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INSTITUTE OF THE OMBUDSMAN (COMMISSIONER FOR HUMAN RIGHTS) AS A MECHANISM OF PROTECTION OF HUMAN RIGHTS IN THE REPUBLIC KAZAKHSTAN AND TURKEY

Since the recognition of the Republic of Kazakhstan as an independent state in the international arena, much work has been done to protect and guarantee human and civil rights and freedoms. The first state to recognize Kazakhstan's independence is the Republic of Turkey. In the legal system of the two brotherly countries, the status of the ombudsman institution (commissioner for human rights) is enshrined in the Constitution. However, it is known that the process of formation of the institute of ombudsman (commissioner for human rights) on both state was not an easy.

The purpose of study is to defines the stages of development of the institute of ombudsman (commissioner for human rights) in the state of Kazakhstan and Turkey and the role that this structure plays for the society. The legal definition of the concept of ombudsman is widely given, and the special duties of the ombudsman, which are intended to meet international standards, are indicated.

In addition, the statistic dates of the applications to ombudsman in the Republic of Kazakhstan and Turkey will be presented, taking into account the legal status and competence of the ombudsman at the present time. In general, the factors of coming to the institution of the ombudsman of the two states and the role of this institution in the protection of the rights and freedoms of people and citizens and the importance of the institution of the ombudsman in the formation of a democratic state are determined.

Key words: ombudsman institution, ombudsman, protection human and civil rights and freedoms, legal status, competence.

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Қазақстан және Түркия Республикасында адам құқықтарын қорғау тетігі ретінде омбудсмен институты (адам құқықтары жөніндегі уәкіл)

Қазақстан Республикасы халықаралық аренада тәуелсіз мемлекет болып танылған сәттен бері адам мен азаматтардың құқықтары мен бостандықтарын қорғау және оған кепіл болу мақсатында қыруар жұмыстар атқарып келуде. Қазақ елінің тәуелсіздігін алғаш мойындаған мемлекет болып – Түркия Республикасы болып табылады. Екі бауырлас елдің құқықтық жүйесінде омбудсмен (Адам құқықтары жөніндегі Уәкіл) институтының мәртебесі Конституцияда бекітілген. Дегенмен, омбудсмен (Адам құқықтары жөніндегі Уәкіл) институтының екі мемлекетте де қалыптасу процесі оңай болмағаны мәлім.

Мақаланың мақсаты – омбудсмен (Адам құқықтары жөніндегі Уәкіл) институтының Қазақстан мен Түркия мемлекеттерінде даму кезеңдері және бұл құрылымның қоғам үшін атқаратын ролі айқындалады. Омбудсмен – ұғымының құқықтық анықтамасы кеңінен беріле отырып, омбудсменнің халықаралық стандарттарға сай боу үшін көзделген айрықша ерешеліктері көрсетіледі.

Сонымен қатар, Қазақстан мен Түркия Республикасында қазіргі таңда омбудсменнің (Адам құқықтары жөніндегі Уәкіл) құқықтық мәртебесі мен құзыретіне тоқтала отырып, жылдық баяндама негізінде азаматтардың осы институтқа шағым беру статистикасы ұсынылады. Жалпы алғанда, екі мемлекеттің омбудсмен институтына келу факторлары мен осы институттың адам мен азаматтардың құқықтары мен бостандықтарын қорғау мақсатындағы орны және демократиялық мемлекет ретінде қалыптасуда омбудсмен институтының маңызы белгіленеді.

Түйін сөздер: омбудсмен институты, адам құқықтары жөніндегі уәкіл, адам және азаматтардың құқықтары мен бостандықтарын қорғау, құқықтық мәртебе, құзырет.

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Институт омбудсмена (уполномоченного по правам человека) как механизм защиты прав человека в Республике Казахстан и Турция

С момента признания независимым государством Республика Казахстан проводит большую работу по защите и обеспечению прав и свобод человека и гражданина. Первой страной, признавшей независимость Казахстана стала Турецкая Республика. В правовой системе двух братских стран статус института омбудсмена (уполномоченного по правам человека) закреплён в Конституции. Однако, что процесс становления института омбудсмена (уполномоченного по правам человека) в обеих странах был непростым.

Цель исследования – определить этапы развития института омбудсмена (уполномоченного по правам человека) в государствах Казахстан и Турция и роль данного института для общества, также в статье рассматривается правовой статус и компетенции омбудсмена (уполномоченного по правам человека). Дано правовое определение понятию «омбудсмен», также определены особые характеристики омбудсмена, которые призваны соответствовать международным стандартам.

В исследовании на основании ежегодных отчетов омбудсменов предлагаются статистические данные по восстановлению нарушенных прав и свобод человека и гражданина. В целом, в статье рассматриваются факторы формирования института омбудсмена двух государств и роль этого института в защите прав и свобод человека и гражданина, также значение института в формировании демократического государства.

Ключевые слова: институт омбудсмена, уполномоченный по правам человека, правовой статус, компетенция, защита прав и свобод человека и гражданина.

Introduction

The level at which every independent state has developed as a democratic-legal state is supporting and enhancing the level of a mechanism for protection human and civil rights and freedoms. One of the basic terms for democratic development is the formatting and functioning of the Institute of Rights and Freedoms. Its ability to function and legislative space is the basis for the existence of a democratic state.

Changes in the economic, social, technological and legal system taking place in our country, as well as in the whole world, demand reforms in accordance with the needs of the times in the issue of human rights protection. Since the Republic of Kazakhstan recognized as an independent state in the international arena, it has been doing a lot of work to protect and guarantee the rights and freedoms of people and citizens. On September 25, 2015, at the UN headquarters in New York, world leaders, including heads of state and government, adopted the Sustainable Development Strategy for 2030, which includes a list of 17 Sustainable Development Goals. One of the goals of global sustainable development

is to increase the quality of work of rational law enforcement institutions that protect human rights in the country. The institution of ombudsman plays an important role in ensuring the rule of law in the issue of human rights protection. When the annual activity reports of the Ombudsman Institution are examined, the environment, education, health, social security, local government services, economy, finance, tax, transportation, human rights, rights of children, women and the disabled, justice and security. It is seen, that it has made recommendations in many areas. In this respect, the Ombudsman Institution the actual contribution of the government to the sustainable development goals is only due to corruption and It is not limited to the fight against bribery. It is understood that it provides support for sustainable development goals (Karaer 2022).

In 2022, Kazakhstan entered 1a new stage of democratic and took measures to improve the legislation on the main areas of the political system. One of them was the amendment of the Constitution of the Republic of Kazakhstan adopted by referendum in 2022, which secured the status of the Ombudsman (Article 83-1). That is, it testifies to the importance and relevance of the institute of the Ombudsman,

which constitutionally defined the rights and powers of the Commissioner for human rights.

On November 05, 2022, a Law “Ombudsman for Human Rights” adopted that expanded the range of competences and the sphere of law enforcement of the Ombudsman. These reforms taking place in the country are a step in the process of protecting and ensuring the rights and freedoms of society, man and citizen. The institution of the Ombudsman is necessary not only as a legal body that monitors the activities of public administration, and protection of human and civil rights and freedoms, but also to improve legal culture, educate people on the rights and freedoms, as well as a body that stimulates the processes of building civil society (Karzhabayev 2022).

The institution of ombudsman in the national systems of human rights protection plays an important role in ensuring the rule of law. The rule of law is a basic legal principle for sustainable development. All citizens have equal rights that guarantee the well-being of society. To reveal the essence of the institution of the ombudsman, to determine its legal nature is impossible without its functional characteristic, which is also important for the practice of state-legal development, increasing the effectiveness of implementation of state functions (Sarybyev 2021).

In Turkey, the ombudsman institution regulated by Article 74 of the Turkish Constitution titled “Right of Petition, Right to Information and Appeal to the Ombudsman” which provides that the institution of the ombudsman, which is established as a constitutional public entity under the Grand National Assembly of Turkey, examine complaints on the functioning of the administration. The institution and its mandate are governed by Law on the Ombudsman Institution No. 6328, the institution is responsible for examining, investigating and submitting recommendations to the administration regarding all acts and actions of the administration upon complaint on the functioning of the administration.

Materials and methods

The article is based in the law of the Republic of Kazakhstan “On the Commissioner for Human Rights”, adopted November 05, 2022, and the law of the

Turkish state “On the Ombudsman” from June 29, 2012 № 6328. Annual reports of the Ombudsmen of the two countries will also be studied. Ap-

proaches of comparative analysis, statistical analysis, and theoretical legal analysis used as a scientific analysis of the topic.

Literature review

The Republic of Kazakhstan since gaining its sovereignty has been improving its law enforcement mechanism in order to protect human and civil rights and freedoms.

Ombudsman is a body, which occupies an independent position in the Republic of Kazakhstan and controls the observance of human rights in accordance with the legislation of the Republic of Kazakhstan and considers applications, complaints about the actions of the state bodies and officials, which caused a distortion of human rights (Karzhayeva 2015).

In the different countries, the institution has different names: ombudsman (Sweden, Finland), parliamentary commissioner (Canada provinces), parliamentary administrative commissioner (Great Britain, Ireland), human rights commissioner (Russian Federation), public defender (Spain), mediator (France), prove justice (Portugal). In Kazakhstan, the ombudsman called the “human rights commissioner”, and in Turkey, the ombudsman called the “ombudsman”.

The order of approval of ombudsman in legislation also differs. According to world experience, this institute introduced in three ways:

1) On the basis of constitutional provisions developed later in the legislation (Sweden, Germany, Spain, Hungary, RF);

2) As a result of the adoption of a special law and later consolidation of this institution at the constitutional level (Poland, Portugal);

3) Passing a special law without approval in the Constitution (France, Australia).

The constitutions of some countries of the world (Great Britain, Norway, Denmark, Japan) do not mention the institution of ombudsman, its legal regulation is carried out at the level of law. This approach cannot be considered optimal, because the constitutional status if this ombudsman provides all the necessary guarantees for the exercise of his powers. In addition, state constitutions are permanent acts over time compared to existing laws. Therefore, fixing the status of the ombudsman only at the level of laws risks limiting his powers in certain cases.

Different definitions of the concepts of ombudsman are proposing among scientists. For example,

N.Y. Khamanayeva, the ombudsman is a person authorized to protect the rights and freedoms of people and citizens, as well as to exercise indirect parliamentary control in the form of comprehensive supervision of all officials of state bodies (Khamanayeva 2000). L.V. Anisimova, defines, the institution of human rights ombudsman as an independent, private body authorized to consider complaints against the actions of the bureaucratic apparatus by making recommendations based on moral norms and ideals of justice, by making public the case without having state power (Anisimova 2014). A.Y. Semenova, believes that the ombudsman institute is an independent official who serves specifically within the framework of the legislative body and receives complaints from citizens about violations of the rights and freedoms of officials, people and citizens by state bodies. The ombudsman is obliged to initiate or personally conduct an investigation of the facts specified in the complaints, to provide a mechanism for resolving disputed legal situations as well as to submit annual reports on the results of his activities (Semenova 2006).

As for the formation of the ombudsman institution in Kazakhstan, it is the result of continuous work in direction. Over the years, experts have made every effort to determine the importance of this structure in the protection of human rights and to summarize the global experience of its creation. Special mention should be made of such international bodies as the UN development program, the Office of the UN High Commissioner for Human Rights, the European Organization for Security and Cooperation (<https://malimmer.kz/kazakhstan-respublikasyndagy-adam-kukykytry-zhonidegi-uakil-institutynyn-kalyptasuy-zhane-onyn-azamatardyn-kukyktaryn-korgaudagy-rol/>).

Since the 1990s, after collapse of the USSR in the 20th century, the organization of an effective system of protection of the rights and freedoms of people and citizens has been the priority of the CIS (Commonwealth of Independent States) countries. Every country aspired to create a democratic legal state where the rights and freedoms of people and citizens are of the highest value. The process of formation and development of the ombudsman institution in the CIS has its own characteristics, first of all, human rights commissions were established in a number states before the position of ombudsman was approved. Based on the decrees of the leaders (Armenia, Uzbekistan, Tajikistan), human rights commissions were created and worked (Saidov 2022).

The socio-economic situation of Kazakhstan prevented the full formation of democratic institutions, as in all post-Soviet states. In addition, the protection and provision of human rights was a key factor in effectively solving the problems of the transition period and creating guarantees for democratic development. That is why the ombudsman institute, which is successfully working in many countries of the world, was of particular interest. Kazakhstan's appeal to the ombudsman model was connected with the desire to strengthen the protection of citizens rights from violations by state bodies, and to weaken the feeling of insecurity of citizens in front of the bureaucratic system (Bashimov 2006).

In general, the history of the ombudsman institution in the Kazakh country divided into the following acts:

- On September 19, 2002, the Regulation on the "Commissioner for human Rights" adopted by Decree of the President.
- On December 21, 2021, the law "On the Human Rights Ombudsman" will be adopted (abolished).
- On November 05, 2022, the Constitutional Law "On the Commissioner for Human Rights" was adopted.

Tradition from the Ottoman and administrative reforms carried out since the proclamation of the Republic, unfortunately did not reduce bureaucracy ordeal in Turkey. European Union harmonization process and citizen-oriented management approach have accelerated the work on the ombudsman institution. Ombudsman institution came up many times during the preparation of the 1982 constitution and at later periods. However, it became a constitutional institution with the constitutional changes in 2010 (Karasoy 2015 a:49).

In order for the Republic of Turkey to join the European unity and in connection with the spread of democratic principles in the country, the need for the institution of the ombudsman (the institution of the Commissioner for Human Rights) arose (Ramazan 2000). Regarding the history of the Turkish people, the establishment and functioning of the institution of ombudsman, which have been actively discussed for many years, made it difficult to define the scope of its competence (Oguzgil 2015). Various factors, such as governance problems, the field of audit, the active role of society organizations, the growth and processes of democratic consciousness and globalization contributed to the creation of the ombudsman institution (Karasoy 2015b :50). In 2012, there were important developments. Following amend-

ments to the Constitution, Law No. 6328 “On the Ombudsman ” was adopted on June 14, 2012. According to this law, the institution of Ombudsman is a legal entity under the Grand National Assembly of Turkey and a public institution with a personal budget (Article 4). The Ombudsman, in accordance with the principles of human rights, with the exception of the actions of the President and the decisions taken and the actions of the Turkish Armed Forces, makes complaints against all acts and omissions of local authorities in the framework of verification, research and consultation in the justice through the body (Article 5).

According to Bashimov, “the emergence of the institute of human rights in the Republic of Kazakhstan was the reason for the development of society and the state, its democratization and the formation of the law enforcement system in the country” (Bashimov 2006). Demidov believes that “main function of the ombudsman is to provide guarantees of state protection of the rights and freedoms of man and citizens, and that the state bodies must respect and observe them” (Demidov 2019). The main feature of the institution of the Ombudsman is its presence primarily as an additional means of human rights activity, not competing with judicial, prosecutorial or other public authorities. The essence of this institution is that, as a public authority, it exercises control over the activities of public authorities as a determinant of the interests of society and its citizens.

The norms of the new article 83-1 of the Constitution enshrine the duties, guarantees of non-accountability of the commissioner to any other state bodies and officials in the exercise of his independence and powers. It is important constitutional enshrinement of the Commissioner for Human Rights for independence and accountability to state bodies and officials (Shakirov 2021). This suggests that the cases included in its orbit considered as objectively as possible based on the principle of the supremacy of human and civil rights. In addition, in order to develop and protect human rights, the Ombudsman given the right to develop draft laws on the protection of human and civil rights and freedoms. The Kazakhstan ombudsman is not limited to accepting complaints of citizens. He implements appropriate measures to restore the violated rights and freedoms of citizen on the issues within his competence. The Ombudsman has the right to submit facts and proposals to the relevant government agencies based on the results of the investigation of a case, if necessary, declaring to the Parliament and the Govern-

ment the status of human rights in the country (Adilhanov 2009).

We agree with the opinions of the authors that the ombudsman is an official acting on behalf of the state, protecting the rights and freedoms of citizens from lawless actions by officials. Also, we believe that the ombudsman is obliged to educate the society about the activities of the institution, thereby expanding the possibility of ignorant people about the existence of the ombudsman institution to protect their legal rights. In this case, the mass media, as well as public associations, play an important role.

The ombudsman in Kazakhstan, when considering a complaint, has right to:

1) request and receive from state bodies, bodies of local state administration and self-government, other organizations and official documents, materials and information necessary for considering a complaint, with the exception of cases and materials that are in court proceedings;

2) to receive access in accordance with the established procedure to the documents of state organizations and public associations relating to issues of human and civil rights and freedoms;

3) organize promote reception of complainants, including with the invitation of representatives of state bodies, local government and public administrative bodies, as well as other organizations;

4) on their own initiative to consider issues related to the violation of the rights and freedoms of man and citizens, if there consider issues related to the violation of the rights and freedoms of man and citizen, if there is information about their violation or such a violation is public importance or it is connected with the need to protect the interests of such persons who cannot independently use legal means to protect their rights and freedoms;

5) send recommendations and petitions to state bodies, bodies of local state administration and organizations, officials on issues of protecting the rights and freedoms of man and citizens (November 05, 2022 the Constitutional Law “ On the Commissioner for Human for Human Rights ”, Article 14).

According to Article 7 of the Law of the Republic of Turkey on the Ombudsman, the following competencies of the Ombudsman is provided: conducting inspections of administrative bodies, making proposals, preparing a regulation on the implementation of this law, preparing an annual report, preparing a report on special issues in case of contingencies, informing the public about reporting, etc.

Natural or legal persons through confidential application can apply to the institution on the grounds of interest violation. The institution under the relevant legislation, examines the application and accepts it if necessary. Thus, it may request information and documents related to the complaints from the relevant government agency. Information and documents requested by the institution must be ease. The institution concludes on the applications it receives within six months. In addition, ombudsman institution notifies the relevant institution about its concluded works.

Ombudsman submits its findings concerning the actions it carried out and its recommendations to the relevant commission yearly in order to consider. Based on this, and considering the relevant legislation, Ombudsman institution has no enforcement authority on public administration (Aktas 2011).

The institution should ensure the protection of all individuals and public life against potential acts of the public institutions by efficiently and effectively investigating complaints in an impartial and expeditious manner and for the benefit of all persons in Turkey, it must advocate improving the quality and standards of public administration in Turkey. Ombudsman institution must have good ties with academia and alliance with media and apart from those parliamentary actions in the wake of an ombudsman, investigation is another important issue.

Establishment an ombudsman institution in Turkey plays a supportive and facilitative role in the on the path goes to the full membership of the European Union. However, further efforts are needed to align the ombudsman institution with EU standards specially in order to consolidate the

trust of civil society in the ombudsman to grant the ombudsman the right of own initiative and of conducting on the spot checks, and to provide for parliamentary follow-up of his recommendations (Alyanak 2015). Moreover, the Ombudsman Institution's power publicly name the public institutions not accepting recommendations pressures them to accept recommendations to prevent possible damage to their reputation among the public. The ombudsman has the authority partially or fully refuse applications under certain circumstances. If an application is about ongoing legal process or issues resolved by litigation, it refused without passing on to further stages (Duran 2021).

The duties of the ombudsman at the time of its first appearance were defined in a basic framework and the protection of freedoms, against the mismanagement of individuals the protection of rights, the fundamental principle of fairness in the ruler-administered relationship. The ombudsman's job is to find the faults of the administration. The main purpose of the Ombudsman is the individuals who think that they have been subjected to any injustice to evaluate their applications, to help them seek their rights and to provide solutions being a follower of the discovery process (Gunes 2018).

Results and analysis

The table below shows the total number of appeals received by the Ombudsman from 2018 to 2021 in Kazakhstan and Turkey (Table 1). Compared to the ombudsmen's reports for 2021, the activity of citizens to contact the ombudsman is increasing.

Table 1 – Number of applications received in the period from 2018 to 2021

Years	2018	2019	2020	2021
Kazakhstan	1468	1090	1201	1855
Turkey	17.585	20.968	90.209	8.843

Table 2 – Types of ways for citizens to apply to the ombudsman in 2021

How to apply	Kazakhstan	Turkey
Center	258	17
in hand	16	461
Mail	158	3.192
E-application	443	15.158
E mail	260	15
Total	1855	18.843

As a method of application in 2021, the report shows that most of the citizens of the two countries apply by e-application and E-mails (Table 2). In comparison with 2020 in 2021, there is an increase in number of complaints of Kazakh people about the actions of law enforcement agencies (217%) and disagreement with the court decisions (236%), as well as actions in the penal and correctional system (288%).

In 2021, based on the report of the Ombudsman, 20.36% of Turkish citizens lodged complaints against public workers, 19.26% against law enforcement and justice authorities, 10.95% against education sphere, and 10.63% against local authorities. As we have seen from the given information, citizens often complain about the actions of law enforcement agencies and state employees.

In general, the ombudsman has his own peculiarities, features of the institution of the ombudsman can be characterized as follows:

- 1) Protection of the rights and freedoms of man and citizen;
- 2) Independence and not accountability;
- 3) Has immunity;
- 4) Impartiality;
- 5) The right to request documents and information;
- 6) Availability and economy;
- 7) Recommendations and public speaking.

For comparison, if we analyze the activity of ombudsmen (commissioner for human rights) in two countries, the objective is to provide the state guarantee for protection, observance and respect of rights and freedoms of a person and citizens, legal status – independent, non –partisan and not accountable to the state bodies and persons. Term of office of Ombudsman in Kazakhstan is 5 years, in Turkey – 4 years. Many scholars mention the importance of the ombudsman institution in every state. Strengthening the legal status of the ombudsman and expanding the range of competencies also determines its role in the legal system of the country. Since 2023 Kazakhstani Ombudsman in accordance with subparagraph 15 Article 17 of the Constitutional Law «On Human Rights Ombudsman» stipulates that «an individual and a citizen may appeal to the Constitutional Court of the Republic of Kazakhstan with regard to compliance of normative legal acts concerning rights and freedoms set forth in the Constitution of the Republic of Kazakhstan». That is the Ombudsman within

his competence has right to appeal directly to the Constitutional Court against legal norms affecting human, civil rights, and freedoms. In general, the Institution of Ombudsman is structure that protects the rights and freedoms of citizens, as required by law, in case of trust in public authorities and doubts about the legality of actions of public authorities.

Conclusion

The post of Human Rights Ombudsman has been established in Kazakhstan, and it has been working for several years already. However, the word ombudsman (commissioner for human rights) still sounds ambiguous to Kazakhstanis. Citizens are still not sufficiently aware of what the ombudsman does. Therefore, it is of particular importance to promote the goals and activities of the ombudsman institution among the public, i.e., to work closely with the mass media. The main task of the constitutional reforms carried out in the country is to improve the well-being of society, people and citizens and to take the protection of their rights as hostages of the state. Proof of this is the adoption of the Constitutional Law “On Ombudsman” adopted on November 5, 2022.

To ensure the rights of the citizens of the Republic of Kazakhstan at the appropriate level worthy of international human rights standards some work is in progress. However, further improvement of the law for benefit of the people should be continuing out by studying the experience of foreign countries. For this purpose, on November 30, 2022, Kazakhstan and Turkey signed the Memorandum of “Cooperation and Interaction” between the Commissioner for Human Rights. The overall objective is to inform the parties about the violated rights of citizens on the territory of the two countries and to provide assistance, exchange of experience. To summarize, we can say that the ombudsman (Ombudsman for Human Rights) is a phenomenon conditioned by social necessity. That is, working as a mediator between the state and individuals, he performs a huge work to reflect possible conflicts in the country and protect personal interests.

In conclusion, for the ombudsman institute to work in accordance with international standards of the highest level, it is necessary to improve the legislative framework, improve its legal status, and expand its powers.

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