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Historical and theoretical legal aspect of children’s Ombudsman activity in the Republic of Kazakhstan as a guarantor of minor’s rights and freedoms realization

Protection of the child’s rights is among the most actual of modern social problems generated by the violation of the rights of this category of the population in recent years and the lack of effective mechanisms for protection and restoration of violated rights of minors, imperfection of legislation in this area. Meanwhile, the UN Convention on the rights of the child which is the primary international document regulating the rights of the child stipulates the state's obligation to provide the child the protection necessary for his prosperity and to take all appropriate legislative and administrative measures. One of the most effective guarantors of minor’s constitutional rights and freedoms realization in the Republic of Kazakhstan is the Institute of the children's rights Ombudsman. The article analyzes the powers and the basic directions of activity of the children’s rights Ombudsman Institute in the Republic of Kazakhstan, the historical aspects of formation and development, as well as issues of functioning and improvement of this Institute. A review of the national legislation in the sphere of implementation of the rights and freedoms of minors was carried out. The work states that Institute of Child’s Ombudsman, from the very beginning of its existence, has proved effectiveness in respect of the legitimate rights and freedoms of minors realization, its demand for the society and the authorities. The recommendations are proposed.

Keywords: guarantees of the rights and freedoms of minors, the protection of the rights of minors, the children's rights Ombudsman, children's Ombudsman, the history of the formation of the Human rights Ombudsman, the legal framework formation of the Children’s rights Ombudsman in the Republic of Kazakhstan.

In the world practice an important place in the system of bodies exercising control over the management system, which effectively protect the rights of the individual, takes ombudsman institute. Its content and activities have opened a new chapter in the relations between the state and the citizen, between persons in positions of authority and manageable. This is an important institution of civil society engaged in providing of subjective rights.

The concept of creation of independent bodies to monitor the government activity and other bodies of executive power in the sphere of protection of individual rights was developed in Sweden for the first time, where in 1809 the first ever ombudsman of general jurisdiction was appointed. Designated position until that time had no analogues in the world. In the state-legal sense, the Ombudsman is understood as a trustworthy independent person who is authorized by Parliament to protect the rights of individual citizens and indirect parliamentary control in the form of extensive oversight of all state bodies and officials, but without the right to change their decisions.

In other countries, this institution became introduced only in the twentieth century, So that later followed the example of Sweden, Finland, Denmark, Norway and other countries. As a public institution established for the protection of individual rights in order to ensure good governance, it helps to ensure that the state administration was responsible for their actions. Experience shows that the need for this institution arises when the existing institutions are not satisfied with the decision of the control objectives and there is a need for additional protection of the rights of citizens against administrative arbitrariness.

Positive features of ombudsman institute predetermined its wide distribution in the world practice, and in one form or another form this institution specified perceive more and more states, including the Republic of Kazakhstan. However, the attractiveness of this body has led to the fact that in some cases in different states called «Ombudsman» were administered authority not having the characteristics discussed above.

So, executive ombudsmen and even public ombudsmen were appeared there. In Sweden ambiguity of the word «ombudsman» contributed to this in some way, as mentioned above. It must be stressed that the public ombudsman has no relation to the public authorities and is established as a public institution only. As a result, it does not have the rights and prerogatives of the ombudsman as a public authority (access to information, including for official use, the extraordinary reception of officials, and so on).

Although traditionally ombudsmen — authorized across the whole spectrum of human rights — do not object to the fact that children should contact them directly for help. However, as a rule, they are usually not involved in the affairs of a particular child. In determining of their duties fact is not taken into account that
children's problems are often different from those of adults and that the nature of children's rights and the mechanisms ensuring respect for these rights are different too. Children are particularly vulnerable in cases where their rights have been violated, since virtually unable to seek advice or protection to independent organizations or individuals. Development of this institution in the twentieth century has led to the emergence of specialized ombudsmen.

A number of countries are now set up an institution of independent ombudsmen or children's rights commissioners. Children's ombudsmen were introduced, in particular in Norway (1981), in French-speaking community of Belgium (1991), Sweden (1993). The mechanism of the establishment of such a position was different: in Norway the initiative came from the committee appointed by the Government, in Sweden — from parliamentarians, in Denmark and Israel — from ministers.

Many existing child's ombudsmen do not meet the generally accepted view about Ombudsman. While some of them are legally established posts, while others act on not fixed on the legislative framework within the non-governmental organizations. Some of them are engaged in the traditional consideration of specific complaints, while others act as an advocate for all children. However, they are characterized by one thing in common — the desire to achieve recognition and protection of children's rights by the state. (Ombudsman и ombudsmen.

- Although the Ombudsman or Child Rights Commissioner's Office do not like each other, there are four main models of creation of Ombudsmen Office:
  - Ombudsmen established by a special law adopted by the—such agencies: Parliament (Norway, Sweden, Iceland, Guatemala, Peru, Costa Rica, Colombia, Luxembourg and others);
  - Ombudsmen, established— in accordance with the legislation on the Protection of Children (New Zealand, Ontario (Canada) and others);
  - Ombudsmen, whose offices established within the framework of the relevant public authorities (Israel, Austria, Spain, Denmark and others.);
  - Ombudsmen, whose offices established by non-governmental organizations and who work under their auspices.

For example, in Finland, a non-governmental non-profit organization — the Manner game League of promotion to child protection — established in 1981 children's rights ombudsman public service. In other countries there are non-governmental organizations that have been campaigning for children's rights protection, lobbying for their interests and promote respect for these rights and interests. However, very few of these organizations clearly indicate that perform functions of an ombudsman or commissioner for children's rights. It is obvious that such bodies have no legal status, official capacity or authority, but act in the interests of children, maintaining full financial independence. Because of this, they have considerable freedom of action, and can challenge and criticize government policies and methods of its implementation.

At the present time ombudsmen or commissioners for children's rights conduct their work in three main areas: the protection mainly of specific child’s rights and representation of his interests; protecting of interests of individual children and children in general; activities for all children that does not involve a specific representation of interests of the child.

An important factor of guarantees the Ombudsman in the exercise of his functions is independence. He should be able to make sure that the voice of children will be heard, to be accessible to children, his activities should focus exclusively on children's rights.

Appointment of the Ombudsman should not depend on the decision of any one particular official. Such appointment must be made on the basis of wide consultations with independent organizations that protect the rights of children. It is important that official position of Ombudsman will be guaranteed by legislation. He shall be appointed for a fixed term, and removed from his post only in the case of willful misconduct on his part, or failure to perform their duties. Ombudsmen should be able to determine the direction of the work of his department. Powers of the Ombudsman should be supported by effective safeguards which, for example, would provide the liability for obstructing the implementation of its activities.

As for the children's ombudsman immediately, the first ombudsman on the Rights of the Child was appointed in Norway in 1981. Children's Ombudsman is an independent, impartial figure, representative, arbitrator, suggesting measures for improvements in spheres related to children.

Generally, the Children's Rights Ombudsman defends the needs, rights and interests of minors, fighting for the observance of the Convention on the Rights of the Child and supports its dissemination. The Ombudsman may conduct investigations, give a critical evaluation and publish his opinion, but he did not have the right to change the administrative action or revoke administrative decisions. The Ombudsman acts inde-
pendently of the legal representatives, parents or guardians, protecting the rights of the child in all types of
civil and criminal cases in which children are directly or indirectly involved.

In some countries, the ombudsman is responsible for the using of valuation techniques such as the
«child impact assessment» in order to identify and evaluate all possible consequences for children of different
legislative proposals, regulations, etc. According to the Swedish non-governmental organization «Radda
Barnen», currently the post of Children's Rights Ombudsman has already been established in 20 countries.

In accordance with the norms of international law, all States must comply with its generally recognized
principles and rules. Especially this is true of the areas where the rights and freedoms of man and citizen af-
acted. International human standards of human and civil rights, principles and norms enshrined in the Uni-
versal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, in
various international treaties, etc. The Constitution of the Republic of Kazakhstan declared that Kazakhstan
«recognizes and guarantees the rights and freedoms of man and citizen according to the universally recog-
nized norms and principles of international law» [1].

The Republic of Kazakhstan Constitution enshrines also the principle of direct effect of its norms, in-
cluding on the rights and freedoms of the individual. Legislative and other normative legal acts of the state
are extremely diverse; regulate different spheres of public relations. And in this diversity a priority belongs
to the rights and freedoms of man and citizen, which should act as the main reference of legislative and law
enforcement practice. Children are vulnerable and dependent on the adult world. For this reason they have
special rights in comparison with adults, which are enshrined in the Convention on the Rights of the Child.
And these special compared with older rights require special protection and the special mechanisms of its
implementation, allowing to provide a targeted and priority protection of the rights of every child and chil-
dren in general.

Children, because of their age and related with it features of mental, physical and intellectual develop-
dment, due to its limited capacity cannot in most cases independently seek protection of their rights and legit-
imate interests.

On their behalf are the legal representatives of the child (parents, guardians, director of children's insti-
tutions and so forth). In the case of child rights violations by the legal representatives, as well as when they
do not defend the violated rights of the child, the child is left defenseless.

Over the past decades in the world practice an additional mechanism to provide targeted and priority
protection of the rights of the child: as each individual child in violation of his rights, and children in general,
which in many countries performs the functions of an independent mechanism for ensuring the rights of
children at national and regional levels is produced.

Children — the future of the state guarantee of a reliable defense, genuine security, law and order and
economic development of the country. As full members of society they must be protected by the state. At the
same time, according to statistics, every year the child population of the country is reduced by about 90 thou-
sands persons. Today in Kazakhstan are 5.4 millions of children, representing 31 % of the country's total
population [2]. And exactly they have because of their age, inexperience, need special attention and care.

In the first place this applies to children deprived of parental support, physically or mentally disabled,
children from needy families, et al.

It should be noted that the Republic of Kazakhstan is taking steps to implement the Convention on the
Rights of the Child, ratified by our country in 1994 [3]. The normative legal acts adopted in the Republic of
Kazakhstan relating to the protection of children's rights; various targeted programs implemented, et al.

However, many of the rules have declarative character. For another thing, occurring in the post-Soviet
sphere, the socio-economic crisis has led in due course to reduce the standard of living and to the massive
violations of children's rights.

In the country, according to official data of the Statistics Committee of the Ministry of National Econ-
omy of the Republic of Kazakhstan, one of three marriages ends by divorce. Only during the first 9 months
of 2016 the number of minors that have fallen into the category of children who are brought up in single-
parent families, made up almost 46.9 thousands; number of successful actions for deprivation of rights to
education of children was in 1530; registered 140 facts of suicide [4].

Thus, a large number of children today is outside the scope of the state's care. Mostly the children left
without parental care and brought up into institutions (orphanages, children's homes, boarding schools for
orphans and children left without parental care).

Children are extremely vulnerable when they have to defend their rights, because they are due to their
inexperience cannot independently use the existing protection mechanisms: the recourse to the courts, the
bodies of state administration, etc. Thus, the child's abilities to use the existing mechanisms to protect their rights are limited, as compared with the adult population — are insignificant. This fact alone suggests that additional independent mechanisms are required to ensure the rights of children [5, 47].

The institute of the Ombudsman for Children was established in the Republic of Kazakhstan by the presidential decree of the Republic of Kazakhstan February 10, 2016 in order to further improvement of the national system of protection of children's rights, guarantying safeguard of rights and legitimate interests of children, as well as the restoration of violated rights and freedoms [6].

Thus, a new independent institute was formed in Kazakhstan, independent of any departmental interests and ambitions and at the same time is a bridge between the state and civil society.

The activities of the above-mentioned institution based on the principles which enshrined in the Law of the Republic of Kazakhstan dated August 8, 2002 № 345-II «On the Rights of the Child in the Republic of Kazakhstan» it is:
- the principle of legality; the principle of independence; the principle of accessibility for children; the principle of priority of protection of the rights and legitimate interests of the child; principle of objectivity; the principle of openness [7].

The main tasks of the Ombudsman for Children should include:
- strengthening of guarantees for state protection of rights freedoms and legitimate interests of the child;
- contribution to the smooth implementation and restoration of the rights, freedoms and legitimate interests of the child;
- improvement of the mechanism of ensuring and protection of the rights, freedoms and legitimate interests of the child;
- Improvement of legislation on the rights, freedoms and legitimate interests of the child, et al.

In order to protect the legitimate rights and consider appeals interests of children Ombudsman for Children's Rights:
- concerning violations of rights, freedoms and legitimate interests of the child, and complaints about decisions or actions (inaction) of the state central and local executive bodies and organizations, enterprises, their officials those who violate the rights, freedoms and legitimate interests of the child;
- supports the contribution to smooth implementation and restoration of violated rights, freedoms and legitimate interests of the child;
- develops and submits to the Government of the Republic of Kazakhstan recommendations for improving of the Republic of Kazakhstan legislation;
- it has unfettered access to the state bodies and institutions of education, health and social welfare, defense, culture and sports, as well as the institutions of the penitentiary system, where juveniles are;
- it has unobstructed access to the documents of state and public institutions dealing with children's rights;
- Performs other powers conferred on him by the laws of the Republic of Kazakhstan and acts of the Republic of Kazakhstan President [7].

The most significant differences of activity of the Children's Rights Ombudsman on the work of other supradepartmental bodies also involved in the protection of children's rights (prosecution, guardianship authorities, commissions of minors affairs, the Commissioner for Human Rights) are facilitate the procedure of self-treatment of a child for help — without the mediation of adults either prior approval by the courts the facts of a violation of his rights; responsiveness to become known child rights violations; protection of children's rights not only in the relationship with the family environment, but with all the social institutions and organizations, as well as the personal involvement of Commissioner in solving problems. Ombudsman, that is very important, organizes procedures to ensure the availability and simplicity of handling child to him.

The Ombudsman provides a wide range of free legal assistance to children and their families, including the preparation of procedural documents. An important direction of the Ombudsman for the Protection of the rights activity of the individual child has become a practice of participation in the civil cases consideration in the court of involving the interests of minors.

To participation in the case authorized drawn at the request of parties to proceedings as well as on the initiative of the court and their own initiative. This is especially actual in the cases where the rights of children are violated by authorities are obliged to protect them.
Along with the protection of the rights of the individual child, the Children's Rights Ombudsman promotes the protection of children's rights in general. For this purpose, authorized bodies monitor the rights of children respect, conducted by an independent non-departmental analysis and assessment of the situation to ensure the rights and lawful interests of children, attend child care centers; special attention is given to verifying compliance of the rights of children in foster home institutions and prisons.

Treatments of authorized bodies to the authorities contribute to management decisions to ensuring and restoration of the violated rights of children, the solution of actual problems of childhood. Objectively, the activity of the regional children's ombudspersons enhances coordination of all structures and provision of integrated solutions of children problems.

In general we can say that the institution of Ombudsman of Children rights today proved its relevance by society and authorities.

As you can see, the range of tasks and functions of the Ombudsman of Children rights is quite broad. However, in our view, the legal status of the Ombudsman of Children rights in the Republic of Kazakhstan is at a formative stage. To date, the legal status of the Ombudsman of Children rights is regulated by the Law of the Republic of Kazakhstan «On the Rights of the Child in the Republic of Kazakhstan», in particular, by articles 7–1 and 7–2, defines the principles and functions of this Institute. Of course, there is an urgent need to adopt a separate legal act «On the Ombudsman of Children rights in the Republic of Kazakhstan». In this case, it would be appropriate to granting the status of Authorized State Body (a person holding public office).

Authorized institution shall have the right to approve the structure of the apparatus, the positions about it and provide overall guidance device activity, make regulations relating to the activities of the apparatus. It is necessary to endow the children's ombudsmen with additional powers that will contribute to more efficient work of the institution. These are the following powers:

- the right to submit to the supreme bodies of state power public annual reports and thematic reports on the position of affairs in the sphere of promotion and protection of children's rights, which are subject to official publication;
- the right to address state authorities and officials the comments and suggestions of a general nature relating to the rights of the child guaranteeing, improving administrative procedures;
- the right to apply to the subjects of legislative initiative with proposals on amending and supplementing the Republic of Kazakhstan legislation;
- the right to work with citizens petitions in a special order, which takes into account the persons who may file such an appeal;
- the right to provide professional legal assistance free of charge;
- the right to exercise the child's representation in courts on criminal and civil cases, cases of administrative offenses and to give opinions on such matters;
- the right to apply to the bodies of the constitutional control with the complaint of a violation of the constitutional rights and freedoms of the child's legal act, as well as on the interpretation of the Republic of Kazakhstan Constitution.

However, the development of the Institute of Ombudsman for Children rights in the Republic of Kazakhstan, improving the efficiency of its activities to promote the protection of children's rights is constrained by a number of problems. The success of the work of the Ombudsman for Children rights as an institution independent of public control over the activities of state bodies on ensuring children's rights to a large extent related with the organizational and legal status of the Ombudsman.

Embeddedness of the Ombudsman for Children's Rights in the Republic of Kazakhstan into the structure of executive power, the actual submission to superiors leader restricts actions of the Ombudsman for the full protection of the rights and legitimate interests of the child, although the first stage of such an option of organization of work authorized, to some extent justified.

Examples of Ombudsman work on a voluntary basis evidence that Ombudsmen face significant difficulties in carrying out their activities, especially financial, organizational and technical character, and this, in turn, reduces the effectiveness of their work and ultimately undermines the activities of the very idea of independent monitoring public authorities on the rights of children respect.

Seems preferable option, in which the position of the Ombudsman for Children's Rights in the Republic of Kazakhstan introduced by a special law which establishes the legal framework, principles and guarantees of activity of the Ombudsman, his powers, appointment and termination of office. In this case, the Ombudsman for Children's Rights receives a certain stability and independence in the work, which is important for this institution.
Institute of the Ombudsman for Children's Rights in the Republic of Kazakhstan is not yet integrated into the system of Kazakhstan legislation, what limits its ability to implement the rights of children, for example, in court or children who are in prisons. Further development of the Ombudsman for Children's Rights Institute is an objective necessity.

Institute of Ombudsman for Children's Rights in Kazakhstan is in formation period, but it has good prospects for development; its activities are directed to ensure that governance has changed in the direction of the recognition, observance and protection of the rights of minors.

A significant factor, from which largely depends on the effectiveness of the Ombudsman activity is his reliance on the public authorities and close cooperation with public human rights organizations.

In the early stages, much depends on the identity of the person who holds the post, his authority and principal positions in the sphere of compliance, safety and protection of children's rights and freedoms in modern Kazakhstan. The Ombudsman for Children's Rights is to merge and consolidate around himself public institutions, to become member of civil society in relations with the state. Only then will he be able to become an effective regulatory authority, leading the fight against violations of children's rights by the state and its employees.

Activities of this institution contributes to the implementation of the UN Convention on the Rights of the Child, legal education of children and adults, the constructive resolution of school conflicts, opportunities for conciliation technologies creation, promote respect for human dignity. In order to introduce new technologies into the system of protection of rights and legal interests of children at the Ombudsman for Children's Rights community councils are created, volunteer movements are organized. Thus, the task of overcoming stereotypes about the possibility of the involvement of children into decisions affecting them is before the Ombudsman.

Child Ombudsman has no power authority. He does not accept the laws, is not responsible for the implementation of the state policy, and has no right to impose sanctions when the child's rights have been violated. But based on expert judgment, he could propose new laws or amendments to existing ones, thereby contributing to the development of social policies for children interests. All actions of ombudsman for children should be based only on the knowledge and understanding of the real situation in which there are children and young people, and with the obligatory reliance on the opinions and views of children and young people.

The special role of the children's ombudsman, which distinguishes it from other institutions such as the time and is constantly reminding the authorities and the public about the obligations imposed by the Convention on the Rights of the Child.

Creating of new institution of the Ombudsman for Children's Rights is an important and noble task. For the successful functioning of this institution is necessary to concentrate the efforts of specialists of different areas that should provide the legal framework of the activities of the human rights machinery.

In our view, the institution of the Ombudsman for Children's Rights in the future will be the main form of independent monitoring of children's rights guaranteeing, the closest of the public institutions in relation to the family and children.

So, in conclusion of this work, we need to draw a line under our modest investigation.

Legal institution of children's ombudsman, appearing for the first time in Scandinavia, in a relatively short time of its existence conclusively proved its effectiveness, thereby predetermining its wide distribution in the world. Ombudsman — not artificial, instrumental construction, but a living, constantly updated Institute.

In foreign countries, the Ombudsman for Children's Rights defends the needs, rights and interests of minors, fights for the observance of the Convention on the Rights of the Child and supports its dissemination. What about of the Republic of Kazakhstan, this institution is new for us; protection of the rights of children are engaged in a variety of different state and public structures, but their activities are not coordinated. But, despite all the difficulties, the institution of ombudsman for children, from the very beginning of its existence, has proven its effective role in protecting of the rights and legitimate interests of children, its demand for the society and the power authorities.

Summing up all the work, the authors consider it necessary to note the following:

Protecting the rights of the child is the most important national and international legal task. It seems that the full potential of civil society institutes should aim at not to ignore any child to take control of the destiny of each child, to support him and help grow healthy and educated.
References


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Комментарий к Конституции Республики Казахстан о правах ребенка

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Исторические и теоретико-правовые аспекты деятельности детского омбудсмена в Республике Казахстан как гаранта реализации прав и свобод несовершеннолетних

В статье подчеркнуто, что защита прав ребенка относится к числу наиболее острых современных социальных проблем, порожденных нарушением прав данной категории населения в последние годы, а также отсутствием эффективных механизмов защиты и восстановления нарушенных прав несовершеннолетних, несовершенством законодательства в данной сфере. Между тем Конвенция о правах ребенка ООН — основной международный документ, регулирующий права детей, предусматривает обязанность государства обеспечить ребенку защиту, необходимую для его благополучия, и принять для этого все соответствующие законодательные и административные меры. Отмечено, что одним из эффективных гарантий реализации конституционных прав и свобод несовершеннолетних...
в Республике Казахстан является институт Уполномоченного по правам ребенка (детский омбудсмен). В статье проанализированы полномочия и основные направления деятельности института Уполномоченного по правам ребенка в Республике Казахстан, исторические аспекты возникновения и развития, а также проблемные вопросы функционирования и совершенствования данного института. Проведен обзор национального законодательства в сфере реализации прав и свобод несовершеннолетних. В работе показано, что институт детского омбудсмена уже с самого начала своего существования доказал свою эффективность в вопросах реализации законных прав и свобод несовершеннолетних, свою вос- требованность обществом и органами власти. Автор предложил рекомендации по решению проблем по рассматриваемому вопросу.

Ключевые слова: гарантии реализации прав и свобод несовершеннолетних, защита прав несовершенно-
лентих, уполномоченный по правам ребенка, история становления института уполномоченного по правам ребенка, детский омбудсмен, формирование правовой базы уполномоченного по правам ребенка в Республике Казахстан.

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