

OMBUDSMEN AS NATIONAL INSTITUTION FOR PROTECTION OF THE RIGHT TO EDUCATION IN UKRAINE

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Abstract. *Under the conditions of an armed conflict in Eastern Ukraine the level of ensuring the fundamental human right to education is being reduced. Therefore there is a need to search for additional mechanisms of the protection of the right to education, among which must be singled out such an extra-judicial human rights mobile institution as an ombudsman. All this stipulates the purpose of the article: to find out the role of the Ukrainian Parliament Commissioner for Human Rights, the Commissioner of Ukraine on the rights of the Child and the Educational Ombudsman to ensure the right to education in Ukraine. During the study, such methods as the analysis of scientific literature, normative legal acts in the field of the right to education and annual reports of the Ukrainian Parliament Commissioner for Human Rights were used. The research results of the Razumkov Center (Ukraine) regarding the attitude of citizens to the Ukrainian Parliament Commissioner for Human Rights have been analyzed. As a result it was discovered that the measures taken by the Ukrainian Parliament Commissioner for Human Rights and the Commissioner on the rights of the Child for the right to education are active and effective. In the society the legislative introduction of the post of educational ombudsman as an additional human rights institution in the field of education in Ukraine is positively evaluated. The conducted study shows that subsidiary, non-judicial means of protection of the right to education in Ukraine have greater authority among Ukrainian citizens than the judicial system.*

Keywords: *human rights, right to education, ombudsman, control, protection of rights.*

Introduction

Access to education in Ukraine is complicated by the on going armed conflict in the East of the state, which results in the destruction of educational infrastructure, the outflow of teaching staff, and the use of educational establishments for other purposes. According to the departments of education and science of Donetsk and Lugansk regional state administrations 119 educational establishments were damaged as a result of military actions in Eastern Ukraine on the territories under the control of the Ukrainian authorities (Lutkovska, 2017). There is a problem implementing the right to education for children who are internally displaced persons, as well as children living on the temporarily

occupied territory of Crimea and uncontrolled territories of Ukraine in Donetsk and Luhansk oblasts (Mendzhul, 2017).

Under such conditions, the level of ensuring the fundamental human right to education in Ukraine decreases. Therefore, there is a need to search for additional mechanisms of protection of the right to education, among which must be singled out such an extra-judicial human rights mobile institution as an Ombudsman.

In Ukraine, for a long time, have been functioning such human rights institutions as the Ukrainian Parliament Commissioner for Human Rights, the Commissioner of the President of Ukraine on the rights of the Child. In order to further protect the right to education the new Law of Ukraine "On Education" introduced the position of Educational Ombudsman, but so far there is no practice of its activity, which increases the topicality of the research study. In this regard the problem under study leads to a considerable scientific interest in the study of issues related to the activities of ombudsmen in the field of education.

The analysis of literature shows that among scientists there is no unanimity regarding the assessment of human rights activities of the Ombudsman. Some of them consider it an effective human rights body that plays an essential role in ensuring human rights (Kovalsky, 2005) and "absolutely necessary" (Hill Robles, 2004). According to O. Martselyak, who comprehensively reviewed the legal nature of the Ombudsman, analyzed its features, functions and place in the mechanism of the state, the Ukrainian Parliament Commissioner for Human Rights is an important control and supervisory human rights organization (Martselyak, 2004).

More often, scientists appreciate the human rights role of the Ombudsman and point out that "he is a guarantee of democratic development of society" (Nikol'skaya, 2014). Rarely - qualify the Ombudsman's activity as a quasi-law-protecting, justifying it by his inability to implement a real, final, without the assistance of other state bodies, protection of a particular human and citizen's right (Pashuk, 2007).

The researchers also endorse the activities of the Ukrainian President's Commissioner on the rights of the Child and recognize that its implementation has become "an important area for improving the state policy on childhood protection" (Sirah, 2016; Fomenko, 2011).

The research of the scholars' works indicates that they emphasize the role of the Ukrainian Parliament Commissioner for Human Rights and the Commissioner of the President of Ukraine on the rights of the Child in the field of rights securement in general, but do not reveal the issue of guaranteeing the right to education. Exceptions are the works devoted to the Educational Ombudsman, which are still small in number. For now we can mention the research done by I. Khomyshyn (Khomyshyn, 2017).

The theoretical and practical significance of the Institution of the Ombudsman and the state of scientific research determine the purpose of the article: to find out the role of the Ukrainian Parliament Commissioner for Human Rights, the Commissioner of the President of Ukraine on Children's rights and the Educational Ombudsman to ensure the right to education in Ukraine.

During the research were used such methods as the analysis of scientific literature, normative legal acts in the field of providing the right to education and annual reports on the activities of the first Ukrainian Parliament Commissioner for Human Rights by N. Karpachova and the second - by V. Lutkovska. The results of the research of the Razumkov Center (Ukraine) regarding the attitude of citizens to the Ukrainian Parliament Commissioner for Human Rights, conducted from April, 21 to April, 26, 2017 were analyzed. 2018 respondents aged 18 and over were interviewed in all regions of Ukraine with the exception of Crimea and the occupied territories of Donetsk and Lugansk regions by sampling, which represents the adult population according to the basic socio-demographic indicators. The sample poll was developed as a multi-stage, random, with quota selection of respondents at the last stage (Results of the sociological survey, 2017). As a result of the sociological survey, it was found that the level of public trust to state institutions is extremely low. However, among the parliament, the president, the government, the prosecutor's office, the courts and the Ombudsman, the Ombudsman got the highest level of trust - 26.3 %. The lowest got courts - 9.3 %. Such results confirm our view of the relative credibility, independence of functioning and the mobility of human rights protection by the Ombudsman.

Commissioner of Verkhovna Rada of Ukraine on human rights

The development of democracy in Ukrainian society and the need to strengthen the protection of human rights in in conditions of military actions in the East of Ukraine predetermine public and state recognition, as well as the further development of the ombudsman institution.

Despite the fact that domestic legislation does not provide the ombudsman with adequate means of influencing those who violated the law to education, this human rights organization responds promptly to such violations. In exercising parliamentary control the Commissioner addresses to the relevant state authorities in order to ensure the effectiveness of the protection, and, as a result, a positive result is achieved in most cases. There are many examples of such appeals by the ombudsman. In particular: to the prosecutor with a request to verify compliance with the legislation in the process of reforming the activities of institutions of extracurricular education, by the results of which a decree is issued on the elimination of violations of the law, which provides an attendance of teen clubs; to the Ministry of Education and Science of Ukraine and to the Fund for the Social

Protection of Disabled Persons in order to protect the right to education for students with disabilities, as a result of which additional places of state order are allocated for the completion of training of these persons; to the Ministry of Education and Science of Ukraine according to the results of the monitoring of the entrance campaign as for the introduction of an additional session for entrants who for various reasons did not pass the test, etc (Karpachova, 2010).

In total, during the year 2016, the Commissioner of Verkhovna Rada of Ukraine on Human Rights received 175 appeals concerning the protection of the right to education. Analyzing the subject of appeals, it is possible to divide them into the following groups: most relevant were the issues of violation of the rights to education (including higher education) – 34 %, the second place is taken by appeals about the reduction of the network of educational institutions (including their reorganization and liquidation) – 9 %, also not single ones are appeals for a decent attitude by teachers and violence in educational institutions – 8 %, granting privileges – 7 %, transportation of children to educational institutions – 6 %, placement of children in pre-school educational institutions (including those without vaccinations) – 4 %, choice of language of education – 3 %, other issues - 29 % (Lutkovska, 2017).

Practice of the Ombudsman activity in the field of the protection of the right to education shows that, in some cases, his efforts are effective in situations where the use of other means does not bring the expected results. Thus, proceedings in case of violation of rights to education, respect for human dignity and personal safety of students of one of the educational establishments, it was defined that its leadership, in violation of the requirements of the current legislation, there were expelled seven juvenile freshmen. In an illegal way, without properly examining the circumstances of the conflict situation on the basis on non-statutory relations, young men were threatened to sign a report on resigning on their own. Only after the Commissioner began to protect the rights of cadets, at the order of the leadership of the Armed Forces of Ukraine, the freshmen were re-engaged in training.

The expediency of strengthening the position of the Commissioner stems from the content of Art. 55 of the Constitution of Ukraine, which recognizes this institution, along with courts and international human rights protection bodies, is an integral part of the system of protection of human rights and freedoms (The Constitution of Ukraine, 1996). The constitutional and legal status of the domestic Ombudsman causes formation of a strong model in Ukraine.

Such characteristics as independence in the system of state bodies, openness, lack of formalized procedures for reviewing appeals, and free provision of assistance - contribute to strengthening the authority of the Commissioner's institution in the system of guarantees of legal protection. This explains people's

trust in Ombudsman, the annual submission of appeals to him to protect the violated right to education.

Note that in almost all countries a person has the opportunity to directly file complaints with the Ombudsman. Except that the “parliamentary filter” exists in the UK and until the constitutional reform of 2008 existed in France. We positively evaluate the possibility of personal appeal to the Commissioner not only the citizens of Ukraine, but also foreigners, stateless persons and their representatives. After all, the direct contact of people with Ombudsman characterizes the protection of the right to education as accessible. The availability of protection is one of the conditions for its effectiveness. It is that: 1) the person must be able to use the proposed method of protection personally, and not resort to the mediation of another body with discretionary powers; 2) this opportunity should not be complicated; 3) it must be real, not declarative, purely theoretical (Pashuk, 2007).

According to the legislation of Ukraine, the Commissioner carries out his activities on the basis of information about the violation of the right to education, which is received not only from written appeals of other subjects, but also on his own initiative. In addition, he draws such information from the media and takes appropriate measures of response.

An important means of parliamentary control over observance of human rights is the annual and special reports of the Commissioner. Their comparative analysis gives grounds for stating that, as a rule, the content of the Ombudsman's defense of the right to education is reduced to the requirement to stop the reduction of educational institutions, to ensure the possibility of realization of the right to education by pupils of secondary schools and children in need of social assistance and rehabilitation, the use of textbooks by pupils, teaching aids, methodical advice, liquidation of debt in scholarships payment and financial support to students, cadets, etc.

Analysis of Valeriya Lutkovska's report on the state of observance of human rights and freedoms in Ukraine in 2016 testifies about numerous inquiries concerning the violation of child's rights by teachers and violence in the educational institutions (Lutkovska, 2017). Thus, on the initiative of the Commissioner, proceedings were opened on the basis of monitoring activities, as a response to the placement in the media of video footage of a situation that arose in one of the schools in Ukraine, where the English teacher was accused of contemptuous attitude towards students. At the request of the Commissioner, an official investigation was conducted, the results of which brought to dismissal of the teacher.

The issue of ensuring the right to education for children with severe visual impairment and, above all, the possibility of their participation in external independent assessment and entrance exams was not out of sight of the

Commissioner. In an appeal to the Minister of Education and Science of Ukraine on the above-mentioned occasion, the Commissioner stressed that a blind person, who has not been created proper conditions for taking of the EIT, has no opportunity to choose between educational institutions, which places people with visual impairment in a significantly worse situation than others entrants. In the opinion of the Commissioner, the only rational solution to this issue, given that such persons use Braille font during the training, is the development of materials for the preparation and the very test of the EIT in Braille.

The above convincingly proves that, despite the absence of its own imperative methods of influencing the organs of state power and local self-government to stop the violation of the right to education, the ombudsman carries out such protection through alternative legal means. The effectiveness of the protection of the right to education provided by the ombudsman is determined by the independence and impartiality, accessibility and relative effectiveness of such protection.

Representative of the President of Ukraine on the rights of the child

The feasibility of functioning of the Ombudsman for the rights of the child in Ukraine is conditioned by a number of objective reasons - peculiarities of mental and physical development of children, impossibility of self-defense of their rights and legitimate interests, dependence on adults, absence of juvenile justice in the state, and threats related to military conflict in the east of the country.

In order to ensure the proper conditions for the implementation of civil, economic, social and cultural rights of children in Ukraine, taking into account the need for special care of a child, the implementation of Ukraine's international obligations in the field of child's rights and in accordance with the Article 102 of the Constitution of Ukraine (The Constitution of Ukraine, 1996) by the Presidential Decree from 11 August 2011, was introduced a position of the Representative of the President of Ukraine on the Rights of a Child (Decree of the President of Ukraine, 2011).

The main tasks of the Commissioner are: continuous monitoring of the observance of the constitutional rights of a child in Ukraine, the implementation of Ukraine's international obligations in this area and the introduction of proposals in the prescribed manner to the President of Ukraine on the cessation and prevention of repeated violations of children's rights and legitimate interests; Making proposals to the President of Ukraine on drafting laws and acts of the President of Ukraine on the rights and legitimate interests of a child; implementation of measures aimed at informing the population about the rights and legitimate interests of a child.

The Commissioner, in accordance with the tasks entrusted to him, has the right: to take, in due order, participation in the elaboration of draft laws, acts of the President of Ukraine on the rights and legitimate interests of a child; to visit special establishments for children, establishments for social protection of children and other institutions in which children are present, including places of detention, pre-trial detention, penitentiary institutions, psychiatric institutions, special educational institutions, interviewing persons, who are there and receive information about the conditions of their detention; apply to the state authorities for assistance in resolving issues that fall within the competence of the Commissioner; to receive in accordance with the established procedure from the state enterprises, institutions, organizations the necessary information, documents and materials, including those with restricted access, on issues that fall within the competence of the Commissioner; to involve, in case of necessity, in accordance with the established procedure, to working out of separate issues of representatives of state authorities, local authorities, associations of citizens, as well as experts, scientists and specialists, including those on a contractual basis; take, in due order, part in meetings of state bodies on issues that fall within the competence of the Commissioner; to apply to state bodies, including law enforcement agencies, regarding revealed violations of rights and lawful interests of a child; to study, according to the established procedure, the state of work on social and legal protection of children in institutions for orphans and children deprived of parental care, special institutions for children and institutions for social protection of children, the state of educational work with children in educational institutions; interact with organizations, including international ones, to protect the rights and legitimate interests of a child.

The analysis of the practice of the Ukrainian President's Office on the rights of a child testifies to his active position in the field of children's rights protection, including the right to education. This agency tested institutions and establishments for children, responded to a number of complaints and appeals, including the demand for money from parents for enrolling children in kindergartens, schools, violence in educational institutions, the need if establishment of inclusive education.

In our opinion, the recommendations of the Council of Europe on the improvement of the activities of the President of Ukraine on the rights of a child are valuable. Particularly noteworthy are the following: it is necessary to adopt a separate law that would increase independence of the children's ombudsman, expand his powers and provide additional funding (Lesko, 2015).

In general, it must be recognized that the activities of the President of Ukraine on the rights of the child provide additional state protection of the rights and interests of children, in particular the right to education.

Educational ombudsman

Given the importance of the right to education for everyone, society and the state, we believe that the functioning of such an institution as an educational ombudsman that protects the rights of school children and students is essential and appropriate. The activities of students' ombudsmen are not known in many countries, but such experience exists in Austria, the UK, the Netherlands, Russia, Canada, and the USA. In particular, in the Austrian Republic, in accordance with §31 of the Federal Law "On External Quality Assurance in Higher Education and the Agency for Quality Assurance and Accreditation Austria" of 29 July, the Institute of Students Ombudsman was also introduced (Federal Law on External Quality Assurance in Higher Education and the Agency for Quality Assurance and Accreditation Austria, 2011). It functions within the structure of the Ministry of Science and Innovation. Students Ombudsman is not an official body, it does not represent the legitimate interests of students in courts or other bodies of state power. In fact, the ombudsman serves as an information and service center for students. He studies their problems, provides advice on education, research, administrative services at an educational institution, etc. The ombudsman closely cooperates with student self-government bodies, with institutions whose competence concerns education. In his turn, he has the right to receive the necessary information and advice from educational institutions. The Student Ombudsman of Austria annually, no later than 15 December, reports on the results of its activities. The practice of student ombudsmen testifies that they serve as a means of reconciling those who exercise the right to education, teachers, and administration of an educational institution and is an alternative to the application of disciplinary penalties.

In the Russian Federation, the Office of the Commissioner for Student Rights was introduced at the federal level, and this human rights body also functions in the regions - in Tyumen, Chelyabinsk, Yaroslavl oblasts, St. Petersburg. Students' ombudsmen direct their activities to protect students' rights, develop self-governance in higher education institutions, improve legislation on higher education, and increase the legal culture of students.

In order to ensure proper conditions for the implementation of the right of a person to education, the Law of Ukraine "On Education" of 5 September 2017 introduced an educational ombudsman institution in the educational system (Law of Ukraine On Education, 2017). The Educational Ombudsman, in accordance with the tasks assigned to him, has the right: to consider complaints and to check the facts indicated in the complaints submitted by those obtaining the education, their parents, legal representatives, as well as pedagogical, scientific, pedagogical and scientific workers; to receive from educational institutions and educational

authorities information necessary for the performance of their functions, including information with restricted access; based on the results of the inspections to make a decision on the validity or ungroundedness of the complaint and, on the basis of it, to provide recommendations to educational institutions and educational management bodies, to inform law enforcement agencies of detected violations of the law; unhindered, in accordance with the procedure established by law, to visit state authorities, local self-government bodies, educational institutions of all levels, regardless of ownership, as well as to participate in established procedures at meetings of state bodies on matters within its competence; to apply to the government bodies, law enforcement agencies regarding revealed violations of human rights to education and legislation in the field of education; Provide counseling to education seekers, their parents, legal representatives, as well as trainees; represent the interests of a person in the court.

The Law of Ukraine “On Education” as a part of the activity of the Educational Ombudsman requires further implementation. The Educational Ombudsman will be appointed by the Cabinet of Ministers for a term of five years without the right to re-appoint. Currently, in order to ensure the functioning of this institution, it is necessary to create a service of an educational ombudsman in Ukraine and to determine the order of its activity in the appropriate legislation. In addition, the Cabinet of Ministers of Ukraine must approve the procedure and conditions for applying to the Educational Ombudsman.

Thus, normalization of activities of the educational ombudsman, in particular his rights and obligations, acquisition and termination of powers, order of application, guarantees of activities, will bring significant benefits to Ukrainian society in the full realization of the right to education. Functioning of this institution as a part of the Government of Ukraine will strengthen its law-enforcement function.

Conclusions

As a result of the study it was established that the measures taken by the Ukrainian Parliament Commissioner for Human Rights and the Commissioner on the rights of the Child for the ensurance of the right to education are active and effective. Among the higher authorities Ukrainian citizens demonstrate the highest level of trust to the Ukrainian Parliament Commissioner for Human Rights. In the society the legislative introduction of the Education Ombudsman position as an additional human rights institution in the field of education is commendable. At the same time the norms of the Law of Ukraine “On Education” as part of the activity of the Educational Ombudsman need to be implemented. The study shows that subsidiary, non-judicial means of protection of the right to

education in Ukraine have greater authority among citizens than the judicial system.

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