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*Taranenko F., graduate student, National Aviation University, Kyiv,
ORCID: 0009-0007-9409-0447*

Тараненко Ф.В., аспірант, НАУ, м. Київ, ORCID: 0009-0007-9409-0447

THEORETICAL PRINCIPLES AND ORIGIN OF THE INSTITUTE OF OMBUDSMAN AS AN OBJECT OF STATE REGULATION

ТЕОРЕТИЧНІ ЗАСАДИ ТА ВИТОКИ ІНСТИТУТУ ОМБУДСМЕНА ЯК ОБ'ЄКТА ДЕРЖАВНОГО РЕГУЛЮВАННЯ

The theoretical foundations are studied and the origins of the Ombudsman institution as an object of state regulation in Ukraine and the world are outlined. The prospects for the development of the Ombudsman institution are determined, in particular, regarding the definition of the legal regime of the local commissioner for the rights of the territorial community in the mechanism for the protection of human rights. This institution is of particular importance for the protection of citizens' rights due to the increase in violations in this area, caused by the full-scale aggression of the Russian Federation.

Keywords: *state regulation, institution of the ombudsman, genesis, local commissioner for the rights of the territorial community, protection of human rights.*

Досліджено теоретичні засади та окреслено витoki інституту омбудсмена як об'єкта державного регулювання в Україні та світі. Визначено перспективи розвитку інституту омбудсмена, зокрема, щодо визначення правового режиму місцевого уповноваженого з прав територіальної громади в механізмі захисту прав людини. Даний інститут має особливе значення для захисту прав громадян через збільшення правопорушень у цій сфері, зумовлені повномасштабною агресією РФ.

Ключові слова: *державне регулювання, інститут омбудсмена, генеза, місцевий уповноважений з прав територіальної громади, захист прав людини.*

Problem setting. Until recently, the institution of the Ombudsman, as well as the term “ombudsman” itself, in Ukraine were known only to a relatively narrow circle of legal specialists. And this is not surprising. After all, this institution arose and developed on the basis of Western European democratic values, based on the principles of separation of powers and the rule of law, and therefore, until the end of the 80s, it did not arouse much interest in the official Soviet legal doctrine. With the strengthening of democratization processes in the countries of Eastern Europe in the early 90s, interest in new democratic mechanisms for the protection of human rights, in particular, the institution of the Ombudsman, its origins and history, is growing.

Recent research and publications analysis. The peculiarities of the formation of management mechanisms in the sphere of development of legal institutions in general and the institution of the Ombudsman in particular were studied by scientists O. Batanov, N. Karpachova, A. Lelechenko, O. Maidannik, V. Pohorilko, A. Pomaza-Ponomarenko, S. Prykhodko, V. Tatsiy, Yu. Todyka and others. [1; 2; 3; 4–5; 8; 9; 11]. However, domestic mechanisms of public administration in the specified sphere (in particular, legal, organizational and resource) in the modern realities of the functioning of our state still remain insufficiently developed in the context of the influence of full-scale aggression of the Russian Federation on them.

Paper objective. Given the above-mentioned relevance of the research topic, the purpose of the article is to determine the theoretical foundations and origins of the development of the ombudsman institution in Ukraine and abroad.

Presentation of the main material. A characteristic feature of the institution of the Ombudsman was that its establishment in most countries of the world took place in the already existing system of state authorities and therefore it was necessary to take into account national, legal, cultural and other peculiarities. Therefore, despite the common principles of the conceptual construction of this institution, it is difficult to find two such institutions in the world that would be completely identical. But it is possible to single out certain common features that unite all these institutions under one generic name - Ombudsman, although in Ukraine it is the Commissioner of the Verkhovna Rada for Human Rights, in Spain, in South Africa - the Defender of the People, in Poland - the Spokesperson for Civil Rights, in France - the Mediator of the French Republic, in Lithuania - the Comptroller of the Seimas, in Greece - the Defender of Citizens, in Moldova - the Parliamentary Advocate, in Sweden, Finland, Denmark - the Ombudsman.

One of the main functions of the ombudsman in the world is to monitor the activities of executive and other state authorities by considering complaints from citizens about the actions of certain bodies or officials that have led to the violation of human and civil rights and freedoms. In this sense, an important inalienable right of the ombudsman is the right to conduct investigations, including on his own initiative, and on their basis to make recommendations on

ways to restore violated rights in a particular case, to make proposals for changes to legislation or to review illegal administrative practices of state authorities. The procedure for contacting the ombudsman is as informal and flexible as possible, and access to it is free and open to all citizens of the state.

A characteristic feature is the independence of the institution, which is manifested primarily in the high status of the position of ombudsman, which in most countries is enshrined in the Constitution, as well as in the election of the ombudsman by the parliament of the state, which ensures his independence from all branches of government, including the legislative one. The independence of the Ombudsman implies the inadmissibility and direct prohibition of interference in his activities by state authorities, political parties, public organizations, and the media. In society, the Ombudsman acts as a kind of arbitrator between a person and the authorities, therefore he must act independently and impartially.

The internal aspect of the Ombudsman's independence implies the availability of sufficient financial resources to fulfill his powers, as well as, given the personification of the institution, independence in implementing personnel and organizational policy.

Due to the lack of imperative and authoritative powers of the Ombudsman, one of the main means of his influence on the adoption of the necessary decision is the publicity and dissemination of information about violations of human rights and freedoms in the state, primarily through the publication of annual and special reports. The above characteristics in their entirety reflect only the most important features of the Ombudsman institution. Depending on the scope of powers, area of competence and other factors, it is possible to conditionally distinguish several models of the ombudsman in the world. The most common of them is the so-called classical, or strong, model of the ombudsman, first introduced in Sweden at the beginning of the 19th century.

Until now, it is impossible to say with certainty what socio-historical prerequisites led to the creation of this institution in Sweden. On the one hand, this was facilitated by the centuries-old tradition of the rule of law and respect for individual human rights inherent in the Swedes, on the other hand, the fierce struggle for power between the Swedish king and parliament. As a result, royal power was significantly limited and parliament received the right to elect a parliamentary commissioner in contrast to the royal chancellor of justice to exercise independent control over the administration and courts. This was reflected in the Constitution of 1809, according to which the position of Ombudsman for Justice (justitieombudsman) was introduced for the first time in the Swedish legal system [2].

The Swedish model is characterized by extremely broad powers and scope of competence. Thus, the Swedish Ombudsman exercises control not only over central government and administrative bodies, but also over courts and local administration bodies, as well as over the armed forces and even over officials of

state-owned enterprises to the extent that they perform state and governmental functions. To this end, the Ombudsman has many means of influence in his arsenal: the right to unlimited access to protocols and documents, including secret ones; the right of legislative initiative; the right to initiate disciplinary proceedings against persons who do not comply with his requirements, and even to impose fines; as an extraordinary prosecutor, to initiate legal proceedings against officials for improper performance of their duties, etc.

The above-mentioned characteristic features of the Swedish model have largely contributed to the success and further spread of the concept of the Ombudsman in Europe and the world.

The next country to introduce the institution of an ombudsman in 1919 was Finland, which is very close to Sweden in terms of legal system. Therefore, the model introduced in Finland is in many ways similar to the Swedish one. Here, a wide scope of competence and powers is provided, including: the right to initiate criminal prosecution of the heads of the Supreme and High Administrative Courts of Finland, as well as, by decision of the Parliament, to act as public prosecutor of other senior state officials, in particular members of the Council of State and the Chancellor of Justice.

After the Second World War, the idea of the Ombudsman institution began to spread actively in Europe. This period was characterized by a significant strengthening of the executive branch and its regulatory role in all spheres of public life, which in turn led to the need for additional means of control over the activities of administrative bodies.

In 1952, the Ombudsman institution was founded in Norway. Initially, its functions were limited only to control over the country's armed forces, and only in 1962 was a corresponding body created to control the civil administration.

Despite the success of the Swedish model, the Ombudsman institution became known to most countries of the world only after the creation of the Ombudsman service in Denmark in 1953. It was this model, given the proximity of the Danish legal system to both the Romano-Germanic and Anglo-Saxon legal cultures, that received the greatest recognition in the world. The powers of the Danish Ombudsman were somewhat narrower than those of his Swedish colleagues, but at the same time it was the first successful experiment in introducing a new institution in a country where, firstly, the principle of ministerial responsibility of the government before the parliament was in force, and, secondly, judicial control over the activities of the administration existed for a long time, which Sweden and Finland did not know.

Since then, the idea of ombudsmanship has been actively spreading from the Scandinavian countries to other countries in Europe, America, Asia and Africa.

The experience of countries with a continental legal system began to be actively studied in common law countries. In 1967, a law establishing the

Ombudsman was adopted in Great Britain. The impetus for this was the dissatisfaction of citizens with the state of administration in the country and the increase in the number of complaints in this regard. But given the specifics of the constitutional structure of the English state, which provides for significant powers of parliament to control the activities of the government accountable to it, a “weak” model of the ombudsman was introduced in Great Britain. It is characterized by a narrow sphere of competence, limited means of legal influence, as well as the introduction of the so-called parliamentary filter, as a result of which citizens’ access to the ombudsman was sharply limited. Such a possibility of appeals is provided only through parliamentarians [4; 11].

In the same 1967, the institution of the ombudsman was created in a number of provinces in Canada. In 1979, it was introduced in Australia.

During the same period, there was a growing interest in the institution of the ombudsman in the USA. The basis was the Swedish analogue. Of course, the interest of Americans in this institution never reached the same level as, say, in Europe, which is explained by the large role of the judiciary in the country. In the USA, the institution of ombudsmen was also introduced in some localities. In 1969 – in Hawaii, in 1971 – in Nebraska, in 1972 – in Iowa. A characteristic feature of the USA was the introduction of a large number of ombudsmen at different levels: state, district, city [2].

In 1976, the institution of the Ombudsman was introduced in Portugal, and in 1981 in neighboring Spain. The introduction of the institution of the People’s Defender in the constitutional and political system of Spain became one of the most successful state and legal innovations after the fall of the Franco dictatorship. The Spaniards chose a “strong” model of the Ombudsman, similar to the Swedish one. However, given the specifics of the country’s federal state system, regional ombudsmen were introduced at the provincial level. They are completely independent in the exercise of their powers from the national ombudsman of Spain, relations with which are built on the principles of coordination and delimitation of the sphere of competence. Such delimitation, in particular between the regional ombudsman of the province of Catalonia and the national ombudsman of Spain, is carried out on the basis of a bilateral agreement. The uniqueness of this model is associated with the federal features of Spain and, as experience shows, does not justify itself in countries with a unitary administrative-territorial structure [2].

Various models of ombudsmen were also introduced in Austria, Belgium, Israel, India, Italy, Cyprus, Mexico, the Netherlands, France, New Zealand, Germany, Switzerland, etc.

A feature of the French model, introduced in 1973, is that the mediator of France, where the role of the executive branch is traditionally strong, is appointed by the Council of Ministers of France, which is a kind of exception in the concept of a parliamentary ombudsman. In addition, in France, as in the UK, there is a so-

called parliamentary filter, which deprives citizens of direct access to the ombudsman.

A new wave of the idea of ombudsmanship, which contributed to the growth of the authority and number of these institutions in the world, is associated with the fall of the “iron curtain” and the appearance of new states on the map of Europe [2; 4].

In 1988, Poland was the first among the countries of Eastern Europe to introduce the institution of ombudsman. This was the first experiment in introducing this institution in a socialist system of governance. The experiment turned out to be successful. The institution of the Ombudsman for Civil Rights in Poland not only fit into the existing system of state bodies, but also actively contributed to many of the transformations that took place in the country in the late 80s. This was largely facilitated by the ideological and political neutrality of the Ombudsman, the promotion of the principles of the rule of law and the hierarchy of values oriented on human rights. The Polish model is also built on a “strong” model. Thus, the Ombudsman of Poland has the right to demand the initiation of disciplinary or administrative proceedings, and his powers in criminal and civil proceedings are equated with the powers of a prosecutor.

Many other countries of Eastern Europe have benefited from Poland's experience. In 1989, the institution of the Ombudsman was introduced in Hungary, and in the 1990s - in Georgia, Lithuania, Latvia, Moldova, the Russian Federation, Romania and Uzbekistan.

On January 15, 1998, the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights" came into force. On April 14 of the same year, the Verkhovna Rada of Ukraine elected the first Commissioner for Human Rights in the history of the state [3; 7; 10].

At the present stage, the idea of ombudsmanship has outgrown national borders and is increasingly used at the regional and international levels. The spread of ombudsman services in the world was the impetus for the creation in 1976 of the International Ombudsman Institute, which unites national institutions from more than 50 countries, promotes the development of the ombudsman concept in the world through research, educational programs, publications and information exchange, as well as the organization of regional and international conferences.

In 1982, teachers from the University of Innsbruck (Austria) initiated the creation of a scientific society, the main task of which was to study the phenomenon of the ombudsman in Europe. Since 1988, the society has received the status of an international public organization and is now known as the European Ombudsman Institute. The main areas of activity of this institute are the dissemination and promotion of the idea of an ombudsman in Europe, support of scientific research in this area, and promotion of exchange of experience at the national, European and international levels. The members of the institute are the

majority of European ombudsman institutions. In October 1998, the Ukrainian Commissioner for Human Rights was admitted to the European Ombudsman Institute [2].

In 1993, in accordance with the provisions of the Maastricht Treaty establishing the European Union, the position of Ombudsman was introduced in the EU. He was granted the right to accept complaints from any legal or natural person of an EU member state and to conduct investigations into the activities of the institutions and bodies of the European Union, with the exception of the Court of Justice of the European Communities and the Court of First Instance of the EU. Currently, active work is underway to prepare a single code of conduct for EU officials, which would allow establishing clear criteria for assessing their activities by the European Ombudsman [11].

In 1999, after long debates, the position of Commissioner for Human Rights was introduced in the Council of Europe. It should be noted that this official does not quite fit into the concept of an ombudsman, since he is deprived of such an important right as the right to conduct a specific investigation based on complaints from citizens or on his own initiative. The Commissioner for Human Rights of the Council of Europe is called upon to carry out educational functions and coordinating activities in the field of human rights within the framework of the activities of this European institution. The process of defining the specific scope of his competence and powers has not yet been completed. The first Ombudsman of the Council of Europe was Álvaro Gil-Robles, formerly the Defender of the People of Spain.

The features of the formation of management mechanisms in the field of development of legal institutions in general were studied by the scientist A. Pomaza-Ponomarenko [9]. She distinguishes authorities depending on their place in the public administration system. The scientist insists that among these public administration bodies it is necessary to distinguish institutions with a link, that some of them determine the role of bodies that are elected and those that are appointed. The institution of the Ombudsman refers to those that have a hybrid nature, because it is elected by voting by representatives of the representative body, that is, by the parliament. However, domestic mechanisms of public administration in this area (in particular, legal, organizational) in the modern realities of the functioning of our state still remain insufficiently developed in the context of the influence on them of the full-scale aggression of the Russian Federation. Given the tendency to the functioning of local ombudsmen of the Russian Federation, we can determine the prospects for the development of the local commissioner for the rights of the territorial community in the mechanism for the protection of human rights. This institution is of particular importance for the protection of citizens' rights due to the increase in offenses in this area, caused by the full-scale aggression of the Russian Federation.

Practice shows that the Ombudsman can function as a centralized

institution at the national level, as well as as a regional / local institution. The institution of regional ombudsmen is used more often in states with a federal form of government, where strong autonomous units function, and the creation of local ombudsmen is often determined by specific needs and historical tradition. Similar institutions operate in a number of states, regardless of the presence or absence of a national ombudsman. Their powers are similar to those of the national ombudsman, but are limited to exercising control over the activities of only the administration in a given constituent part of the state or its administrative-territorial unit (province, region, oblast, community) [6].

Conclusions. Thus, today the institution of the ombudsman at the national, regional and local levels exists in more than 100 countries of the world, and this idea continues to spread. It is no exaggeration to say that the institution of the ombudsman is not only a desirable, but also a necessary element of the national system of human rights protection, a key link in the process of transformation in countries that have embarked on the path of democracy and the rule of law. The prospects for the development of the Ombudsman institution are determined, in particular, regarding the definition of the legal regime of the local commissioner for the rights of the territorial community in the mechanism for the protection of human rights. This institution is of particular importance for the protection of citizens' rights due to the increase in violations in this area, caused by the full-scale aggression of the Russian Federation.

Список використаних джерел:

1. Батанов О. Місцевий уповноважений з прав територіальної громади в механізмі захисту прав людини (проблеми теорії та практики) // Право України, 2001. № 2. С. 43.
2. Карпачова Н.І. Інститут омбудсмана. URL: <https://first-ombudsman.org.ua/ru/ombudsman-institute.html>.
3. Кривенко Л.Т. Верховна Рада України. К.: Ін Юре, 1997 (Б-чка «Нова Конституція України»). С. 22-41.
4. Майданник О.О. Інститут омбудсмана у механізмі забезпечення прав людини в Україні // Адвокат. 2010. № 7. URL: https://www.socosvita.kiev.ua/sites/default/files/Maid_adv_2010_7_1.pdf.
5. Майданник О. О. Парламентський контроль за додержанням конституційних прав людини в Україні // Адвокат. 2006. № 3. С. 14-18.
6. Омбудсмен // Вікіпедія. URL: <https://uk.wikipedia.org/wiki/%D0%9E%D0%BC%D0%B1%D1%83%D0%B4%D1%81%D0%BC%D0%B5%D0%BD>.
7. Офіційний веб-сайт Верховної Ради України. URL: <https://zakon.rada.gov.ua/laws>.
8. Петренко А.А. Питання вдосконалення парламентського контролю і Закон України «Про Уповноваженого Верховної Ради України з прав людини» // Державно-правова реформа в Україні. Матеріали науково-практичної конференції. К., 1997. С. 163-165.

9. Помаза-Пономаренко А.Л. Роль інституту президентської влади у сфері забезпечення національної безпеки // Теорія та практика державного управління і місцевого самоврядування». 2019. № 1. URL: http://el-zbirn-du.at.ua/index/zmist_2019_1/0-39.

10. Приходько С.Г. Шляхи вдосконалення інституту омбудсмана в Україні // Парламентаризм в Україні: теорія та практика. Матеріали міжнародної науково-практичної конференції. К., 2001.

11. Тацій В.Я., Погорілко В.Ф., Тодика Ю.М. Конституційне право України. К., 1999.

References:

1. Batanov O. Local Commissioner for the Rights of the Territorial Community in the Mechanism for the Protection of Human Rights (Problems of Theory and Practice) // Law of Ukraine, 2 (2001) : 43. Print.

2. Karpachova N.I. Ombudsman Institute. URL: <https://first-ombudsman.org.ua/ru/ombudsman-institute.html>.

3. Kryvenko L.T. Verkhovna Rada of Ukraine. Kyiv: In Yure, 1997 (New Constitution of Ukraine). P. 22-41. Print.

4. Maidannik O.O. Ombudsman Institute in the Mechanism for the Protection of Human Rights in Ukraine // Advocate. 7 (2010). URL: https://www.socosvita.kiev.ua/sites/default/files/Maid_adv_2010_7_1.pdf.

5. Maidannik O.O. Parliamentary control over the observance of constitutional human rights in Ukraine // Advocate. 3 (2006): 14-18. Print.

6. Ombudsman // Wikipedia. URL: <https://uk.wikipedia.org/wiki/%D0%9E%D0%BC%D0%B1%D1%83%D0%B4%D1%81%D0%BC%D0%B5%D0%BD>.

7. Official website of the Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/laws>.

8. Petrenko A.A. The issue of improving parliamentary control and the Law of Ukraine “On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights” // State and legal reform in Ukraine. Materials of the scientific and practical conference. К., 1997. P. 163–165. Print.

9. Pomaza-Ponomarenko A.L. The role of the institute of presidential power in the sphere of ensuring national security // Theory and practice of state administration and local self-government. 1 (2019). URL: http://el-zbirn-du.at.ua/index/zmist_2019_1/0-39.

10. Prykhodko S.G. Ways to improve the institution of the Ombudsman in Ukraine // Parliamentarism in Ukraine: theory and practice. Materials of the international scientific and practical conference. Kyiv, 2001. Print.

11. Tatsiy V.Ya., Pohorilko V.F., Todyka Yu.M. Constitutional Law of Ukraine / Edited by Tatsiy V. Ya., Pohorilko V. F., Todyka Yu. M. K., 1999.