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COMPARATIVE ANALYSIS OF THE OMBUDSMAN'S FUNCTIONS: NEW WAY TO IMPROVEMENT THE SYSTEM OF PROVIDING ADMINISTRATIVE SERVICES IN UKRAINE

In the article the stages of the historical emergence of the ombudsman institute in the Scandinavian countries were studied, as a mechanism for protecting the citizen's rights from abuse of state power and issuing unreasonable decisions by officials. Based on the main legislative acts regulating the scope of activities of ombudsmen, a comparative analysis of the functions of this Institute was carried out in different countries of the European Union. The necessity of creating an administrative ombudsman is grounded in the sphere of providing administrative services in Ukraine.

Key words: *ombudsman, administrative services, public authority, European Union, unsubstantiated decisions, mechanism to defend citizens' rights.*

The problem formulation. Nowadays in Ukraine the system of providing administrative services needs to review its own functions and change understanding of the meaning term 'public services'. After long years of discussion about the role of public services within the creation of the single market, the framework for public services has become more and more precisely. This specific rulemaking provision on the functioning of public services constitutes a major change in the existing legal framework and thus far the high point in the fight for a specific legal status for public services. It goes without saying that this rulemaking provision is designed to bear legislation specifically designed to meet the particular mission of public services and thereby, at least to a certain extent, replace the predominant focus of the existing legal framework on competition rules and their implementation.

During many years in European Union countries institution of ombudsman has been exist and citizens feel positive attitude to protect their rights. There why for Ukraine is very important to analyze functions of ombudsman for scientific feasibility study to establishment of a structural unit for monitoring unreasonable refusals by state bodies. Such an approach will improve the institutional mechanism for providing administrative services in Ukraine and will eradicate the remnants of bureaucracy and corruption.

Recent research analysis. Among the Ukrainian scientists can distinguish the works of V. Averyanova, R.Voitovicha, I. Koliushka, S. Kravchenko, V. Kuybidy, A. Lipentseva, K. Nikolayenko, V. Tymoshchuka, V. Soroko, Y. Surmina, who declare the necessity of building a fundamentally new effective system of providing administrative services in Ukraine in the context of European integration processes.

An important contribution was made by such foreign researchers as Epaminondas A. Marias, Claes Eklundh, Jon Andersen, Michael Mills, Katja Heede, Eilschov Holm, Malaret Garcia, Tom Madell, who studied the historical genesis of the institution of the ombudsman, conducted a comparative analysis of their functions in different European countries. At the same time, the issue of the possibility of introducing the institution of an ombudsman in the national system for the provision of administrative services remains unresolved.

The purpose of the article is to analyze functions of ombudsman in the member states of the European Union and provide the opportunity of the implementing om-

budsman functions into the system of providing administrative service in Ukraine.

The main material. The office of ombudsman was established for the first time in Scandinavia as a means for the people to defend themselves against administrative abuses. It was as early as 1809 when Swedish Constitution established a Justice ombudsman responsible for supervising public officials and protecting the citizens from bureaucratic practices. In 1915 an independent military ombudsman was established in Sweden and in 1919 Finland introduced provision for establishing an ombudsman into its new Constitution. With the introduction in 1952 of a military ombudsman by Norway and a general ombudsman in 1953 by Denmark, Scandinavia confirmed its historical contribution towards protecting citizens' rights.

The Scandinavian experience was followed by the controversial establishment of a military ombudsman in the Federal Republic of Germany in 1957 and the establishment of general ombudsmen in the United Kingdom (UK) in 1967, in France in 1973 and later on in the other member states. Sweden, Denmark, the UK and Spain have demonstrated their preference for parliamentary ombudsmen. Ombudsmen also function in The Netherlands and Ireland. In Portugal the ombudsman co-exists with the Committee on Petitions of the Portuguese Parliament [1, p. 17–19].

With this historical tradition in the member states of the Union, it is hardly surprising that proposals for the creation of an ombudsman at supranational level were submitted during the Intergovernmental Conference on Political Union. Following Spanish proposals, the European Council in Rome on 14 and 15 December 1990 reacted favorable to the idea of establishing a European ombudsman [2].

The Spanish proposal on the European ombudsman was further endorsed by Denmark, a member state where the ombudsman has proved to be a highly successful institution. In the Memorandum which the Danish government issued on 4 October 1990 [3], it sated that in order to strengthen the democratic basis the aegis of the European Parliament.

The institution of the European ombudsman was approved at political level by the European Council in Rome. Meeting on 14 and 15 December 1990, the Heads of states and governments of the twelve stated that consideration should be given to the possible institution of a mechanism to defend citizens' rights as regards Community matters (Ombudsman) [3].

The existence of the Committee on Petitions of the European Parliament as well as the national ombudsmen and the ambitious Spanish proposals being significantly limited. Accordingly, the Treaty on European Union limited the ombudsman's jurisdiction only to examining instances of maladministration in the activities of the Community institutions or bodies with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Yet the powers of the European ombudsman are very important. He has jurisdiction to treat complaints regarding cases of maladministration occurring in the framework of the most powerful Community institutions, such as the Council and the Commission. Moreover the ombudsman is empowered to request the member state's authorities, via the Permanent Representations of the member states of the European Communities, to provide any information that may help to clarify instances of maladministration by Community institutions or bodies.

The European ombudsman together with the Committee on Petitions of the European Parliament, are non-judicial bodies competent to safeguard citizens' political, civil and social rights vis-à-vis the Community institutions. The models already followed are the committee on petition of the national parliaments as well as the national ombudsman [4, p. 25].

In order to carry out his work, the European ombudsman must have access to all documents, possibly subject to a pledge of professional secrecy and confidentiality; the relation between public administration and European ombudsman must be based on trust and on a kind of "legal privilege", as recognized under English law.

Very important question is whether the ombudsman could be brought before

the European Court of Justice. This possibility might arise under Article 178 EC.

According to Article 4 of the European Parliament Decision on the ombudsman's duties [5], the ombudsman and his staff are bound by Articles 214 EC [6], 47(2) ECSC [7] and 194 EAEC. They are in particular obliged in the course of their inquiries. Furthermore, they are required to threat in confidence any information which could harm the person lodging the complaint or any other person involved.

The word "ombudsman" simply means "representative" and it is used in many different contexts in Sweden. To make the role of the Swedish ombudsman institution easier to understand need go back in time to 1713. In that year the Swedish autocratic King, Charles XII, who had by then been abroad waging war for 13 years, created the office of the King's highest ombudsman in order to improve the quality of the Swedish judicial and administrative organizations. When creating this office, King Charles relied on the fact that the work of the Swedish administration consisted to a very large extent of the application of statutes and other legal rules and that the officials were responsible for their actions under criminal law [8, p. 11].

Thus the ombudsman, later renamed the Chancellor of Justice, was given the tasks, on behalf of the King, to see that judges and other public officials obeyed the law in their work and to prosecute any official found at fault.

It is obvious that this first office of ombudsman was in no way a democratic institution. It should be noted, however, that King Charles recognized the principle of the rule of law and that he did not consider himself to be above the law [8, p. 12].

Today, the main provisions concerning the Swedish parliamentary ombudsman are to be founded in the 1974 Constitution. The activities of the ombudsman form part of the government's parliamentary control. Cabinet Ministers are supervised by the Swedish Parliament, the Riksdag, itself, whereas the rest of the administrative authorities of the State, courts of law and local government are supervised by the ombudsman in their role as heads of ministries.

The main objective of the ombudsman's activities is to safeguard the principle of the rule of law and – in the case of the Swedish ombudsman – to protect the rights and freedoms of the individual as laid down in the Constitution and Swedish law.

The ombudsman do not side with the complainants against the authorities, but represent the Riksdag and the idea of impartial justice instead. The decisions by the ombudsmen are based on law, and the ombudsmen have practically no mediating role of the king found in some other countries.

It is laid down in the Swedish Constitution that the ombudsmen have access to all official files and documents, however secret they may be. Also all officials are obliged to give the ombudsmen any information they may request and to assist them with investigations and in other ways.

Another characteristic shared with the prosecutor is the right of the ombudsmen to take initiatives of their own.

The ombudsman institution is usually described as an extraordinary organ. This means that the ombudsmen do not in any way take part in the authorities' ordinary decision-making activities and that they do not function as an appeal body. Thus the ombudsmen cannot change a decision made by a court or an administrative agency, nor can they order a court or an authority to act in a certain way. This is obviously the other side of the ombudsmen's independence.

The ombudsmen's main weapon nowadays is instead the power to state their views on the actions of the authorities and their officials. If, for instance, an ombudsman finds a measure inadequate, improper or unwise, he will say so and point out how, in his opinion, the matter should have been handled. The ombudsmen also have the right, within the framework of a specific case, to lay down guidelines for proper judicial and administrative behavior. Such guidelines are based on the ombudsman's interpretation of the law and on common sense.

Anybody can complain to the Swedish ombudsmen. The complainant need not be personally concerned in the matter. There is no fee and only a minimum of formalities. However, complaints should preferably be made in writing [8, p. 14].

Denmark set up its ombudsman office in 1955. To some extent the old Swedish system as a model for the Danish ombudsman in the early 1950s. However, in several respects the Danish institution was shaped differently to the Swedish model.

The ombudsman office in Denmark was designed to pursue two objectives, in particular:

First, the ombudsman was to act on behalf of Parliament in relation to administrative agencies, strengthening the control traditionally exercised by the supreme elective body over ministers and their officials. Such strengthening was considered necessary because of the growing power, especially the wide, quasi-legislative power which had been delegated to Danish government services, and because of the increasing complexity of the administrative process [9, p. 29].

Second, the ombudsman was to safe guard law and order for the individual: a sort of appeal institution for citizens in conflict with administrative agencies. The Ombudsman was meant to be "the protector of the man in the street against injustices, against arbitrariness, and against the abuse of power on the part of the executive".

From its origin, the Danish ombudsman system has been based on the principle that the personal element is of great value to the performance of the ombudsman's functions, and for this reason endeavors have always been made to maintain the ombudsman institution as an institution of limited size without any traditional bureaucratic appearance.

There are three characteristic aspects of the Danish model:

1) the ombudsman as a controller of individuals or of authorities;

2) the ombudsman and judicial review;

3) the ombudsman and Parliament [9, p. 29].

A perusal of the Danish Ombudsman Act leaves one with the impression that the Office is primarily designed as a disciplinary authority. The function of the Danish ombudsman is to investigate whether persons under his jurisdiction (cabinet ministers, civil servants, and all other persons in government service) have committed errors or been negligent in the performance of their duties.

As compared to judicial review, access to the ombudsman is very easy. There are no formalities and there are no costs involved. On the other hand, the ombudsman cannot formally nullify or amend an administrative decision at issue; he can merely state his views on a matter brought before him.

The ombudsman might also on the basis of an individual complaint enter into a dialogue with the appropriate authorities on the expediency, rather than the legality, of its policies or internal standards serving as guidelines for the exercise of administrative discretion. Today the ombudsman mostly states his view on the legality of administrative decisions.

It is an important element in the Danish conception of the ombudsman idea that the ombudsman is the representative of Parliament, and that he exercises his functions of controlling government services on behalf of Parliament.

The existence of a good working relationship between Parliament and ombudsman is beyond doubt a necessity for the proper functioning of his Office. How such working relationships are secured of course depends to a very large extent on the constitutional framework within which the ombudsman works.

To summarize one can say that the ombudsman serves three functions in society:

1) the institution serves to prevent malpractice by the administration.

2) the Office is to some extent a solver of disputes between citizens and the administration.

3) the ombudsman contributes to developing new standards of administrative behavior.

The Office of the ombudsman in Ireland was set up under an Act of Parliament, passed in 1980. The legislation was not implemented, however, until July 1983 when a Ministerial Order was made bringing the provisions of the act into operation. The Office commenced operations on 1 January 1984.

The legislation under which the Office was established was influenced to a great extent by the ombudsman legislation in operation in Denmark and in New Zealand. The ombudsman offices in many countries

were studied by the draftsmen and it was decided at the end of the day that the Danish and New Zealand models were the most attractive from an Irish viewpoint.

The area of maladministration defined in the ombudsman Act is that an action was or may have been taken:

– without proper authority;
– on irrelevant grounds;
– as a result of negligence or carelessness;
– based on erroneous or incomplete information;
– improperly discriminatory;
– based on an undesirable administrative practice;
– otherwise contrary to fair or sound administration [10, p. 53].

The ombudsman 'only' has the power to express criticism and issue recommendations. Prior to the modifications of the Ombudsman Act in 1996, the ombudsman could take another kind of decision: he could also order the prosecuting authorities to bring a case before the courts if he deemed that a civil servant had committed a crime or order the administrative authority concerned to institute disciplinary investigations [11]. Those powers where however never used, and were therefore removed in 1996 leaving the ombudsman with the power to "express criticism, make recommendations and otherwise state his views of a case".

The way in which the ombudsman express his views or criticism has crystallized during the years, presenting a spectrum reaching from "desirable' or "more considerate" to "extremely unjustifiable". If the ombudsman finds no reason for comment or grounds of criticism, this may imply actual agreement with the authority's decisions but it may also reflect the fact that special examination limitations (especially with regard to discretionary decisions) preclude the ombudsman from considering the matter closely and possibly comment critically.

Thus, I propose to review national system of providing administrative services according to the course of Ukraine towards to the European Union and create new structure inside of every administrative services center, main tasks which will be inspection and analyze of unsubstantiated decisions taken by government structures.

In this way let's consider organizational mechanism of providing administrative services based on the ombudsman's functions. This can be illustrated schematically by which the relationships between rule, public authority and society (figure 1).

The purpose of rules governing the activities of public authorities – whether a constitution, law, guideline or policy – is to protect citizens against arbitrary behavior by such authorities. This presumes that rules have been created which the public authorities understand and apply in their relationship with the society. A mechanism of control being rule development and the way the public authority interprets them, whereas a mechanism of redress concerns the activities of the administrative ombudsman which address an individual citizen directly. A redress mechanism will supervise the application of the law and principles in individual cases with as its primary purpose to restore the relationship

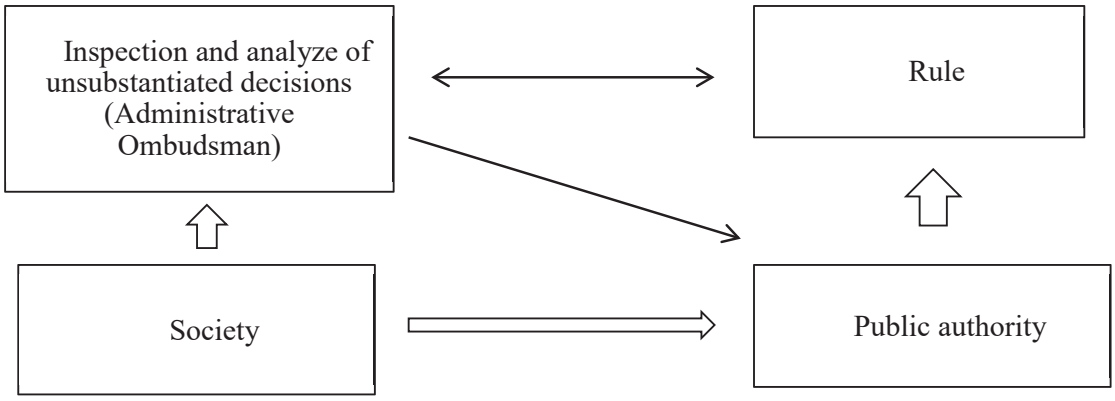

Fig. 1. Relationships between rule, public authority and society in the concept of protecting citizens' rights by administrative ombudsman

between a public authority and a private individual with a legitimate interest, whereas a mechanism of control regulates the rules that govern all activity of public authorities.

The distinction between control and redress ombudsmen is of course not as black and white. This is because in the end they both seek to ensure that citizens can rely on certain rules. Just as any control mechanism serves in the end to ensure that the rights of citizens are protected, any redress mechanism has the effect of modifying administrative practices, which is what the control mechanism is supposed to do.

Such structure of interaction between citizens – administrative ombudsman – public authorities will improve confidence and help to become more transparent and legitimate for Ukrainian system.

Conclusions and proposals. The European ombudsman is an institution which, if used properly, can provide the citizens of the Union with an important and costless means to defend themselves against Community bureaucracy. This is very important for the functioning of the European Union which should be as close as possible to its citizens.

The practical effect of the ombudsman institution is to a large extent preventive. Administrative errors do not happen simply because of the existence of the ombudsman. This is partially due to the fact that officials know that their actions might be scrutinized by the ombudsman. Another important factor is that in their decisions the ombudsmen lay down guidelines for proper judicial and administrative behavior.

The general point that should be emphasized is that ombudsmen have no power to make legally binding decisions. This might be seen as a weakness but paradoxically it can be strength, because it enables ombudsmen to do two things, which they could not otherwise do: First they can apply broader criteria in examining cases than the courts can do – because they are not making legally binding decisions. Second they can be more accessible than the courts. By that I mean the formal and the procedural condition for complaining to an ombudsman is generally less restrictive than those for taking a case to the court.

Taking into account the historical stages of the emergence of the ombudsman institution in European countries, the introduction of the administrative ombudsman institution at all state levels, including the system of providing administrative services, will solve a lot of problems for citizens of Ukraine:

– stop the adoption of unauthorized or unjustified decisions by state authorities or local self-government bodies in relation to subjects of economic activity;

– monitor the activities of civil servants in cases of negligent or unfair performance of their duties;

– eradicate the elements of corruption schemes when making a negative decision when obtaining administrative services.

Thus, based on the materials studied, it would be advisable to consider establishing the Institute of the administrative ombudsman at the legislative level in Ukraine.

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Розмаріцина Н. А. Порівняльний аналіз функцій омбудсмена: новий спосіб удосконалення системи надання адміністративних послуг в Україні

У статті розглянуто етапи історичного виникнення інституту омбудсмена в скандинавських країнах як механізм захисту прав громадян від зловживання державною владою і ухвалення необґрунтованих рішень чиновниками. На підставі основних законодавчих актів, що регулюють сферу діяльності омбудсменів, проведено порівняльний аналіз функцій цього інституту в різних країнах Європейського Союзу. Обґрунтовано необхідність створення адміністративного омбудсмена у сфері надання адміністративних послуг в Україні.

Ключові слова: *омбудсмен, адміністративні послуги, публічна влада, Європейський Союз, необґрунтовані рішення, механізм захисту прав громадян.*

Розмарицына Н. А. Сравнительный анализ функций омбудсмена: новый способ усовершенствования системы предоставления административных услуг в Украине

В статье рассмотрены этапы исторического возникновения института омбудсмена в скандинавских странах как механизм защиты прав граждан от злоупотребления государственной властью и принятия необоснованных решений чиновниками. На основании основных законодательных актов, регулирующих сферу деятельности омбудсменов, проведен сравнительный анализ функций этого института в разных странах Европейского Союза. Обоснована необходимость создания административного омбудсмена в сфере предоставления административных услуг в Украине.

Ключевые слова: *омбудсмен, административные услуги, публичная власть, Европейский Союз, необоснованные решения, механизм защиты прав граждан.*