NOTE

THE RUSSIAN COMMISSIONER FOR HUMAN RIGHTS AND THE EUROPEAN OMBUDSMAN: COMPARATIVE ANALYSIS

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Abstract

The author analyzes official sources specifying the models for the European Ombudsman and the Commissioner for Human Rights in the Russian Federation. The comparison of ombudsman models, which exist in the EU and Russia, is particularly interesting not only because of that institution novelty, but also due to the fact that the EU, which emerged in the mid-20th century, has now grown into a highly developed form of European integration. Within the legal internationalization using a positive experience is not only horizontally, that is, by borrowing from the national legal systems the most valuable and innovative ideas, approaches, institutions and procedures, but also through their generalizations, enrichment and promotion at international and national levels and the reverse influence of international law on the national legal systems. Supranational ombudsmen are a striking example of that. Whereas states with well-established democratic values and standards can demonstrate the effectiveness of the ombudsman institution, the Commissioner of Human Rights in Russia cannot, for many reasons (for example, low legal culture of officials, corruption etc.). What’s more, the legislation contains a lot of gaps and provisions, which are issued in favor of power structures. The aim of the note is to identify the Achilles’ heel of Russian legislation regarding ombudsman institute in comparison with the community of democratic states.

Keywords

Ombudsman, human rights, constitution, democracy, legislation, European Union
Human rights, which are proclaimed in constitutions of most modern states, have a great value both for individuals and mankind; the proclamation of human rights has a great impact for the growth of values awareness as well as for improving the quality of the legislation. 

**Declaration of the Rights and Freedoms of Man and Citizen** (August 26, 1789) is a striking example of how important the proclamation of human rights and freedoms is. It is said in its preamble: “...ignorance, forgetfulness or contempt of the rights of man to be the only causes of public misfortunes and corruption of Governments”. Constitutions of many states, including the Constitution of the Russian Federation (December 12, 1993), proclaim that a human with his/her rights and freedoms is the supreme value. The recognition, observance and protection of humans and citizens’ rights and freedoms shall be an obligation of a state. Therefore, a state accepts responsibility for securing human rights by providing actual and efficient guarantees. One of them is the institution of ombudsman, internationally proven and recognized.

The institution of ombudsman originated in Sweden in the XIX century and remained an exclusively Swedish legal phenomenon for many years. However, after World War II other countries started to embrace it. Soon there were established the UN High Commissioner for Human Rights, the Commissioner of the Council of Europe and the Ombudsman of the European Union. The European movement after World War II was based on new grounds — democratic principles and voluntary methods. So, the ombudsman concept has a long tradition in most European states and has been incorporated into

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3 B Ziedalski, ‘What does it mean to be a European citizen and why the concept of European citizenship is important to the European Union?’ (2006) 6 New England International and Comparative Law Annual.

“The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport.” John R. Johannes describes the ombudsman role as being, “in short, the function of the legislature as intermediary between the government and the governed—between citizens and the bureaucrac.” He describes two primary aspects of this role: casework and federal projects assistance. Casework, which Johannes defines as “intervention for individuals, groups, or organizations that have requests of, grievances against, or a need for access to federal (and occasionally state or local) government departments or agencies,” might include, for instance, helping a constituent demonstrate eligibility for social security benefits, or nudging a local highway department to fill a pothole. It’s worth mentioning ombudsman’s role also regarding corruption: individuals and businesses should be able to lodge complaints against demands for bribes or other favors, through for example, an independent ombudsman. Johannes describes “projects” assistance as ‘assisting state and local governments in their attempts to secure federal grants from agencies that possess discretion in allocating such funds.

As it was mentioned before the comparison of two ombudsman models, which exist in the EU and in Russia, is particularly interesting not only because of that institution novelty, but also due to the fact that the EU, which emerged in 1991, has a particular role in the European Union.

6 JR Johannes, To serve the people: Congress and Constituency Service (University of Nebraska Press 1984).
7 Ibid 2.
8 Ibid.
11 Johannes (n 7) 2.
the mid – 20th century, has now grown into a highly developed form of European integration, playing an increasingly significant role for the global balance of power. This kind of experience should be very interesting and valuable for Russia.

The Russian Federation is a state where legal and constitutional traditions are quite weak. Above all, the legislation here contains a lot of gaps and provisions, which are enshrined in favor of power structures. Therefore, the aim of this note is to identify the Achilles’ heel of the ombudsman institute in Russian legislature compared to the community of democratic states.

It’s worth noting that it could seem not absolutely correct to make a comparison of the Ombudsman institute between the European Union and Commissioner of Human Rights in Russian Federation. But there are some reasons, which can make sence.

First of all within the legal internationalization there are two ways of spreading a positive legal experience: horizontal and vertical. In first case (horizontal way) spreading takes place by borrowing the most valuable and innovative ideas, approaches, institutions and procedures by one country from another (its legal system). The other way is a generalization of the best national legal experiences by international law and spreading it within the different countries. The European Union Ombudsman is a striking example of the second way.

Second, the EU is a union of states with a high degree of integration. This means the EU has not only confederative features but even federative:12

1. The EU has common bodies: the European Parliament, the European Council, the Commission, the Court of Justice of the European Union, the European Central Bank, the Court of Auditors. Among the general authorities the EU Ombudsman takes place as a guarantor of Human Rights.

2. Superior Union bodies make the constitutive (determinate) decisions. And some of acts of the EU have a direct effect on the territory of the

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member states. According to the Part 1 of Article 2 of the Treaty on the functioning of the European Union “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts”.

3. Another element of federalism is the division of competence between authorities of different levels:

Having a form of federation Russia is a very centralized state. At the same time, decentralization and subsidiarity are very important trends for a development of modern states. That’s why a study of the European experience of subsidiarity is very useful for implementation of that principle into legal system of the Russian Federation, including the institution of the ombudsman in Russia that includes federal ombudsmen and regional ones.

The institution of the Commissioner for human rights is an important public institute, which represents an additional mechanism for legal protection of citizens in terms of unlawful actions of the state bodies, including bodies of executive powers.

According to the annual report of the Commissioner for human rights for 2013 the average number of appeals is 15.8 out of 100 thousand people. However, the number of appeals to the Commissioners for Human Rights in regions of Russian Federation is considerably higher. For example, the average number of appeals in Republic of Karelia is 109 out of 100 thousand people, in Kirov region it’s 478, in Tver’ region it’s 80, in Republic of Tatarstan it’s 73, in Kaluga Region it’s 280 out of 100 thousand. As for the


EU Ombudsman, the average number of appeals is 0.4 out of 100 thousand. The statistics for EU members is also different. In Spain, for example, the average number of appeals is 48 out of 100 thousand; in France it is 129 out of 100 thousand (according to annual reports for 2013). As opposed to other public authorities, the Commissioner for human rights doesn’t have administrative power, so in case of a violation of human rights, he may give recommendations to the relevant public authority in order to improve a violation. Therefore, the effectiveness of the Commissioner directly depends not only on its authority in the state but also on a public support.15

According to the statistics given above, it is important to be aware of the fact that the Commissioner for human rights in the Russian Federation has a public support.

However, as a number of human rights’ violation by the authorities in the regions of the Russian Federation is still very high, a number of appeals to the ombudsmen doesn’t show much influence of that institute in Russia, unlike it is in the EU member states.

Finally, the EU Ombudsman and the Commissioner of Human Rights in the Russian Federation have similar aims – to defend human rights, so their essence is quite similar.

Having analyzed the official sources specifying the models for the Ombudsman in the European Union and the Commissioner for Human Rights in the Russian Federation, we can conclude these models have both similarities and differences.

First of all, the Commissioner for Human Rights (in accordance with Article 8 of the Federal Constitutional Law On the Commissioner for Human Rights in the Russian Federation) and the Ombudsman (in accordance with Articles 21 and 195 of the Treaty establishing the European Community), are both appointed by parliaments. But the dismissal of the Commissioner for Human Rights takes place by decision of the Parliament, while the EU Ombudsman may be dismissed by the Court of Justice, which can be an example of a real counterbalance between

institutions and bodies of EU. So, comparing the Commissioner for Human Rights and the Ombudsman from a point of independence, we can conclude that EU ombudsman is a really independent control institution.

Secondly, there are a lot of differences coming out of their roles. The EU Ombudsman has to investigate complaints against EU institutions in case of any violation by activities of any Community institution or body apart from the Court of Justice and the Court of First Instance. Commissioner for Human Rights in Russia deals with appeals against decisions or actions of state bodies, government officials and civil servants. Due to certain cultural and legal reasons for the Russian Federation, the possibility to appeal actions of officials and civil servants is an important function of the Commissioner for Human Rights. It helps to protect citizens from unreasonable and incompetent decisions against them and also helps to eliminate elements of corruption because the Commissioner for Human Rights must work outside the interests of the existing system. However, the legislation has a weighty gap, concerning the independence of the Commissioner for Human Rights and its actions outside the interests of the system: Article 16 of the Federal Constitutional Law of 1997 On the Commissioner for Human Rights in Russian Federation prohibits complaints for actions of the Parliament and the legislative (representative) bodies. That position restricts the role of the Commissioner for Human Rights as a mechanism of anti-corruption and limits independence of this institution that at the end affects the quality and possibilities of defending citizens’ rights and freedoms. The Commissioner for human rights is a body of parliamentary control. According to the legislature provisions Commissioner for Human Rights in Russia can use remedies of citizen’s rights protection only in respect to Executive power officials and bodies. So, how can the state improve that? The experience of the European Union is a very good example to be taken.

Thirdly, according to Article 43 of the Charter of Fundamental Rights of the European Union and Article 195 of the Treaty Establishing the European

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Community, the European Union Ombudsman is empowered to receive complaints from any citizen of the Union or any natural or legal entity residing or having its registered office in a Member State. In accordance with Article 15 of the Federal Constitutional Law on the Commissioner for Human Rights in the Russian Federation, the Commissioner for Human Rights should consider complaints only from Russian citizens and foreign citizens, who are on the territory of the Russian Federation and also stateless individuals. So, it doesn’t consider complaints of legal entities. But the question is: why does law of the Russian Federation prohibit protecting interests of legal entities? No doubt this position doesn’t comply with international standards.

It’s worth mentioning that a scientific legal thought has produced various classifications of ombudsmen. The doctrine identifies two models of the ombudsman institution: passive (an ombudsman only responds to the complaint) and active (an ombudsman not only responds to the complaint, but also conducts an investigation on his own initiative).\(^{17}\) The EU Ombudsman shall conduct those inquiries for which he/she finds grounds, either on his/her own initiative or on the basis of complaints submitted to him/her directly or through a Member of the European Parliament. As for the Commissioner for Human Rights in the Russian Federation he/she doesn’t carry out an investigation on his/her own initiative for the purpose of a particular citizen rights protection. On the other hand Article 21 of the Federal Constitutional Law On the Commissioner for Human Rights in the Russian Federation, provides the possibility for initiative actions of the Commissioner in cases “if there is an information about mass or gross violations of human rights and freedoms or in cases of particular public importance or concerned with a necessity of protecting interests of persons, who can’t use singly legal recourses of defense...”. At the same time those issues are more often within cognizance of competent organs (Office of Public Prosecutor etc.), but less often of Commissioner.

Finally, it’s worth mentioning that the Commissioner for Human Rights in the Russian Federation is able to consider a complaint just in case if the

\(^{17}\) Institut Upolnomochennogo po pravam cheloveka v sub’ekte Rossiiskoy Federatsii / Pod obshch. red. A.Yu. Sungurova. Spb.: Norma, 2003 (The Institute of the Commissioner for Human Rights in Russian Federation in the subject (A Sungurov ed, Norm 2003)).
applicant has previously appealed decisions or actions of state bodies and officials in the juridical or administrative order, while the EU Ombudsman’s role is the opposite: the EU Ombudsman doesn’t conduct an investigation if disputed facts have already been the subject of legal proceedings, which from the author’s point of view is more reasonable. The institution of ombudsman shouldn’t substitute the jurisdiction of judicial review. What’s more, if a citizen doesn’t agree with a court’s decision and has exhausted all available remedies in Russia, the citizen may appeal to the European Court of Human Rights. In the author’s opinion the position of obligatory appeal to a court for further complaint to the Commissioner for Human Rights in the Russian Federation contradicts Article 7 of the Universal Declaration of Human Rights (December, the 10th, 1948) which says: “All are equal before the law and are entitled without any discrimination to equal protection of the law”.

Having carried out the analysis of the ombudsman and the commissioner models, it is necessary to mention how important is for Russia to study foreign experience with its history, particularly in the field of fundamental human rights and freedoms.

Having mentioned all of these, the author considers that the most important for a person authorized to defend the other people is to be a person of pure, like a blue sky, soul, and so wise as a goddess Maat used to have!

**Conclusion**

We have to accept that states of Western Europe are leaders in the sphere of observance and security of human rights. This is not only because of a high-developed legal culture of citizens and public servants, but also because of a high laws quality in this field. The ombudsman institute is very important for individuals’ rights and freedoms guaranteeing. As the author has already mentioned the EU Ombudsman investigates complaints against EU institutions in case of any violation by activities of any Community institution or body including the European Parliament and the Central Bank, but excluding the Court of Justice and the Court of First Instance. In a light of recent events, the EU should share its positive experience in human rights protection. If mankind wants to live in peace it’s extremely important to respect all the rights of every individual, especially the right to live.
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