

ТРИБУНА МОЛОДОГО ВЧЕНОГО



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Ombudsman's Institution as a way to protect the legitimate rights and interests of convicted and imprisoned

At present Ukraine is steadily moving towards joining the European Union that requires decisive action and significant changes in the state's overall structure and some of its spheres in order to establish democratic, independent, free, legal state with high level of lawful culture of all its citizens and to assure that every member of society, in case of violation of his rights and legitimate interests will be heard and by the government and receive assistance.

In our opinion, one of the most important issues that needs reorganization and its implementation control is the issue of compliance and protection of human legitimate rights and interests. After all, human rights – is a person's exceptional and secured legislator ability to have certain guarantees for realitation of their interests, comfortable existence in the world and all spheres of society. The European Community expressed its vision in the need for man's and citizen's rights and legitimate interests

protection and consolidated this position in the Universal Declaration of Human Rights (Article 7 which states "All are equal in the face of law and have right, without any exception, for equal defence of law. All people have right for equal defence from any discrimination that violates Universal Declaration of Human Rights and from any - incitement to such discrimination" [1]. Ukraine supports this position and serves as a guarantor of human rights and freedom's implementation. The confirmation of the given fact is Article 3 of the Constitution of Ukraine, which states that "A person, his life and health, honour and dignity, privilege and safety are recognised in Ukraine as the highest social value. A person's rights and freedoms and their guarantees determine the state's content and directivity ... " [2] and also presence in the Basic Law of the country Title II Rights, freedoms and duties of man and citizen, representing almost a third part of the entire Constitution, which again

demonstrates the state's interest in every person and citizen's welfare and protection.

But in our article we want to pay attention to a specially insecure part of society - convicted and imprisoned. As most of people serving criminal sentences in the institutions of punishment or those who are in the institutions for detention of people to whom as a precaution was elected detention or those who are under temporary or extradition arrest - can not always afford a lawyer's paid service or other experts in the legal sphere because of the difficult financial situation or other reason of individual character. But the possibility of defending their rights by this exact layer of society can talk about the level of legal and democratic development of our country and its possibility of expressing themselves as worthy representatives of the European Union. This matter of fact is not quite new in human history, as Winston Churchill said, "Show me your prisons and I'll tell you what society you live in" [3].

One of the possible ways to protect your rights and interests is Ombudsman Institute as a guarantor of implementation of these same rights, freedoms and interests of prisoners and detainees. That is the institution of civil society and the state, informal, personalized, depoliticized, that has no administrative or discretionary powers, that deal with complaints, submit proposals, recommendations, expressing opinion on officials and public bodies. This is an element of social structure - constitutional and legal mechanism for protecting human and civil rights - a certain institution - public authority that is formed to achieve a specific goals - human rights' protection and to perform certain tasks and functions aimed at ensuring the rights, freedoms and lawful interests of individuals, social groups, sectors or society as a whole [4, p. 10].

The study of this institution has been performed by such scientists, as Martselyak O. V. who researched and

opened legal nature of this institution, more specifically its constitutional legal status, characterized its formation and development, provided a description of existing models of human rights institutions in the world and its scheme in Ukraine; Barchuk V. B. who paid more of his attention to the place of Commissioner of Verkhovna Rada of Ukraine on human rights in juridical mechanism of providing human rights as a whole and more detailed among the subjects of the system of assurance of national security of Ukraine; Naulik N.S. who held comparative analysis of distinctive features of constitutional legal status of Ombudsman in Ukraine and Poland, established the place and role of Ukrainian and polish Ombudsmen in the system of human rights body, analysed the structure, general kinds of and regulatory support of these institutions; Golyak L. V. who in her study analysed the world's experience of implementation, organization and activity of the specialized Ombudsman's institution in the world, found common and specific between the ombudsmen of so-called "general jurisdiction" and specialized ombudsmen; Govorov V. S. who researched the legal nature of local and regional ombudsmen in foreign countries, and main principles and regulations of their organization and activity.

But, unfortunately, attention to a special role of Ombudsman in life of convicted and imprisoned in our country hasn't been paid at all. As we can see from that the research of Ombudsman's institution in general and in the system of human right and legal interests protection is still of current importance nowadays, both from the eurointergration's point of view and position of determination of Ombudsman's place in the general structure of human rights protection.

The aim of writing this article is an attempt to inquire into the question of the Ombudsman's institution role in the system of protection of legal interests of convicted and imprisoned

and also the research of the problems that can arise on practice in the context of interaction of Ombudsman with those who are executing and serving criminal sentences.

In Ukraine the Commissioner is appealed to take parliamentary control over the following of constitutional rights and freedoms of an individual or citizen that is clearly assigned in the law of Ukraine "About the Commissioner of Verkhovna Rada on human rights." He is called to stand as a guarantor of following the laws of every human's legal rights and interests. It is confirmed by giving possibility to examine all spheres of society's vital activity. That is why, in our opinion, we should agree with Martselyak's O. V. given definition of "Ombudsman" as a legislative (authority) body of control and observation [5, p. 12]. By accomplishing his controlling and observing powers, the Ombudsman implements (plays part) a balance between the citizens and the state. He not only helps to solve a person's existing problem but also he is an anchor of the state's power legality, which under the Ombudsman's impact solves the present problems and gets respect and trust among its citizen. That is why we share the thought of Borschenka A.S. that Ombudsman's sphere of activity - is a relationships between the citizen and the state, cases where the citizens interact with each other are out of his competence [6, p. 11].

The main aim of the Commissioner is realization of protection of human and citizen's rights and freedoms which are indicated in the Constitution of Ukraine, laws of Ukraine and international agreements; prevention of human and citizen's right and freedoms violations, or their renewal, affect upon renewal of Ukraine legislation on rights and freedoms of a person or citizen according to the norms of the present legislation and avoidance of any forms of discrimination while implementing by person his rights and freedoms [7].

If we look at the place of Ombudsman in the general system of human and citizen's protection we can see that from the very beginning it is consolidated as one of the most independent from one side and one of the most conflict – arising from another. Independence accordance to the article 5 demands from the candidate on the post of Ombudsman of the Law of Ukraine "About the Commissioner of Verkhovna Rada on the human rights" the commissioner is appointed on the post for 5-year term by Verkhovna Rada of Ukraine by means of secret vote giving the bulletins, preliminarily renders information about his property according to the Ukrainian Law "About the methods of corruption" has an experience in human rights' protection activity and high moral qualities that points at dignity and self-dependence of the person chosen on this post.

Under the word "conflict ability" one should at once understand the legal status of the person elected as the commissioner as he is immediately obliged to control the appropriate work fulfillment by relevant official and to be ready to publicly criticize the government if there is any violation of rights and freedoms of man and citizen.

Having analyzed the normative legal acts that regulate the activity of Ombudsman in Ukraine and also their usage practice it is necessary to notice that although the state recognizes the existence of such institution in the country as necessary but it doesn't pay much attention to the given issue as all norms of the possibility to apply to the Commissioner of Verkhovna Rada in Ukraine on human rights bear only blanket character. This is confirmed by absence of separate article in the Constitution of Ukraine that could regulate the Ombudsman's activity as a result to gain his authority and people's trust. Also in the law of Ukraine "On the Commissioner by Verkhovna Rada on human rights" there is no article that called regulate the order of

addressing of convicted and imprisoned to the Ombudsman in order one's rights and legal interests. Although article 8 Criminal – Executive code of Ukraine gives the right to convicted to address according to the legislation with proposals, complaints and applications to administrative bodies and penal institutions and their parent bodies and to the Commissioner of Verkhovna Rada on human rights [8]. Also article 24 of Criminal - Procedure Code of Ukraine states that the Commissioner of Verkhovna Rada of Ukraine on human rights or special commissioners who represent him have right to visit the penal institutions without a special permission (accreditation) at any time freely, to control and hold an inspection (optionally with or without less than three medical workers for medical examination of convicted and two media representatives), similar rights is stated in p. 8 p. 13 of Law of Ukraine "On the Commissioner of Verkhovna Rada of Ukraine on human rights" that he has right to attend without any preliminary discussion of time and purpose of visit or list of places such as a place of imprisonment and pretrial detention.

In order to highlight and analyze the Ombudsman's role as a guarantor of prisoners and detainees' right and freedoms as a part of this article we consider it necessary to analyze the special report of the Commissioner "Monitoring places of captivity in Ukraine : state of implementation the national preventive mechanism. Report for 2014 "[9]. This report consists of an introduction, 5 chapters and 2 addenda. Part 4 is called "Monitoring Results of places of imprisonment in terms of ministries and departments", where the second part is devoted to monitoring institutions that are subordinate to the State Penitentiary Service of Ukraine. Article 18 imposes the Commissioner as a duty to present during the first quarter of every year an annual report on the state of implementation and protection of man's and citizen's right

and freedoms in Ukraine by state authorities, local authorities, trade unions, enterprises, institutions, organization regardless the property form and their officials who violate with their actions (inaction) man's and citizen right and freedoms and on deficiencies found in legislation on human rights' protection. In necessary he must report to Verkhovna Rada of Ukraine a special report (s) on separate issues of abidance in Ukraine of man's and citizen's rights.

It should be noted that this monitoring is held hot only by the Commissioner, but also by regional representatives of the Commissioner on Human Rights, that are created by the Ombudsman in accordance with the Ukraine Law "On the Commissioner of Verkhovna Rada on Human Rights" in order to provide the Commissioner with effective activity and available personal consultation of citizens in removed from c. Kyiv administrative-territory unit.

Regional representors are supposed not only monitor the implementation of constitutional rights and freedoms of people but also to put forward a proposal to the Commissioner on Human Rights and Freedoms; to explain measures that the person have to take applying to the Commissioner; to provide with co-operation the Commissioner and representatives of public society's institutions; to organize and hold the citizen's reception; to take measures as for realization of regulations of Additional protocol to the Convention against tortures and other cruel, inhuman or humiliating dignity kinds of treatment and punishment; to organize connections between territorial and state authorities and interact with local authorities; to provide co-operation of the Commissioner with non-governmental public organizations etc.

Although the Commissioner by Verkhovna Rada of Ukraine on human rights gets lulp from the regional representatives it doesn't give him any opportunity to cover by checking

(examination) and control of the implementation of human rights and freedoms in full scale.

Thus, according to the given report at the beginning of 2015 in the sphere of the State Penitentiary Service of Ukraine were 150 institutions on the territory under Ukraine's authority, control and that held 72,602 people. During 2014 together with public representatives monitoring visits to 25 institutions were completed (10 detention centers, 8 prisons and 7 surepile correctionals), one of which was the second that makes almost 17% from general number of institutions. Visits were held in 15 regions (Volyns'ka, Dnipropetrovs'ka, Donets'ka, Zhytomys'ka, Zaporizhs'ka, Kyivs'ka, Luhans'ka, Poltavas'ka, Rivnens'ka, Sums'ka, Ternopyls'ka, Kharkivs'ka, Khmelnyts'ka and Chernihivs'ka oblasts).

The results of monitoring visits showed systemic violation of the detention and punishment order, causing a cruel and degrading treatment of prisoners and convicts. Also great attention has been paid there to systemic violation of the established by the state order of sentence's completion that violates the right for free self-development as a person. Exactly: support of criminal subculture, not determined by the state methods of social educational work, shifting by administrative establishments responsibility for maintaining order of punishment onto convicted in negative direction. Among the other in punishment institutions there is possible cases of unjustified limitation of the state's provided rights of convicted and those who are in custody:

- Telephone conversations' right is violated. A limited number of pay phones and compiled in the interests of the penal administration schedules of their duration does not exceed 3-5 minutes;

- numerous complaints were received from convicts and prisoners that the cooking technology was

violated. The food had low quality and inappropriate organoleptic properties. The diet of convicts and prisoners practically has no fresh vegetables, lack of cases fat;

- the are of convict's unpaid labour, when they are displayed on the facilities over the legally stipulated working hours without a corresponding sign – out board, cases when products made by convicts were put on account of so-called "asset" (foremen);

- The budget for convict's labour left to work in economic service, doesn't permit to pay minimal wages per month each (1218 hrn). In fact, they are paid only 0.25 or 0.5 from it. Work at weekends or holidays, according to the Labor Code of Ukraine, is not compensated;

Almost in every institution facts of lack in individual protection tools of workers and special clothes plus additional catering are noticed.

The Commissioner often gets citizen's applications as for violation of those in custody and convicts' rights stated by the law. During 2014 for this reason 1,038 appeals were made, which were connected with: bad conditions of imprisonment, violation of health care right, correspondence rights, telephone calls rights, physical violence and legal assistance right's violations.

According to the monitoring report in the places of non – freedom (imprisonment) convicts and prisoners don't know rights and duties and administration of the establishments ignores given them such information. That's why, in our opinion, the Ombudsman must not only supervise the convicts and prisoners' rights and freedoms implementation but also pay attention to the conditions of their workers' activity in order to provide with good living conditions of criminal - executive service workers of Ukraine as they must provide with the law implementation.

Having analyzing this we would like to notice that the these problems' existence tells that the general system of human rights and legal interests

protection at this period of our country's functioning is rather unefficient. According to that we should look for additional opportunities to protect our interests. As we think it is the Ombudsman who are chosen to establish the interaction between the authority's representatives and each separate person, it means he is a necessary (essential) link between understanding of every single person by the state. As sometimes to protect oneself their legal rights and freedom a person needs an assistance that can not only be realized by the law's position but whose solving problems a person would paid attention to as an individual with own problems, psychological worries and human needs.

In practice during the co-operation of the Commissioner Verkhovna Rada on Human Rights with subjects of criminal punishment's implementation following problems arise:

- Ombudsman can hardly monitor effectively all punishment institutions, because of his "being busy" and other duties;

- the majority of normative - legal acts that regulate the Ombudsman activity in the sphere of prisoners and

convicts' right and interests are of blanket character. As there is no clear norm regulating the way to apply to the Commissioner Verkhovna Rada of Ukraine on Human Rights, that is so essential for this special layer of society;

- Low level of information for prisoners and convicts concerning institution of Ombudsman in Ukraine and his possible role in their live;

- As the results of monitoring by the Commissioner are mostly like recommendation, not compulsory, the reports must be more public. By paying attention to the problems socially we have more chances to solve it.

To solve these problems we suggest to think of establishing a specialized institution of Ombudsman on convicts and prisoners' right; to make up a separate normatively - legal act that would regulate the order of applying to the Commissioner of Verkhovna Rada on Human Rights exactly by the prisoners and convicts; also to increase the level of acknowledgement of these people in the sphere of their rights' protection by means of applying to the Ombudsman and the legal level of every person in general.

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Петельнікова Н. М. Інститут омбудсмена як спосіб захисту законних прав та інтересів засуджених і ув'язнених

Стаття присвячена розгляду одного із способів захисту законних прав та інтересів людини та громадянина, а саме – Інституту омбудсмена в Україні. Даний інститут слугує гарантом дотримання прав кожної окремої людини, але в нашій статті ми хочемо приділити увагу особливо незахищеній верстві населення – засудженим та ув'язненим. Адже більша частина людей даного прошарку суспільства не завжди можуть скористатися платними послугами адвокатів чи інших спеціалістів в правовій сфері через скрутний матеріальний стан та низку чинників індивідуального характеру. Та по можливості відстоювання своїх прав саме засудженими та ув'язненими можна говорити про правовий та демократичний рівень розвитку нашої держави, а також про її можливість вираження себе як гідної представниці Європейського об'єднання.

Актуальність дослідження даної теми полягає в тому, що дослідженням та вивченням інституту омбудсмена в Україні займалися вітчизняні науковці, але, на превеликий жаль, особливій ролі омбудсмена в житті засуджених та ув'язнених в нашій країні, взагалі не приділялася увага.

Проаналізовано нормативно – правові акти, що регламентують діяльність омбудсмена в Україні, а також практику їх застосування. Виділена така проблема, що хоча держава і визнає за необхідність існування в країні даного інституту, але не приділяє багато уваги даному питанню, оскільки всі норми про можливість звернення до Уповноваженого Верховної Ради України з прав людини носять бланкетний характер. Підтвердженням цього являється відсутність окремої статті в Конституції України, що могла б регулювати діяльність омбудсмена і цим самим підвищити його авторитет та довіру населення. Також в Законі України «Про Уповноваженого Верховної Ради України з прав людини» відсутня окрема стаття, що регулювала б порядок звернення засуджених та ув'язнених до омбудсмена для захисту своїх прав та законних інтересів.

Також в статті розглянутий спеціальний звіт Уповноваженого Верховної Ради України з прав людини «Моніторинг місць несвободи в Україні: стан реалізації національного превентивного механізму. Доповідь за 2014 рік». Дана доповідь складається зі вступу, 5 розділів та 2 додатків. Розділ 4 має назву «Результати моніторингу місць несвободи в розрізі міністерств та відомств», де друга частина присвячена саме моніторингу установ, що знаходяться у підпорядкуванні Державної пенітенціарної служби України. Відповідно до даного звіту, під час виконання та відбування кримі-

нальних покарань в установах виконання покарань зафіксовані неодноразові порушення законних прав та інтересів засуджених і ув'язнених.

В кінці статті наведений перелік можливих проблем, що виникають під час взаємодії омбудсмена з суб'єктами виконання покарання, серед них такі: неможливість перевірити омбудсменом всі установи виконання покарання за рік принаймні один раз; низький рівень проінформованості засуджених та ув'язнених про можливість захисту своїх прав та законних інтересів саме інститутом омбудсмена; більшість нормативно – правових актів, що регламентують діяльність омбудсмена в сфері захисту прав засуджених та ув'язнених носять бланкетний характер та надані можливі рекомендації для вирішення даних проблем.

Ключові слова: права людини, засуджений, ув'язнений, інститут омбудсмена, Уповноважений Верховної Ради України з прав людини, регіональні представництва Уповноваженого з прав людини.

Петельникова Н. Н. Институт омбудсмена как способ защиты законных прав и интересов осужденных и заключенных

Статья посвящена рассмотрению роли Института омбудсмена в системе защиты законных прав и интересов осужденных и заключенных. Проанализированы те проблемы, что могут возникать на практике, в рамках взаимодействия омбудсмена с субъектами исполнения уголовных наказаний. Также предоставлены возможные решения данных проблем.

Ключевые слова: права человека, осужденные, заключенные, институт омбудсмена, Уполномоченный Верховной Рады Украины по правам человека, региональные представительства Уполномоченного с прав человека.

Petelnikova N. Ombudsman's Institution as a way to protect the legitimate rights and interests of convicted and imprisoned

The article considers the role of the Institute of Ombudsman in the protection of the legitimate rights and interests of prisoners and detainees. We analyzed the problems that can arise in practice, within the framework of cooperation of the Ombudsman with the subjects of the execution of criminal penalties. Also provided the possible solutions to these problems.

Key words: Human Rights, convicted, prisoners, Ombudsman, Commissioner Verkhovna Rada of Ukraine with human rights, with the regional offices of the Commissioner of Human Rights.