ ለመስጠት የሚያስችሉ ሥነ-ስርዓት መከተል ይገባቸዋል። የፌዴራል ሲቪል ሰርቪስ ያስተዳደር ፍ/ቤት የመደበኛውን ፍርድ ቤት አሠራር (Procedures) አጥብቆ ለመከተል ባደገረው ጥረት ያቤት ባይን መሠረታዊ መብት (substantive rights) ማሣጣቱ ተገቢ አይደለም።

በሕግ ምሁራን ዘንድ ተቀባይነት ያገኘውና

" Incidental procedural matters must not kill substantive rights"

የሚለውን መርህ ያልተከተለ ውሣኔ ነው። በፌዴራል ሴቪል ሰርቪስ ኮሚሽን ያስተዳደር ፍ/ቤት የተሰጠው ውሣኔ።

በትንታኔ መግቢያችን ላይ ካነሳናቸውና አሁን የያዝነው ጉዳይ መሰረታዊ ነጥቦች የመጀመሪያውን ከላይ በተመለከተው መልኩ ከተነተንን ወደ ሁለተኛው ነጥብ እናመራለን።

በሁለተኛ ደረጃ የምንመረምረው ፍሬ ነገር በመግቢያችን ላይ እንደጠቀስነው ተጠሪ መ/ቤት በአቤት ባይ ላይ ከመሠረተው ክስ አቤት ባይ ከወንጀሉ ክስም ይሁን ከፍትሐብሔር ክሱ ነፃ መውጣታቸውን ያመነው ጉዳይ ነው።

ከተቋማችን ተልኮና ስልጣን አኳያ በፍ/ቤቶች የተሰጠውን ውሣኔ ተመልሰን ለማየት አንፈልግም። ፍ/ቤቶች የሚሰጡት ውሣኔ የመጨረሻና አስገዳጅ እንደሆነ እና ፍ/ቤቶች የሚሰጡትን ውሣኔ መሻር የሚቻለው በሕግ በተዘረጋው የይግባኝ ስርዓት ብቻ እንደሆነ ተቋማችን ይገነዘባል ያምንበታልም።

በተጠሪ መስሪያ ቤት የዲሲፕሊን ኮሚቴ ታይቶ አቤት ባይ ከስራ እንዲሠናበቱ የተደረገበት ዋናው ጉዳይ የመ/ቤቱን ንብረት በማጉደል ነው። ነገር ግን ይህንኑ ጉዳይ ተንተርሶ በመደበኛ ፍ/ቤት አቤት ባይ ከተከሠሱበት የእምነት ማጉደል ወንጀል ነፃ ሲወጡ ፍ/ቤቱ የሚከተለውን አስፍሯል። እንጠቅሣለን

> ***"በብዙ ሺህ የሚገመት ስህል በማንቀሣቀስ ሂደት ውስጥ ጉድለት ሲከሰት ሊደቻልም ብሎ ማሠብ የማይቻል ከመሆኑም ሴሳ ቁጥጥሩ ሰሸሚ በሆነ ሁኔታ የተከናወነ በመሆኑ ተከሣሽን ጥፌተኛ ማድረግ ሰስቸጋሪ ስለሆነ የመከሳከያ ምስክሩ የበለጠ ሰሣማኝ ሆኖ በመገኘቱ***

በሲቲዮቭያ ወንጀለኛ መቅጫ ህግ ሥነ-ስርዓት ሰንቀጽ 149/2/ መሠረት ተከሣሽ ጥፋተኛ ሰደደሱም ብለን በነፃ ሰሰናብተናል::"

በጥቅሱ በግልፅ እንደተገለፀው የመንግስት ንብረት የጐደለው በአቤት ባይ ጥፋት ሣይሆን በመስሪያ ቤቱ ዝርክርክ አሰራር ምክንያት እንደሆነ ያሳያል::

ይህንኑ ጉዳይ የበለጠ የሚያጠናክርልን ነጥብ አቤት ባይ በፍታብሄር ከተከሰሱበት ክስ ሊጠየቁ አይገባም ሲል የኦሮምያ ጠቅላይ ፍ/ቤት በቀን 30/05/94 በዋለው ችሎት የሰጠውን ውሣኔ እንጠቅሣለን::

"- - - የተሰፈው ሰፊ ሰዚህ ሰተከሰተው ችግር ምክንያት ቢሆንም ተከሳሽ ደህንኑ ሰየገሰፀ ከመኪና ወደ መኪና ሰህሰ ሰየተጫነ ሶዲተርችም ሰንደተመዘነ ሰድርገው በመቁጠር ሰንዲሁ በሞፍን ሰሰበው ያቀረቡት በተከሣሹ ሳይ ጉዳት ሰማድረስ ካልሆነ በቀር ጉድለት ሰሰከተሏል ሲያሰኝ የሚችል ሰደደሰም::"

አቤት ባይ አጉድለዋል የተባለው የመንግስት ንብረት በተጠሪ መ/ቤት ያሰራር ችግር የጐደለ መሆኑ ከላይ በተጠቀሱት ነፃና ገለልተኛ ፍ/ቤቶች ተረጋግጧል::

በነዚህ ፍ/ቤቶች የተሰጠው ውሣኔ አስገዳጅ ከመሆኑም አንፃር በተመሣሣይ የንብረት ማጉደል ክስ የተወሰደው አስተዳደራዊ የስራ ስንብት እጣ ፈንታ ምን መሆን ይገባዋል? የሚለው የማቀጥለው ጥያቄአችን ነው::

ለተጠሪ መ/ቤቱ የዲሲፕሊን ኮሚቴ ውሣኔ መነሻ የሆነው ምክንያትና በአቤት ባይ ላይ የተመሠረተው የንብረት ማጉደል ክስ በነፃና ገለልተኛ ፍ/ቤት አቤት ባይ ሊጠየቁበት የሚችል ንብረት አልጐደለም ከተባለ የዲሲፕሊን ኮሚቴው ውሣኔ የሚቆምበት መሠረት የለውም:: ነፃና ገለልተኛ ፍ/ቤቶች አቤትባይ ያጐደሉት ንብረት የለም እያለ የዲሲፕሊን ኮሚቴው ውሣኔ በተመሣሣይ ሰበብ (cause) አቤት ባይን ተጠያቂ ለያደርግ የሚችልበት የህግም ይሁን የአመንክዮ መሠረት የለውም::

ስለዚህ ተጠሪ መ/ቤት አቤት ባይ ወደ ስራ መልሱኝ ብለው በጠየቁት መሠረት አቤት ባይን ላለመመለስ የጠቀሰው የመንግስት ሰራተኞች ደንብ አንቀጽ 88/2/ አቤት ባይን እንዳይመለሱ ስለማይከለክላቸው በተጨማሪም ጐድሏል የተባለው የመንግስት ንብረትን ተንተርሶ የተሰጠ የስራ ስንብት ውሣኔ በፍ/ቤት የጐደለ ንብረት የለም አቤት ባይ ሊጠየቁ አይገባም ተብሎ በተወሰነ ጊዜ ያለምንም ተጨማሪ መመሪያ (automatically) አቤት ባይን ወደስራ መመለስ ከህግም ይሁን ከአመንክዮ አንፃር ተገቢ ነበር:: በዚህ ረገድ ተጠሪ መ/ቤት አቤት ባይ ለጠየቁት ወደስራ ልመለስ ጥያቄ ላይ በመጋቢት

9/1997 ዓ.ም. በቁጥር ዘ1/ሠአ17/15/72 የተሻፈው ደብዳቤ ፈጽሞ ህግን ያልተከተለና አቤት ባይ ወደ ስራ እንዳይመለሱ የሚከለክል አንዳች ምክንያት መጥቀስ ያልቻለ ነው።

የ ው ሣ ኔ ሃ ሳ ብ

ከላይ በትንታኔው ክፍል እንዳብራራነው አቤት ባይ ከስራ ሲሰናበቱ የተጠሪ መ/ቤት የዲሲፕሊን ኮሚቴና የሲቪል ሰርቪስ ኮሚሽን የአስተዳደር ፍ/ቤት በሰጡት ውሣኔዎች ላይ በርካታ ህፀፆች እንዳሉ ተቋማችን ተገንዝቧል። ከዚህ በተጨማሪ አቤትባይ በተጠሪ መ/ቤት ከተመሰረተባቸው የፍትሐብሄርና የወንጀል ክሶች ነፃ ከወጡ በኋላ ወደ ስራ አለመመለሣቸው በተጠሪ መ/ቤት የተፈፀመ ጥፋት ነው።

በአጠቃላይ ተቋማችን ባደረገው ምርመራ ተጠሪ መ/ቤት የሕዝብ ዕንባ ጠባቂ ተቋም በተቋቋመበት አዋጅ ቁጥር 211/92 አንቀፅ 2/5/ ላይ በተገለፀው መሠረት ያአስተዳደር በደል ፈፅሞአል ብሎ አምኖአል።

ስለዚህ ከላይ በተጠቀሰው አዋጅ አንቀፅ 26/2/ መሠረት የሚከተለውን የውሣኔ ሐሣብ ያሣልፋል፦

1. አቤትባይ [illegible] ወደ ቀድሞ ስራ ገበታቸው ይመለሱ

2. የደረጃ እድገታቸው እና ደሞዛቸው በስራ ቢቆዩ ኖሮ ሊያገኙ ከሚችሉት ደረጃና ደሞዝ አንፃር ታይቶ የስራ ምደባው ይከናወን።

3. ከስራ ከመሠናበታቸው በፊት ያሉተጠቀሙበት የዓመት ዕረፍት እንዲሁም አበል ካለ ህጉ በሚያዘው መሠረት ይፈፀምላቸው።

ተጠሪ መ/ቤት ይህ የውሣኔ ሃሳብ በደረሰው በአጭር ጊዜ ውስጥ የወሰደውን እርምጃ ለተቋማችን እንዲያሣውቅ እናሣስባለን።