

## СЕКЦІЯ 3 СОЦІАЛЬНІ СТРУКТУРИ ТА СОЦІАЛЬНІ ВІДНОСИНИ

### THE PROBLEM OF THE FORMATION OF OMBUDSPERSON FOR CHILDREN'S RIGHTS INSTITUTION IN UKRAINE

### ПРОБЛЕМА ФОРМУВАННЯ ІНСТИТУТУ УПОВНОВАЖЕНОГО З ПРАВ ДИТИНИ В УКРАЇНІ

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*This article reviews the problem of development of organizational forms of ombudsman for children's rights in Ukraine functioning as a mechanism for ensuring the rights and freedoms. Based on comparative analysis it identifies possible directions its formation as an independent and effective institution in Ukraine. Conditions for the*

*creation of a modern model of professional activity of ombudsman for children at different levels of management and administration and institutional systems in Ukraine are defined.*

**Keywords:** ombudsman, commissioner for children's rights, organizational and legal form of activities.

**Problem.** The current situation in the field of children's rights in Ukraine shows that, despite many transformations, the desired result is not achieved. The system of control, which has the hallmarks of corporatism, limited and narrow approach cannot be considered effective yet. In developed countries, the functioning of the Ombudsman for Children's Rights solves this problem. UNICEF defines child ombudsman institute as an independent and legally established body established to defend the rights and interests of children. Therefore, we can recognize the actual raise the question of the possible directions of its establishment as an independent and effective institution in Ukraine.

**Analysis of recent research and publications.** In the scientific literature the problem of the legal status of children's ombudsman is covered by such scholars as K. Zakomorna, N. Kovalko, O. Martselyak, I. Nyedov, R. Opatsky, I. Sira, U. Voitenko and others. The problem of the place and authority of Commissioner (Ombudsman) in Ukraine as a new institute focuses primarily lawyers. So, the ombudsman functioning in the mechanism of human rights defense in Ukraine is analyzed by A. Maidannyk. V. Levchenko considers the authorities of the Commissioner on Child's Rights and its place in the structure of Juvenile Justice. Administrative-legal principles in support of the ombudsman in Ukraine are considered by N. Puzyrna, who indicated that the current level of authorities and independence of the President of Ukraine Commissioner on Child's Rights requires the development

of its legal and organizational basis of the activity, release him from the presidential administration and the formation of sufficient staff with the ability to influence on the situation in different communities. Foreign experience was studied by A. Dakal, V. Hovorov, V. Zakrynytska, K. Myaskovska-Dashkevich. However, because of the relatively short term work in Ukraine problems of organizational forms of child functioning ombudsman remains without attention. Ongoing debate about the place and role of President of Ukraine Commissioner on children's rights in the mechanism of the rights and freedoms implementation leave a hope for a finding a middle ground in this important state decision.

Article 4 of the UN Convention on the Rights of the Child (CRC) states that governments must "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention". In other words, it places a pro-active obligation on governments to introduce the measures needed to turn the principles of the CRC into practical realities. The Convention also requires governments to provide regular reports to the Committee on the Rights of the Child, the international body established to monitor governments' progress in implementing the CRC. In its scrutiny of these reports, the Committee has stressed the need for changes in government structures and mechanisms to allow consistent consideration for children's rights.

According to the CRC establishment of the Ombudsperson for children's rights is an essential element in the system of protection

of children. This institution aims to replace existing authorities, dealing with children, but complements them as it is at the junction between the authorities and society and serves as the public control. Unlike other bodies, performing control functions, is that children's ombudsman appeals directly available for children, and thus eliminates the need for mediation adults, allowing more thorough insight into each individual situation. Despite the common functions and tasks performed by the Ombudsman for Children, currently there is not uniformity in its organizational and legal status.

In the world, there are four main forms of Ombudsman for children's rights institution: 1) Commissioner on the Child's Rights in the executive power establishments, 2) an independent structure under the laws of any territory, 3) Commissioner on the Child's Rights, which is part of the Ombudsman staff, 4) Commissioner on the Child's Rights, which operates on a voluntary basis. This list does not exclude the definition of models and other criteria, indicating the possibility of various forms of protection of children. Considering that children's ombudsman powers often extend not only to the country but also aimed at protecting the children of a particular region, city and so on., national, regional and local institutions are distinguished.

In 1975, the Norwegian Ministry of Justice established a committee to examine legislation on parents and children in relation to the need for a special public body for children. The committee's verdict was unanimous: an independent agency to safeguard children's interests should be established. A Ministry inter-departmental working party considered the proposal and recommended a specialized commissioner or ombudsman for children with a mandate to protect their rights and interests. The Norwegian "Barneombud" was set up by Act of Parliament in 1981 to: 1) be an independent spokesperson for children in Norway – not directed by Government views or priorities; 2) observe and work for improvements in children's living conditions; 3) set its own professional priorities and working methods; 4) have the right to see all documents in all cases dealing with children by public authorities and have access to all children's institutions [4].

The different researchers note that the practice and work experience of national Child's Rights commissions or ombudsman

offices give a possibility to define some effective features. Firstly, the mode of establishment is relevant, because such status guarantees prestige and stability. It should be established by the legislation, and not by an executive order.

Secondly, the mandate of Commissioner on the Child's Rights must be proportionate to the challenges that are to be faced. In the case of ombudsmen, a mandate which would not to be limited to abuse of authority by civil servants but would also include abuse by holders of public office (ministers including head of government) would give a greater degree of credibility and effectiveness to the office.

Thirdly, independence of Commissioner on the Child's Rights is essential to its effectiveness. Persons who evaluate public confidence and are known for their integrity and impartiality of judgment must operate it. The appointment should be through affair and transparent selection process involving effective consultations between the government and the opposition, and others such as a head of the judiciary. They should have security of tenure and enjoy safeguards against removal from office similar to those enjoyed by a judge of the highest court.

Fourthly, it is self-evident that Commissioner on the Child's Rights who is expected to monitor and redress violation of the children's rights and abuse of authority would be seriously impaired if he did not have adequate financial resources assured to him and not have to depend upon those whose abuses are to be checked by. Commissioner should also have a capacity to employ staff having professional competence and other qualities necessary for carrying out the commission's task.

Finally, the scope of powers of the national institution is equally important. Its effectiveness would normally be impaired if it did not have power to complete production of evidence and the attendance of witnesses, or if it did not the capacity in appropriate case to initiative investigations and prosecutions. Having only a power to make recommendations and not binding decisions would normally detract from its effectiveness though this is an aspect, which would depend on the political culture of a society. It should have power to adopt innovative techniques to monitor implementation of economic and social rights, to commission studies and to evaluate reports with regard to progress in

implementation. Most important it should have a power to promote children's rights education and awareness of children's rights in all sections of society, in particular the police and security forces [3].

Creation of a Presidential Decree number 811 \ 2011 dated August 11, 2011 the President of Ukraine Commissioner on the children's rights was an important step in the protection of children's rights in Ukraine. The initiative came from the executive, and not from representative government. The idea of N.Karpachova (Ukrainian Parliament Commissioner for the human rights) – the implementation of a separate structure within the Office – formed a law project “About Commissioner of Verkhovna Rada of Ukraine on the Child's Rights” (“Про Уповноваженого Верховної Ради України з прав дитини”, 2008), who found no support and was rejected for lack of constitutional possibility of introducing other than the Parliamentary Commissioner on Human Rights parliamentary control Institute.

Analysis goal – to ensure the implementation of the constitutional authority of the President of Ukraine for children's rights protection and implementation of Ukraine's international obligations in this area – forced to talk about narrowing the terms of the Commissioner reference. The issue of activity guarantees, procedure and manner of appointment and dismissal, execution period of authority which do not meet the requirements for competency, ombudsman's independence and immunity during the work still remain unresolved. Also, issue of capacity of powers is not clearly regulated, the right of legislative initiative and independent budget is not determined. After analyzing the law which the Commissioner has in accordance with the tasks assigned to we can make conclusion that the institution does not have real authorities that would ensure its independence and effectiveness in the protection of children's rights, in particular the implementation of human rights functions and features redress [2]. The task of separation of authorities of the President of Ukraine Commissioner on children's rights and the Verkhovna Rada of Ukraine Commissioner on human rights is not resolved at the legislative level.

In many countries, together with the national ombudsman are independent and regional ombudsmen or operate regional offices (representatives). The argument of

thought supporters that the institution of Ombudsman for Children should be part of the apparatus of the Verkhovna Rada is Art.11 of the Law of Ukraine “About Verkhovna Rada of Ukraine Commissioner on Human Rights” (“Про Уповноваженого Верховної Ради України з прав людини”, 1998), which includes the right of last appoint their representatives and organize their activities from the definition of the limits of their powers. According to researchers, this will ensure the independence of the Ombudsman for Children's Rights from the authorities, the opportunity to have their views on the problem of the rights and interests of the child and conduct national politics considering possible wider interests of the child.

As Yuriy Pavlenko, the first appointed President Commissioner for children's rights, specifies: “one of the recommendations of the Council of Europe – enlargement commissioner office ... Earlier appeals were general, today – specific, requiring personal intervention, representation in courts that lead to conflict and confrontation with the authorities” [2].

Often children write that they are not heard, their opinion is not taken into account when making decisions on them – whether in court or authority. Starting from family problems – with whom the parents after divorce stay – and ending with problems in school when the child against whom committed violence was called guilty.

Speaking of children, it is often the case of their rights violations during the conflict between the parents, or – failure to comply by parents court decisions concerning their duties towards the child determined by law. First of all – a child support. It also conflicts for determining residence of the child after divorce. Parents accustomed to divide children during the separation as property and do not respect her as a person with his point of view. Because only the child, which is respected by parents, is respected by doctors, teachers and police. There are also a large number of complaints regarding local government inaction on violence against children, the right to health. One of the main suggestions of president of the European network of Ombudsmen for Child Marek Michalak for Ukrainian government – to introduce a European model of children's ombudsman institution, competent and independent, which has certain immunities during operation, to legislate its

authorities to provide a right of legislative initiative and independent budget. "Only if all these components are present, can truly feel empowered independent and properly perform their duties to protect the rights of children in full. To make his work effectively, he must be protected by the state, has integrity and feels independent, as it is in Poland" [2].

In view of the statement about the active work Ukrainian Commissioner with the Council of Europe, the European network of children's ombudsmen and the countries that provide methodological assistance it can be expected to focus on a Polish model: constitutional position, legislative confirmation that the Ombudsman is elected by parliament and approved by the Senate.

On the other hand, we should calculate the possibility of using Russian experience. The feature of this model is that Russian Federation President Commissioner for Children's Rights acts at the federal level. At the same time, a special ombudsman to protect the rights of the child was introduced in separate regions of RF. In most cases there were created a separate position of commissioner that is not accountable in exercising their authority of State bodies and other persons with the financing a separate article of the budget of the Federation subjects. In some subjects, children's ombudsman was introduced to different positions in the Ombudsman office: head of the structural unit to protect the rights and interests of minors in the Ombudsman office (Moscow and Smolensk region), in three regions – Deputy of Ombudsman. In some areas, it operates on a voluntary basis, or substitutes civil service position, or it is appointed by head of the region. In Vologda region Ombudsman for Children operates as adviser to the Governor, in the Belgorod region and Karelia these functions are carried out by the executive body of state authority. In a number of subjects, the status of children's rights commissioner unchanged afterwards. Thus, in Moscow this position has ceased to be an independent structure and introduced into the apparatus of the Ombudsman, in St. Petersburg the children's ombudsman contrary acquired independence.

The question of the organizational and legal form of Commissioner for Children's Rights is important because for effectively achieving the objectives and performing the work tasks he must find his place in system

of authorities that deal with children's problems. Commissioner has to choose: to act within the sample solutions to common problems inherent in the bureaucracy (which entails the loss of the meaning of existence of this institution), or demonstratively to distance itself from the leadership of the region, but the autonomy and independence are likely to result in the loss of real levers of influence. Another problematic task after model selection can be a personnel issue. Requirements for the position of commissioner for children's rights should be determined by regulations. Analysis of existing authorized personalities showed that in most cases people nominated were from former officials from the field of social protection or education.

Ukraine as a state that reaffirmed the commitment to the European vector of the social institutions development requires the creation of a modern model of professional children's ombudsman at different levels of management and administration and institutional systems. Appointing a man from agency, on which complaint come, will reduce the public weight and authority of the Commissioner for children's rights, transforms it to another "lever of authority". The initiative of the Commissioner institution founding that comes from the public and human rights organizations, may conflict with the actual implementation of these ideas in practice. The government, establishing this institution, seeks to establish control. In situation like that, Commissioner for the children's rights does not fully perform his functions and largely duplicates the work of other agencies. To be effective the Commissioner's activities in the regions should create certain preconditions, which is a concern of civil society and government.

Factors that prevent development an effective system of social protection of children at the regional level in Ukraine include ignorance or inability to use modern mechanisms of realization of the rights of childhood by many managers, professionals, legislators, etc.; departmental divisions; the weakness of the organizations "third sector" and the lack of consolidation in it [1]. It is necessary to promote and consolidate property rights and legal interests of a child in the local and regional communities, to engage the proliferation of modern practices and technologies aimed at the realization of the basic children's rights among

government officials, NGOs and the media. Ombudsperson for children's rights should be a center of spreading positive experience on the protection of childhood and civil society initiatives for child support. As the Commissioner position is personalized, it is important that occupying its people would be aware of the specific activities and be ready to take responsibility for solving the problems of children.

**Conclusions.** System examination and improving components of Commissioner's activity is a condition for institutionalization. To do this, the ombudsman body of any level to full-time (freelance, public) basis must be certain number of lawyers and social workers (proportional to the population of the region) who possess socio-legal and socio-pedagogical technologies. Professional training of staff is already a constitutive element of higher education, on the agenda – developing and improving the mechanisms for their work. This requires the creation of standards for the ombudsman office work, in particular, supporting the child's interests at all stages of the case, procedures, restorative justice and conflict resolution. A propagation of practices should be recognized necessary component.

**Prospects for further scientific research.** In solving the problem of regulation of the organizational and legal form of functioning Ombudsperson for children's rights in Ukraine should consider

the socio-cultural features and resource of communities. The clarity of Commissioner's list of authorities that must be enshrined in law depends on the definition of the working model of Commissioner for Children's Rights in Ukraine. An immediate task may be processing key aspects of existing institutions interaction in the executive and legislative branches of government. In the future construction of effective mechanism for child protection will promote implementation of the UN Convention on the Rights of the Child in all administrative and sectoral levels in Ukraine.

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