

# The Ombudsman Institution as a Determining Factor in the Transition to Democracy

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*Like many other countries, Ukraine studied and applied the experience of Scandinavian countries to establish a powerful ombudsman institution – the Ukrainian Parliament Commissioner for Human Rights. In political crisis, the Ombudsman serves as a mediator between citizens and the state, and bears a great responsibility for deterring the government from irresponsible actions during crisis. Sadly, in countries that are in transition, governments often become the principal violators of human rights and freedoms. Therefore, the Ombudsman is always bound to be in constructive opposition to the government. A special function of the Ombudsman in a transition period is to promote the implementation of international human rights standards. This paper reviews the Ombudsman's investigations and struggles for the protection of fundamental human rights during the past 10 years, from the protection of those wrongly imprisoned to complaints about the judiciary to recommendations to fight piracy. The fight for real, unrestricted freedom of speech and of the press is a current priority. The global financial crisis has also further aggravated existing problems and frustrated many hopes for social justice. In this, we all bear an important task and high responsibility to ensure the progress of society toward effective democracy, based on respect for human rights and freedoms.*

Historically, the establishment of the Ombudsman's office in Sweden was closely related to the tragic events of old times that took place on the territory of the present Ukraine. The first Ombudsman in Sweden was established during the critical period of the country's history, after the defeat of the Swedish King Charles XII in the Great Northern War. At the suggestion of the Hetman Mazepa, who abandoned his allegiance to the Russian Czar Peter and allied himself with Charles XII, the Swedish troops turned into the territory of Ukraine and besieged the town of Poltava before being defeated by the Russian Army in the well-known Battle of Poltava – the 300<sup>th</sup> anniversary of which was commemorated on June 27, 2009. Charles XII was forced to retreat to the territory controlled by the Turkish Sultan, where he spent many years in exile.

The hardships of the long-lasting war, the defeat, and the King's prolonged absence from the country were all too much of a burden for the people of Sweden. The situation was further aggravated by the arbitrariness of the civil servants. Maladministration and abuse of power were causing riots. The need to safeguard the citizens' rights and interests from infringements by civil servants during this social crisis inspired the establishment of the Office of

the Royal Supreme Ombudsman (*Konungens Högste Ombudsman*) by Charles XII in 1713. Based on the socially rewarding experience of the Royal (and later Parliamentary) Ombudsman, the latter was eventually enshrined in the Constitution of Sweden in 1809.

As such, the legal institution established during a severe crisis has become crucial for overcoming the social challenges for human rights and freedoms associated with such crises. Throughout the history of mankind, the adoption of democratic principles has always been preceded by a transition period, and Ukraine is no exception. Like many other countries, Ukraine has studied and applied the experience of Scandinavian countries (Sweden, Finland, Denmark, and Norway) to establish a powerful ombudsman institution – the Ukrainian Parliament Commissioner for Human Rights.

### Establishment of the Ombudsman institution during the transition period

One of the most difficult problems the Ombudsman of Ukraine has to face is the political crisis in the country, stemming from the fact that for many years the government has cynically neglected the dignity and interests of the working people. This prominently manifested itself in the winter of 2004-2005 during what became known as the “Orange Revolution.” In those winter days, I, together with the Chairman of the Ukrainian Parliament, had to try to dissuade thousands of protesters from storming into the Parliament building. For an hour, in the minus-15-degree cold, we tried to convince the people that any destructive actions would only have a more damaging effect on their rights and freedoms. Fortunately, the voice of the Ombudsman was heard.

Another no less difficult task of the Ombudsman, in view of a political crisis, is to prevent the use of law enforcement agencies and the judiciary as the means of political oppression. I have had to fight for the release of illegally detained opposition members who would later become Prime Ministers, and former ministers who would later become opposition, from detention facilities. During the years of the political crisis, I managed to revoke illegal arrests of five governors from regions with a combined population of more than 10 million.

In political crisis, the Ombudsman serves as a mediator between citizens and the state, and as such, one must be independent and neutral, and must act in accordance with one’s oath, the national legislation, international standards, the principle of justice, and the principles of one’s own conscience. That is why the Ombudsman bears a great responsibility for deterring the government from irresponsible actions during crisis.

The development of the Ombudsman institution was marked by large-scale, systematic violations of human rights. Over the course of the last 10 years, the Ombudsman of Ukraine has received complaints from approximately 1 million people. It would be hard to believe for some of my colleagues that the Ukrainian coal miners did not receive their earned pay for

more than three years, or that the only chance for their families to collect the debt came in the form of a miner's death on the job.

The crisis was marked by the large-scale poverty, which the government persistently refused to admit. The problem of poverty in Ukraine was officially acknowledged on the state level only after the Human Rights Commissioner and the UN Office in Ukraine had raised the issue.

The Ombudsman initiated the development of the state program for poverty alleviation, as well as ongoing monitoring of the right to adequate living standards – covered in the Annual and Special reports of the Ombudsman of Ukraine. The Ombudsman institution develops amendments to legislation, as well as proposals for ratification of conventions of the UN, the Council of Europe, and the International Labor Organization. Another important function is to handle specific problems of the most vulnerable social groups – disabled persons, pensioners, unemployed workers, large families, women, and children.

Between 2007 and 2008, Ukraine dropped from 76<sup>th</sup> to 83<sup>rd</sup> place in the UN Human Development Index rankings. According to the World Bank's criteria, approximately 70% of the population of Ukraine lives in poverty. It was solely due to the Ombudsman's persistence that the problem of poverty was acknowledged, forcing the government to start working on poverty alleviation. At the core of the problem of the poverty in Ukraine, despite its developed industry and agriculture and the population's high level of education, lies, first and foremost, the flagrant violation of the right of the larger part of the society to access national wealth and resources.

It is my conviction that the governments of the world, transnational corporations, and civil societies have to direct their efforts at poverty alleviation by means of increasing social responsibility of businesses and promoting implementation of decent work programs. Another particularly important issue is the responsibility of the developed countries to establish a free and non-discriminatory world trade system.

The policies of international financial institutions, particularly the International Monetary Fund and the World Bank, must also take account of human rights. However, we are witnessing that even during the global financial crisis, international credit resources are channeled to the wealthiest part of the society while the poor are getting poorer. It is my conviction that in order to support peace, stability, and development, it should not be permissible to use the funds allocated for crisis recovery to benefit the rich at the expense of the poor.

Poverty and unemployment have forced millions of my fellow countrymen to seek a better life abroad. This has led to a large-scale labor migration of Ukrainian citizens, which, according to the Ombudsman's estimates, amounts to 5-7 million people, including seasonal migration.

As the Ombudsman of Ukraine, I realized that it was important to break the stereotypes of labor migration held by the government and the population and thus make the state address the problems of our many citizens working abroad, implementing effective safeguards of their rights.

To this end, I prepared the first Special Report of the Ombudsman of Ukraine, *The State of Observance and Protection of the Rights of the Ukrainian Citizens Abroad*. As the Ombudsman, I argued against double standards in relation to migrants – Ukrainians abroad and foreigners in Ukraine. This resulted in the signing and ratification by the Ukrainian Parliament, on the initiative of the Ombudsman, of the *European Convention on the Legal Status of Migrant Workers of 1977* in 2007.

With a view to improving the protection of the rights of migrants, the Ombudsman of Ukraine has developed and signed bilateral cooperation agreements with the Ombudsmen of the countries where a great number of Ukrainian migrants work, i.e. Russia, Poland, Azerbaijan, Portugal, Spain, and France, as well as with the Ombudsman of Buenos Aires, the capital of Argentina, where the Ukrainian community is estimated at over 200,000 people.

I have to note our effective cooperation in protecting migrants' rights with Thomas Hammarberg, the Council of Europe Commissioner for Human Rights. In February 2007, Mr. Hammarberg contacted me with a request to protect the right to life of Zinaida Voloshyna, a stateless woman who by then had spent more than 13 years in prison in Abkhazia. For the last five years, she had been very ill and confined to bed.

The Ombudsman conducted an impartial investigation into the life of Mrs. Voloshyna, who had moved to Abkhazia back in the Soviet times, where she was involved in a very tragic situation during the war of 1994 and consequently sentenced to death. It was later discovered that the court's verdict was illegitimate. On March 30, 2001, the Panel of the Supreme Court of the Republic of Abkhazia commuted her death sentence to 15 years in jail.

The Ombudsman of Ukraine spent three months fighting for the woman's early release and return to her Homeland. We managed to organize the transfer of Mrs. Voloshyna, who was by then paralyzed. By April 26, 2007 she was out of prison and back in Ukraine, at a hospital in the Crimea.

About a year later, Zinaida Voloshyna expressed her deep gratitude as she met with Mr. Hammarberg in Kiev during the International Conference on the occasion of the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights and the 10<sup>th</sup> Anniversary of the Ombudsman of Ukraine. With our assistance, she registered at her elderly mother's place of residence and finally obtained her long-awaited Ukrainian passport.

It is also necessary to focus our attention on the effects of international maritime terrorism, specifically maritime piracy, which is one of the manifestations of the present global crisis – tragic gaps in social and economic development between nations. Neither Ukraine nor other countries were prepared for that new challenge to human rights and freedoms.

One of my first successful missions as the Ombudsman was the release from captivity of 27 Ukrainian seafarers – the crew members of the *MV Dubai Valour* captured in Nigeria – at the request of the seafarers' wives and mothers in 1998. Following that, there were other extremely difficult missions, such as the release and repatriation of the captain and the first mate of the *MV Navstar-1*, who were arrested and convicted in Iraq and experienced the horrors of the notorious Abu-Ghraib prison. Over the last 10 years, the

problem of protection of the sailors' has become much worse, due to rampant maritime piracy.

At the moment, 17 foreign ships and almost 300 seafarers (60 of them, or one-fifth, are Ukrainians) are held captive by pirates. It should be noted that Ukraine is the second only to the Philippines in the number of seafarers captured by Somali pirates; however, safeguarding their security still remains totally unregulated.

The first response of the Ombudsman of Ukraine to this situation was the request to ratify the UN Convention on the Law of the Sea of 1982. The second one was the recommendation for the Cabinet of Ministers of Ukraine to establish an Interagency Coordination Council for countering piracy. Then the Ombudsman of Ukraine held direct negotiations with the government officials of Kenya, the United States, and Russia, in the case of *MV Faina* in order to prevent the use of force for its release that would inevitably entail casualties among its crew.

It is my conviction that within this context, Ukraine should accede to the EU ATALANTA anti-piracy action plan as soon as possible, which would mean that the Ukrainian vessels as well as those with Ukrainian citizens on board would be safely escorted by EU ships off the coast of Somalia. I believe we need joint and coordinated efforts of both ship owners and freight consigners to ensure security of seafarers in the Gulf of Aden and similar areas. This was never the case with the *MV Faina* crew that became hostage of the pirates, or in other subsequent cases.

Besides, without poverty alleviation throughout the African Continent, including actions against the humanitarian disaster in Somalia, it will be impossible to eradicate piracy. The international community and organizations need to coordinate their efforts and find solutions to these global challenges.

Unfortunately, in countries that are in transition, governments often become the principal violators of human rights and freedoms. Therefore, the Ombudsman is always bound to be in constructive opposition to the government. The Ombudsman institution as such is not established with assistance of the government but rather against its will.

Unprotected groups, such as detainees, are especially vulnerable vis-à-vis the state. Over the last decade, my colleagues and I have spent more than two years of my working time in various detention facilities, fighting for detainees' rights.

According to our monitoring, approximately 1 million people get arrested by Ukrainian law enforcement officers each year. Their legitimate rights can be violated, as proved by the growing number of complaints from victims of the physical violence etc.

It took me a few *ad hoc* visits to detention facilities to make the government acknowledge torture in Ukraine. Eventually, on the initiative of the Ombudsman, the Parliament ratified the Optional Protocol to the Convention against Torture of 2002. The Cabinet of Ministers supported my proposal to establish an independent national controller against torture. This was preceded by a high-profile Ombudsman case: for the first time in a country of the former Soviet Union, the Ombudsman filed a lawsuit against the state,

namely the Security Service of Ukraine and prosecution agencies, for compensation of damages to the parents of 26-year-old Yuriy Mozola, who had been tortured to death in the Security Service isolation ward in Lviv. He was wrongfully charged with a crime he had never committed and chose death rather than admitting the crime.

Based on our monitoring, I came to the conclusion that it was necessary to reconsider the use of the special task force units within the penitentiary system. The UN Committee against Torture also questioned their approach, particularly wearing special masks, believed to intimidate detainees.

During one of my *ad hoc* visits, I discovered that the Security Service detention facility in Kiev, which was supposed to be closed down at the request of the Council of Europe in 2003, was still operating. As the Ombudsman, I publicly stated that it was, in fact, a secret prison, the use of which was strictly forbidden.

A special function of the Ombudsman in a transition period is to promote the implementation of international human rights standards. Much has been done in Ukraine to this end. On the initiative and with direct assistance of the Ombudsman, the following International and European Conventions were ratified or signed: the UN Convention Relating to the Status of Refugees of 1951, the European Convention on the Legal Status of Migrant Workers of 1977, the UN Convention against Transnational Organized Crime of 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the UN Convention on the Rights of Persons with Disabilities of 2006.

Since 2000, the Ombudsman of Ukraine has advocated at the highest level for Ukraine to accede to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 – a document that provides a breakthrough in securing and protecting the rights of migrant workers, including illegal migrants.

As Conference participants, you will also have an opportunity to familiarize yourselves with the Special Report of the Ombudsman, *The Status of Observance of the International Standards for Human Rights and Freedoms in Ukraine*, presented by the Ombudsman of Ukraine to the Parliament of Ukraine on December 10, 2008, the day of the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights.

The transition to democracy would be impossible without a fundamental reform of the judiciary. Under the present conditions, people do not see the Ukrainian judiciary as a fair and reliable means of protection of their rights. Since the establishment of the Ombudsman's office, I have received more than 100,000 complaints from citizens on their violated right to judicial protection. Most of these complaints concerned untimely and inadequate court proceedings, the violation of the right to appeal against court decisions, and/or their inappropriate enforcement.

It is no coincidence that Ukraine is one of the leading Council of Europe member states, in terms of the number of complaints per capita to the European Court of Human Rights, as 25,000 Ukrainians have filed lawsuits against violation of their right to a fair trial to the Strasbourg Court.

Cooperation between the Ombudsman of Ukraine and the judiciary resulted in the legislative approval of the Ombudsman's Office participation in the Judicial Qualification Commissions for law, military, and specialized courts, and personal participation of the Ombudsman in the Higher Judicial Qualification Commission of Ukraine. This new function enables the Ombudsman to have a say in the appointment of the Ukrainian judges and to request dismissal of the corrupt judges.

The Ombudsman's persistent stand has contributed to the successful establishment of an administrative court system to ensure protection from illegal actions of the central and local government officials in Ukraine. However, efforts were made to liquidate the High Administrative Court of Ukraine. Last year in September, I had to defend judges and officials of the Kiev District Administrative Court after it was nearly dismissed by the President of Ukraine for having made several decisions concerning the election process.

The Ombudsman of Ukraine actively cooperates with the Constitutional Court by exercising the right to file constitutional appeals. The Ombudsman provides expert legal comments for the Court on the issues related to the constitutional rights and freedoms. One of the first decisions adopted by the Constitutional Court of Ukraine on a submission from the Ombudsman was to declare depreciated personal deposits held at Sberbank – the Savings Bank of the USSR – to be the individual property of the depositors, and to acknowledge the right of the citizens of Ukraine to receive the deposits, thus setting a precedent for the countries of the former Soviet Union.

Another example of such cooperation is the case with the constitutional appeal by the Ombudsman and the President of Ukraine to declare a 2008 Cabinet of Ministers Decree making the State Migration Service subordinate to the Ministry of Internal Affairs of Ukraine, a law enforcement agency, unconstitutional.

At the Cabinet meeting before the adoption of that Decree, I argued that the decision was unconstitutional and would lead to a conflict of interests within the Ministry of Internal Affairs since the goal of the State Migration Service is to protect the rights of refugees, asylum seekers, and illegal immigrants, while the goal of the Ministry of Internal Affairs is to counter illegal migration. Besides, Ukraine had committed to implement the European Union recommendations on the establishment of an independent, centralized civil executive agency for migration.

After the Constitutional Court of Ukraine had admitted the constitutional appeal, the Cabinet denounced the Decree in question and adopted another one to the same effect. The Ombudsman had to submit another appeal to the Constitutional Court. Only when it became obvious that the Court would most likely declare the Cabinet Decree unconstitutional did the Cabinet of Ministers denounce it without giving the Constitutional Court a chance to rule.

The Ombudsman could not have performed the difficult tasks associated with the transition period without the effective support of mass media, which, in turn, requires perseverance in the area of protection of the freedom of speech and the right to information. The Ombudsman has initiated an amendment to the Criminal Code of Ukraine establishing criminal responsi-

bility for the obstruction of professional activities of journalists. However, Ukraine has not yet managed to comply with the international norms and standards in this field.

It is my conviction that the main problems with the freedom of speech are related to the dangerous trend of “buying” journalists, as the administrative censorship at the early stage of development of the independent state was replaced by financial censorship. An oligarch or a political party publisher can dictate editorial policy and subject journalists to his will. These days, government agencies and local self-governments, oligarchies, and political parties put unprecedented pressure on mass media and journalists, and can even resort to violence against them. This is why I keep stressing that there can be no talk of democracy in Ukraine until the outrageous murder of journalist Georgiy Gongadze is finally solved. This is also the reason why the investigation of this case by the Ombudsman will not cease until those who ordered the murder for political reasons have been identified and punished.

More recently, the editor-in-chief of the Crimean newspaper *Yevpatoria Weekly*, Vladimir Lutyev, fell victim to the revenge of certain criminal organizations and was wrongfully convicted for his investigative reports. As the Ombudsman, I spent six years fighting for the journalist’s right to practice his profession until Mr. Lutyev was released from custody in March of 2007 by the Supreme Court of Ukraine, and was acquitted on all charges in September of 2008. That acquittal is still unique for Ukraine, where people commonly suffer from the arbitrariness of the judiciary.

In this respect, a new objective has emerged for me as the Ombudsman, namely to address the urgent tasks concerning provision of real and unrestricted freedom of speech. These include adopting the draft law on protection of journalists’ professional activities that was submitted to the Ukrainian Parliament a long time ago; setting up public TV broadcasting as a means to prevent monopolization and oligarchization of the information market; and establishing effective control of the highest permissible concentration of mass media by a single owner, including family members.

It is my conviction that these measures will secure the right of our citizens to objective, truthful, and non-partisan information, as they will bind the media to work appropriately as a real mediator between the state and the society, as opposed to being an instrument of political influence and manipulation vis-à-vis viewers, listeners, or readers.

The global financial crisis has only further aggravated the existing situation and frustrated many hopes for social justice. The sharply increased unemployment, as well as underemployment, multiple shutdowns and closures of enterprises, the rise in wage arrears, and other numerous violations of labor rights further contribute to poverty, inequality, and all forms of discrimination.

It is high time to re-assess the values that form the basis of the protection of human rights and freedoms. We have to admit that economic, political, and ideological liberalism has discredited itself. In a society where human rights are respected and secured, we need to rely more extensively on the values of international solidarity. Therefore we welcome the appointment of the Inde-



pendent Expert on human rights and international solidarity by the UN Human Rights Council.

We have to join our efforts to promote the principles of multiculturalism and respect for every person and every culture as a universal legacy in view of other challenges to human rights and freedoms spurred by the global crisis, i.e., increased racism, xenophobia, and discrimination, and the growing danger of the rise of neo-fascism.

Most importantly, we have to employ more extensively the principle that formed the basis of the Chinese tradition for protection of human rights and freedoms, that is the principle of harmony between the individual and the society, man and nature, collective and individual efforts, and the sovereignty and identity of all nations.

In this time of the global crisis, we all bear an important task and high responsibility to ensure the progress of society toward effective democracy, based on respect for human rights and freedoms. With this in mind, I would like to wish all of us strength and perseverance.

To sum up my report, I would like to stress that the transition period in Ukraine is far from being over, hence it is particularly important to identify the priority tasks of the Ombudsman institution.

The 11 years of the Ombudsman institution in Ukraine have proven that the authors of the Law on the Ombudsman made no mistake in adopting the classic model, i.e. the strong, Scandinavian-influenced model. However, over time the Ukrainian model has revealed some flaws. Therefore, our priority tasks include the following:

- Bringing the Ombudsman institution closer to the people and making it more open and accessible by establishing a new regional presence and strengthening the existing five regional offices;
- Multiplying the efforts aimed at protection of the rights of the most vulnerable groups; strengthening the activities of the Ombudsman that are of the highest priority in Ukraine today, particularly regarding protection of the rights of minors, disabled persons, veterans, military servicemen, ethnic minority groups, migrants, and refugees, as well as the freedom of belief and religion;
- Strengthening the authority of the Ombudsman in view of the social crisis; drafting and introducing amendments to legislation currently in force to give the Ombudsman of Ukraine the power to initiate legislation, as well as to participate in any stage of the court proceedings which, in my opinion, would contribute to more effective protection of human rights and freedoms; and
- Consolidating international coordination and cooperation between national human rights institutions under the auspices of the Council of Europe Commissioner for Human Rights and the UN High Commissioners for Human Rights.

Last year, many of you participated in the International Conference on the occasion of the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights and the 10<sup>th</sup> Anniversary of the Ukrainian Ombudsman institution,

*Modern Challenges to Human Rights and Freedoms*. The declaration adopted by the conference acquires special significance in view of today's global crisis.

Further to my report, I would like to present to you a documentary film chronicling the everyday work and the scope of missions of the Ombudsman of Ukraine – attending to the deprived masses, low-paid workers, coal miners facing high risks in work-related accidents, the Orange Revolution participants, relatives of victims of torture and political killings, and prisoners; legal defense of the wrongfully convicted journalist Lutyev; ensuring the protection of the rights of military servicemen and veterans; protecting the memory of the II Great Patriotic War soldiers; protection of the rights of the Ukrainian migrant killed in front of his pregnant wife by a Polish police officer; addressing the needs of little six-year-old girl Nastya, the youngest to be awarded the title of the Hero of Ukraine, who saved her two-year-old sister from the fire while suffering bone-deep burns herself; protection of the rights of seafarers in Iraq's Abu Ghraib prison or held captive by the Somali pirates; securing the release of Zinaida Voloshina from the prison in Abkhazia; and many other missions. The film's protagonists are the Ukrainian people. I believe that every person has the right to happiness.