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Author: Batanov O., Verlos N., Lotiuk O., Sinkevych O.

Affiliation: V. M. Koretsky Institute of State and Law, NAS of Ukraine; Zaporizhzhia National University; Taras Shevchenko National University of Kyiv

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Author information

Batanov O., Verlos N., Lotiuk O., Sinkevych O.

V. M. Koretsky Institute of State and Law, NAS of Ukraine; Zaporizhzhia National University; Taras Shevchenko National University of Kyiv

Abstract

DOI: <http://dx.doi.org/10.34069/AI/2020.29.05.31> Ombudsman Institute: Basic Models and Problems of Reception in Constitutional Law Інститут омбудсмана: основні моделі та проблеми їх рецесії у конституційному праві

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Oleksandr Batanov¹²⁸ <https://orcid.org/0000-0002-0239-4539> Natalia Verlos¹²⁹

<https://orcid.org/0000-0003-3598-2721> Olga Lotiuk¹³⁰ <https://orcid.org/0000-0001-7119-754X> Olena Sinkevych¹³¹
<https://orcid.org/0000-0003-1700-9768>

In the search for optimal ways of improving the normative foundations and organizational -legal forms of human rights protection, the problem of institutional support of relevant processes is actualized. The protection of human rights is inherently linked to all public -power structures of the mechanism of state power and is possible only in the context of optimal implementation of the principles of the rule of law, separation of powers, democratic, social, rule of law. In Ukraine, in the context of constitutional modernization, the problem of improving the organizational-legal mechanism of human rights protection remains urgent. For this purpose, the Institute of the Ombudsman operates in Ukraine.

Its implementation fully meets the tendencies existing in the modern democratic world and is a reaction to those conflicts and contradictions that exist in the field of human rights protection. Nevertheless, the social insecurity of certain sections of the population (children, pensioners, persons with disabilities, servicemen, migrants, internally displaced persons, ethnic minorities, persons belonging to the LGBTI community, entrepreneurs, patients and other categories of citizens) is an indicator of the relevance of the problem and the functioning of national human rights protection mechanisms, including the strengthening of the relevant oversight functions of the Ombudsman. The subject of the research

is the problems of reception in the constitutional

Анотація

В умовах пошуку оптимальних шляхів удосконалення нормативних засад та організаційно-правових форм захисту прав людини актуалізується проблема інституційного забезпечення відповідних процесів. Захист прав людини іманентно пов'язаний з усіма публічно-владними структурами механізму державної влади та можливий лише у контексті оптимальної реалізації принципів верховенства права, поділу влад, демократичної, соціальної, правової держави. В Україні, в умовах конституційної модернізації актуальною залишається проблема удосконалення організаційно-правового механізму захисту прав людини. Для цього в Україні діє інститут омбудсмена, запровадження якого повною мірою відповідає тим тенденціям, які існують у

сучасному демократичному світі, та є реакцією на ті конфлікти та протиріччя, які існують у сфері захисту прав людини. Попри це, соціальна незахищеність окремих верств населення, зокрема, дітей, пенсіонерів, осіб з інвалідністю, військовослужбовців, мігрантів, внутрішньо переміщених осіб, етнічних меншин, осіб, які належать до ЛГБТІ спільноти, підприємців, пацієнтів та інших категорій громадян, свідчить про актуальність проблематики організації та функціонування національних механізмів захисту прав людини, у тому числі зміцнення відповідних 128 Doctor of legal science, Professor, Leading Researcher at the Department of Constitutional Law and Local Self-Government of V.M. Koretsky Institute of State and Law, NAS of Ukraine.

129 Ph. D., Associate Professor of Department of Constitutional and Labor Law of Zaporizhzhia National University.

130 Doctor of legal science, Professor of Department of Constitutional Law of the Taras Shevchenko National University of Kyiv.

131 Ph. D., Associate Professor of Department of Constitutional Law of the Taras Shevchenko National University of Kyiv.

law of the basic models of organization of the Ombudsman Institute in the mechanism of functioning of the rule of law. The object of the study is the public relations that delve into the human rights protection process and the ombudsman's exclusivity in the relevant processes. The methodological basis of the study are general scientific methods, such as dialectical, comparative -legal, formal -legal, historical, and logical methods of cognition, as well as special and private -law methods. The history of development, the causes, the processes of institutionalization and constitution of the ombudsman services in the modern world, the permanent transformation of their functions and the differentiation of their specialization are

evidence of the improvement of the classical system of separation of powers and the constitutional mechanism of its organization. It is argued that the functional isolation, independence, and organizational diversity of the control bodies, first of all, the Ombudsmen, is a testament to the formation of control power, the conceptual idea of which is the existence of a system of measures to ensure control over public authority.

Key Words: ombudsman, human rights, control, controlling power, rule of law, democracy, reception. контрольних функцій Уповноваженого Верховної Ради України з прав людини. Предметом дослідження є проблеми реєстрації у конституційному праві основних моделей організації інституту омбудсмена у механізмі функціонування правової держави. Об'єктом дослідження є суспільні відносини, які виникають у процесі захисту прав людини та виключність омбудсмена у відповідні процеси.

Методологію дослідження формує сукупність загальнонаукових та спеціальних методів наукового пізнання. Як базові визначаються порівняльно-правовий, моделювання, системно-функціональний. Додатково використовуються методи семантичного аналізу, логіко-юридичний, прогнозування.

Історія розвитку, причини виникнення, процеси інституціоналізації та конституювання омбудсманівських служб у сучасному світі, перманентна трансформація їх функцій та диференціація їх спеціалізації є свідченням удосконалення класичної системи поділу влади та конституційного механізму її організації.

Стверджується, що функціональна відокремленість, незалежність та організаційна різноманітність контрольних органів, насамперед, омбудсманів, є свідченням формування контрольної влади, концептуальна ідея якої полягає в існуванні системи заходів, для забезпечення контролю над публічною владою.

Ключові слова: омбудсман, права людини,

контроль, контрольна влада, правова держава, демократія, рецесія.

Introduction

Human rights today are one of the key problems of legal doctrine and practice of constitutional law, which are considered from the broadest and most varied positions – from the philosophical and humanistic point of view, in terms of the nature and phenomenon of public power, its tasks and functions, principles of modernization of the political system, holding socio-economic and cultural policies, combating environmental threats, crime, etc. In essence, human rights have "opened up a fundamental theme of relations between citizens and states" and revealed "an internal conflict in the international community that exists between law and justice, between society and the state" (Wheeler, 1992). The basis

of civil society is law-conscious citizens and their voluntary associations, the existence of which is regulated not by political power, but by self government, free expression of citizens and legal law (Kharytonov, Kharytonova, Tolmachevska, Fasii, & Tkalych, 2019).

Thus, according to foreign researchers, in the middle of the twentieth century in the understanding of human rights, "there was a revolution that embodied natural law doctrine in the norms of international and national law" (Vincent, 1986), which allowed them to look at human rights as "new standards of civilization" (Donnelly, 1998). Without exaggeration, respect for human rights has already become part of modern ideas about the international legitimacy of states. Human rights are strongly in the arsenal of legal regulation within the state and cannot be ignored by countries in their foreign policy. At the same time, "the internal order of implementation of human rights norms remains forceful and the very subject matter of these

rights demonstrates the possibility of progress in international relations" (Vincent, 1986). Liberalism aims at affirming parliamentary order, free enterprise, democratic freedoms; Batanov, O., Verlos, N., Lotiuk, O., Sinkevych, O. / Volume 9 - Issue 29: 273-281 / May, 2020

upholds the absolute value of the human personality ("person is more important than the state") and the equality of all people with regard to individual rights (Shyshka, & Tkalych, 2020). Thus, the issue of human rights in connection with the operation of external functions and the constitutional and legal support of the foreign policy activity of the state in the conditions of globalization and interstate integration, harmonization of legal systems, and formation of global constitutionalism were actualized, as human rights themselves became an instrument that brings the norms and values of humanity, states, and the international community closer together.

Theoretical framework In domestic science, various aspects of the status of the Commissioner for Human Rights and Ombudsmen in foreign countries have been studied in the works of many constitutionalist scholars. Thus, in the writings of Ageev (2017) foreign models and prospects of the introduction of the Institute of the Ombudsman on Migration in Ukraine were investigated. Moreover, Barchuk's (2006) research is devoted to the problems of the inclusion of the Ombudsman in the process of ensuring national security. Moreover, the works of Golyak (2011) discuss the world experience of organization and activity of specialized ombudsmen. Banach (2014) performs a comparative study of the functions of the

Ombudsman in the modern world. Furthermore, Zakomorna (1999), one of the first in the national science, offered a comparative characteristic of the Ombudsman Institute as a means of ensuring the rights and freedoms of the individual and the citizen.

In addition, Martselyak (2004) explored the world experience and features of the Ukrainian model of the constitutional and legal status of the Ombudsman. Besides, Naulik (2007) conducted a comparative study of the Ombudsman Institute in Ukraine and the Republic of Poland. Nedov (2011) drew attention to the peculiarities of the administrative and legal personality of local ombudsmen.

The conceptual analysis of the work of these and other researchers convincingly proves that the essence of the Ombudsman Institute and its specific characteristics, first of all, determines the functional aspect of its activities. It is the functions, as the basic organizationally-provided and normatively-regulated directions and types of their activity, that are the most important element of the constitutional-legal status of any body or official of public authority.

Despite the abundance of theoretical studies, there remains a need for further doctrinal scientific research in this field, since the current legislation still has a number of shortcomings. In particular, foreign experience of functioning of the Ombudsman Institute requires theoretical elaboration and reflection.

Methodology

The methodological basis of the study was made by the general scientific methods, such as dialectical, comparative -legal, formal -legal, historical, and logical methods of cognition, as well as special and private -legal methods. Thus, the dialectical method of scientific knowledge has made it possible to thoroughly and objectively investigate the theoretical elaboration of the Ombudsman's control functions.

Moreover, the historical method of cognition was used in the study of the formation and evolution of the functions of ombudsmen and the factors that influenced their development and modification in the constitutional mechanism of the modern state.

Besides, the comparative method revealed the regular patterns and general tendencies of the development of the Ombudsman's functions, in particular, the comparative analysis method allowed to distinguish the characteristics and features of the various models of the Ombudsman Institute in foreign countries. The comparative method, together with the formal legal method, was also used in the analysis of legislative acts regulating the functional duties of ombudsmen of different countries.

In addition, system -structural and system functional methods have made it possible to determine the role of the Ombudsman's functions in the system of functions of other human rights institutions, the elements of their interconnection and interaction. The sociological method was used in the analysis of internal and external factors and social processes that led to the recognition and consolidation of the functions of the Ombudsman. Furthermore, modeling and forecasting methods were used to develop proposals on ways, means, and methods for improving the legislation of Ukraine on defining Ombudsman functions.

Results and discussion Diverse and multi -vector globalization tendencies lead to a change in the civilizational paradigm of state development, and planetary life becomes interdependent. The world community has come close to the emergence of a new phenomenon – a worldwide civilization that encompasses all humanity. Human rights, being a reflection and active lever of these processes, have moved to the next level of their development – the level of globalization. They demonstrate their maturity to participate in global harmonization issues, which is undoubtedly reflected in national law.

This led to a radical revision of the very concept of the relationship between the state and the person, since instead of the priority of public and state interests over the private, the concept of the priority of the interests of the person, "under control and constitutionally responsible to its power" (Batanova, 2019), which radically modernizes the algorithms of the state, is based on. In this aspect, under the constitutional mechanism of state power, we understand a legal system based on a single system of interrelated, public, legal, statutory, and organizationally and functionally provided institutions, aimed at the practical implementation of state functions and based on available resources. At the same time,

under the structure of the constitutional mechanism of state power, it is advisable to understand the complex multilevel system of normative and institutional means by which purposeful, effective influence on state -power relations is exercised through the interdependent, balanced functioning of all structural elements in order to create optimal political, economic, social, spiritual, cultural, ideological, legal, and other conditions for the functioning of a sovereign, independent, democratic, rule of law state, and the protection of human rights as one of the organizational principles of its existence (Shatilo, 2018).

These trends undoubtedly affect not only the political but also the socio -economic processes occurring in the modern world and, of course, the functions of the state and civil society, as well as the functions of law in general and, in particular, the functions of constitutional law, which has a manifestation in the purposeful transformational impact of its norms on a particular type or group of social relations that are the subject of constitutional law, to promote constitutional human rights, the rule of law and democracy and ensuring the constitutional order (Sinkevich, 2016).

According to the history of the development of the states, the mechanism of the state will only be effective when the economic, political, and social tasks set before it are successfully resolved when the stability of the government and its state-legal institutions will be secured, the methods of state legal regulation will be properly used, and the proper balance is maintained in the system of elements that make up the mechanism of the state, and the bodies of the state will perform all the functions assigned to them, that is, the activity of the mechanism of the state will be indigenous to the interests of society and citizens.

This approach testifies to the transition in the functional theory of the state and the right from the traditional emphasis on its formal components to the so-called "human factor" from the standpoint of a broadly humanistic approach designed to lead to a certain reassessment of the correlation of objective and subjective factors in the system of public administration for the benefit and in the interests of the latter. In particular, the human dimension of the problems of the functioning of the mechanism and apparatus of the state is a methodological basis, which makes it possible to more thoroughly analyze new for the legal science, but extremely important, important and very complex issues of

its information, personnel, financial support, etc. This undoubtedly applies to the Ombudsman Institute as one of the most important bodies in the mechanism of the rule of law, whose practical activity involves exercising control over the observance of the constitutional rights and freedoms of the individual and citizen, which is, in fact, a kind of titular function of the Ombudsman, taking priority in his system of functions.

In practical terms, the relevant relationship and interaction are most evident in human rights protection processes. After all, the protection of human rights is organically linked to the whole complex of their relations with the public authorities and is fully possible only in the context of the principles of a democratic, social, rule of law, which develop and complement each other. These principles apply to the protection of the entire human rights system: civil, political, economic, social, cultural, etc.

In Ukraine, in the context of reforming the socioeconomic, political and spiritual spheres of life and active formation of civil society institutions, the problem of improving the constitutional and legal mechanism of human rights protection remains urgent. For this reason, following the legal traditions of democratic countries, the

Institute of Ombudsman, the Ombudsman of Ukraine, was introduced in Ukraine, which has become an important way of ensuring human rights, fully responding to the trends that exist in the modern democratic world and is a reflection to those systemic challenges and complex problems that exist in the field of human rights protection. According to Art. 101 of the Constitution of Ukraine, he exercises parliamentary control over the observance of the constitutional rights and freedoms of man and citizen. It is established that everyone has the right to apply for the protection of their rights to the Ombudsman (part two of Article 55 of the Constitution of Ukraine).

The formation of new types, groups, and generations of human rights in the modern world is in line with the widespread concept of human rights in the Western constitutional doctrine, an idea inherent in the international community that reflects a certain line of evolution not so much as a social practice. According to this concept, modern human rights are based on natural rights, reflecting the universal nature of human relations. At the same time, considering the categories of human nature and natural human rights, the ideologists of this concept substantiate another understanding of the origin of human rights in modern international relations, arising from human needs that satisfy different needs,

contribute to the preservation and development of the human race. This is where human rights emerge as an opportunity to do anything (Donnelly, 1985). At the same time, recognition of a holistic array of rights of different social groups, a kind of updating of their catalog, especially in the aspect of civic integration, multiculturalism, overcoming all kinds of phobias (anti-Semitism, xenophobia, ethno- and religious phobias (e.g.

Islamophobia), migrantophobia) and discriminatory practices (racism, sexism, victimization of women, ageism, androcentrism, heterosexism, bullying) and forms of discrimination that undermine the foundations of democracy and border on threats to human life, the development of intercultural dialogue and tolerance, objectively requires the formation of effective mechanisms for guaranteeing and protecting the respective individual and collective rights (Batanov, 2018; 2019). In this context, the Ombudsman Institute is one of the most dynamic, effective, constitutionally-tested and accessible forms of human rights control over the observance of its subjective rights.

Thus, in the opinion of Martselyak (2004), the Ombudsman is special monitoring, human rights body of state power (official), the initiation of which is a reaction of the society to the imperfection of the existing human rights system in the country, and is a new, more effective institution which has become a complement to existing forms of human rights control and oversight.

The Ombudsman's mechanism of human rights activities consists of a whole system of functions, means, methods, forms, methods, and principles of the Ombudsman's activity that he or she applies to combat mismanagement, abuse of power, bureaucratic arbitrariness, etc., as well as to increase accountability of the government and its officials the public, ensuring the rights, freedoms, and legitimate interests of citizens, assisting them in exercising their rights and restoring rights in the event of their violation.

The functions of the Ombudsman are aimed primarily at protecting and restoring violated human and citizen rights, preventing and curbing their violations by public administration bodies and their officials. In doing so, it performs broad control functions that help to improve the mechanism of state regulation and improve administrative practice.

As the world experience shows, the main means of exercising the functions of the Ombudsman is to control the activity of public authorities and local self-government bodies and their officials in compliance with human rights law, the activities of competent structures and persons empowered by duty to provide appropriate assistance to citizens in the field of the implementation and protection of human rights.

The basic ways of carrying out the functions of the Ombudsman include the consideration of complaints, statements and communications of citizens and conducting investigations into the facts of the mentioned violations, as well as conducting investigations on their initiative, the application of preventive (preventive) measures and moral, ideological and informational influence, promoting the implementation of measures guilty of human rights abuses or maladministration, monitoring of existing legislation and providing expert advice evaluation of legislative projects for compliance with their international human rights standards, ensuring coordination and cooperation of all bodies and individuals in the field of human

rights implementation and protection, etc.

According to Art. 1 of the Law of Ukraine "On the Ombudsman of Ukraine" of December 23, 1997, parliamentary control over the observance of the constitutional rights and freedoms of man and citizen and the protection of the rights of everyone within the territory of Ukraine and within its jurisdiction are exercised permanently by the Ombudsman of the Verkhovna Rada of Ukraine for Human Rights.

Thus, following Art. 3 of this Law, the purpose of parliamentary control exercised by the Ombudsman is:

1) protection of human and citizen's rights and

freedoms proclaimed by the Constitution of Ukraine, laws of Ukraine and international treaties of Ukraine;

2) observance and respect for the rights and

freedoms of the individual and the citizen by the entities specified in Art. 2 of this Law;

3) preventing or facilitating the violation of

human and citizen's rights and freedoms;

4) promoting the harmonization of the

legislation of Ukraine on human and citizen's rights and freedoms with the Constitution of Ukraine, international standards in this field;

5) improvement and further development of

international cooperation in the field of protection of human and citizen's rights and freedoms;

6) prevention of all forms of discrimination in

the exercise of human rights and freedoms;

7) promotion of legal awareness of the

population and protection of confidential information about the person. As current foreign experience shows, the scope of the Ombudsman's oversight function depends on the range of bodies and officials under the jurisdiction of the Ombudsman, as well as the extent of the rights and freedoms of the individual and citizen that they control.

In general, the main object of oversight of the Ombudsmen is to verify the legality of management acts, compliance with the requirements of the current legislation during the procedure of their adoption, as well as the legitimacy of the behavior of officials. Such supervision is done to protect the violated rights of individual citizens. The Ombudsman assists in resolving specific issues and complaints, oversees the process of resolving them and, where necessary, requests their resolution by the appropriate authorities.

When considering the complaints and complaints of citizens about the activities of administrative bodies, the Ombudsman should not only carefully examine them, but also analyze the situation, make conclusions about the nature of violations, whether they are individual, or have a broader spectrum, i.e. they become mass violations. The number of received complaints of the same nature is evidenced by the mass of violations and, consequently, by the shortcomings in the work of the respective bodies. That is, in this case, the function of the Ombudsman is precisely to identify deficiencies in the work of certain structures and to submit proposals to the legislature to eliminate them.

It should be noted that the domestic constitutional practice of oversight activities as a whole, as well as the institutionalization of ombudsman services, does not stand aside from the processes that take place in the field of human rights protection and development of human rights institutions in the modern world. This is evidenced, in particular, by the introduction of the Institute of State Ombudsman (Law of Ukraine "On Ensuring the Functioning of the Ukrainian Language as State", 2019).

Thus, to protect the state language from public humiliation, from deliberate distortion of the state language in official documents and texts, for example, the intentional use of it with violation of the state language standards, as well as from neglect of the requirements of mandatory use of the state language, defined by law, the Ombudsman, together with other powers aimed at the exercise of the respective function, exercise state control over the use of the state language by natural and legal persons.

Reflecting on existing human rights issues, contradictions, and challenges that exist in this area in Ukraine, it is also worth considering a bill to amend the Constitution of Ukraine (concerning the plenipotentiaries of the Verkhovna Rada of Ukraine), which was intended to amend the Constitution of Ukraine – Articles 85 and 101 – concerning the regulation of the status of authorized persons of the Verkhovna Rada of Ukraine. In particular, the President of Ukraine was proposed, first, to consolidate the new power of the Parliament appointing and dismissing the authorized representatives of the Verkhovna Rada of Ukraine, in compliance with the Constitution of Ukraine and laws in certain spheres; hearing their

annual reports on the state of compliance with the Constitution of Ukraine and laws in the respective spheres, and, secondly, to establish

that to exercise parliamentary control over the observance of the Constitution of Ukraine and laws in certain areas, the Verkhovna Rada of Ukraine may appoint authorized representatives of the Verkhovna Rada of Ukraine whose legal status is determined by separate laws.

The Constitutional Court of Ukraine has ruled that the proposed changes do not comply with the constitutional principles of the rule of law and separation of powers, the principles of a democratic rule of law and, in the case of implementation, will endanger the rights and freedoms of the individual and the citizen.

This indicates that in Ukraine there is still no established model of the parliamentary ombudsman, its tasks, functions, guarantees of activity, procedural forms of interaction with other public authorities, etc. require improvement. In this aspect, the study of foreign experience in the organization and functioning of the Ombudsman's services is of particular relevance and importance.

After analyzing foreign experience, we can see that world practice follows the differentiation and functional specialization of the Ombudsman Institute. This is to ensure that the institute can fully and immediately exercise its oversight role in the event of human rights violations, including primarily within the territorial communities as primary entities of local self-government.

In our view, the introduction of the Institute of Specialized Ombudsmen would eliminate the existing gaps in the field of public control and functioning of human rights protection mechanisms and would be an important step in the development of democratic processes aimed at strengthening the rule of law, protecting the human rights, strengthening the guarantees for the exercise of its rights and freedoms. , would help improve public administration and humanize relations "person – public authority – state", which, on the one hand, would certainly have a positive impact on effective exercising the functions of the state and its bodies, and secondly, would not only complement the existing system of guarantees of citizens' rights

but would also become an innovative system of public authorities capable of providing citizens with another human rights channel in cases of violation or restriction of their rights.

Conclusions

Summarizing the results of the study of domestic and foreign experience of the functioning of the Ombudsman Institute, we can make the following generalizations:

1. The worldwide trend of development of the

Ombudsman Institute is: – transformation of its functions as a mediator between society and government and one of the key actors, ensuring the restoration of the integrity of the social system of the country; – strengthening the function of monitoring the human rights observance by the authorities and management, as well as the law enforcement function and the function of out-of-court conflict resolution;

– the appearance of the functions of improvement of the legislation (including by giving the legislative initiative in the field of human rights); – empowerment to facilitate the implementation and evaluation of the implementation of the principle of good governance in the field of public administration, legal education of the population and the development of international cooperation;

– strengthening advisory and coordination functions.

2. The history of development, the causes, the

processes of institutionalization and constitution of the ombudsman services in the modern world, the permanent transformation of their functions and the differentiation of their specialization are evidence of the improvement of the classical system of separation of powers. Functional isolation, independence and organizational diversity of the control bodies, first of all, the Ombudsmen, is a testimony to the formation of control power, the conceptual idea of which is the existence of a system of organizational, regulatory, institutional measures to ensure control over public power. Control is one of the main factors in ensuring democratic rule.

3. The current period is characterized by the

permanent development of the institutional specialization of the Ombudsmen and the fulfillment of the functions of ensuring the realization of human rights in various spheres of public relations (public administration, military, penitentiary system, taxes and business, medicine) and various most vulnerable categories of population (children, persons with disabilities, war veterans, national

minorities, migrants, the LGBTI community, etc.), distribution of functions of control and supervision over the activities of regional and municipal authorities and controls and more.

4. Extensive oversight functions of the

Ombudsman for the activities of the administration and officials of all levels contribute to the elimination of identified violations and defects in the activities of governing bodies, as well as testify to the institution's recognition as a democratic society. Foreign experience proves that fundamental constitutional values, including, first and foremost, human rights, the constitutionally responsible government are the functional -teleological dominant of the Ombudsman's activity, the expediency of establishment and practice of which, in essence, is conditioned by the resolution of these interrelations.

5. Given the positive foreign experience in the

field of human rights, to improve the Ombudsman Institute in Ukraine, it is advisable to continue the constitutional and project work on amendments to the Constitution of Ukraine, which provide for the possibility of introducing specialized parliamentary ombudsmen (for children, servicemen, military, etc.), clearly defining the areas of their control activities and human rights groups that determine its content, as well as relevant ombudsman services for regional in and municipal levels.

In our opinion, these would have the following positive effects: – strengthening parliamentary control over human rights; – elimination of existing gaps in the functioning of human rights protection mechanisms; – improvement of democratic government and functioning of public administration, constitutional mechanism of state power as a whole;

– humanization of relations in the coordinate system "person – body of public authority – state" and strengthening of the human centric potential of constitutional law and its functions; – improving the efficiency of the exercise of human rights and control functions of the state, as well as mechanisms for applying the measures of constitutional and legal responsibility of public authorities.

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