

Ukrainian Helsinki Human Rights Union

Olehivska str. 36, office 309, Kyiv city, Ukraine, 04071

Phone/fax: +380 44 4174118, e-mail: office@helsinki.org.ua, <http://www.helsinki.org.ua>

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A short analysis of the work of the Human Rights Ombudsperson in Ukraine

The office of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine (hereafter the Human Rights Ombudsperson) is the only government institution in Ukraine created to defend human rights and fundamental freedoms. The Human Rights Ombudsperson is empowered to exercise parliamentary control over the observance of these constitutional rights and liberties.

The relevant law, passed in December 1997, was based on the model of what they call a “weak” Ombudsperson who does not consider the kind of appeals which are reviewed by courts, and terminates consideration already commenced if the party involved lodges a civil law suit, application or complaint with the court. The law envisages a fairly wide mandate for the Human Rights Ombudsperson who has the right to receive any information, including that which is classified and see any documents; to visit unimpeded any state institutions or bodies of local self-government, enterprises and organizations, including any “closed” institutions, and to question any individuals held there; to be present at sessions of any state authorities, courts at all levels; to ask to see officials and civil servants in order to receive explanations, to demand from them assistance in checking the activities of institutions, enterprises and organizations under their control; to approach the court with an appeal defending human rights and freedoms; to inspect the situation with observance of human rights and freedoms by state bodies including those carrying out investigative operations. All structures approached by the Human Rights Ombudsperson are bound to cooperate and provide all necessary assistance, in particular by ensuring access to all documents and other materials, by providing information and also giving explanations as to the actual, and the legal grounds for their actions and decisions. Interference by any public authorities or bodies of local self-government in the activity of the Ombudsperson is prohibited, and the latter is not obliged to give any explanations with regard to the substance of any cases either presently being investigated or upon their completion. Having completed examination of a complaint, the Ombudsperson sends a submission to the relevant body on eliminating the violations of rights and freedoms identified, this requiring enforcement within a month. In fact, however, the law stipulates no liability for violations of the Ombudsperson’s mandate or for failure to comply with his/her submission.

This institution for the defence of human rights, previously unknown in Ukraine, is thus based on the high moral standing of the Ombudsperson whose decisions and suggestions should be heeded by the authorities and the public. However, since in Ukraine neither the authorities nor society have too much respect for human rights, the Ombudsperson’s job was not always easy. Having begun without any financing and without premises, the Secretariat of the Ombudsperson was immediately inundated with vast numbers of complaints all of which it was in fact simply impossible to cope with. However, being concerned and extremely energetic, Nina Karpachova gradually achieved notable success. This is evidenced, for example, by the enormous difference between the first and second annual reports. If the first was to a large extent of an academic nature, the second was the report of an active and productive human rights institution. It was largely a case of “putting out fires”. Maybe

at that time this was the only possibility for protecting people in the country, by bringing specific cases to conclusion. It was extremely difficult then to build a system for human rights protection at that time.

From 1999 – 2003 Karpachova took an active role in a number of high-profile cases, often against the wishes of the highest echelons of power. Flaccid legislation notwithstanding, she was able to force government bodies to reckon with her opinion and her assessments. She intervened in some instances of heated conflict, such as those around the events of 9 March 2001¹, and pointed to violations of human rights whatever the political circumstances. When the first 5-year tenure ended, her election to a second term in May 2003 was by no means straightforward since the Presidential circles wanted to see a more amenable and malleable person in that position. However there were virtually none willing to take on an extremely difficult job. Human rights organizations, believing that there was no better candidate for the position, actually sent many appeals to parliament calling on the latter to elect her again. As a result she began a new term in office.

From spring 2004, the views of the Ombudsperson and of the majority of human rights organizations regarding the political processes in the country began to diverge, and in some issues became even diametrically opposed. For example, in her third report (in July 2005), Karpachova claimed that there had been no change for the better as regards freedom of speech and that there were numerous cases of political repression. It would be difficult to agree with such an assessment. It gradually became ever more evident that Nina Karpachova had adopted the position of the Party of the Regions, losing therefore impartiality and independence, and that she was increasingly involved in promoting her own image. This could be seen during the Presidential campaign of 2004. Her voice was not heard when hundreds of young people from “Pora” were unlawfully detained. It became clear to all when she took part in the 2006 elections.

In our view, the prohibition stipulated in the Law on the Human Rights Ombudsperson against holding representative office means that the Ombudsperson has no legal right to take any steps aimed at being elected to such office in the immediate future. After all, participating in the elections as a candidate for the office of National Deputy is a nationwide statement of overt political preferences and party leanings. One should also note that Nina Karpachova effectively held second place on the candidate list, following only the leader of the party. This demonstrates that the image, authority and power of the position of the Ukrainian Human Rights Ombudsperson were deliberately used to serve the interests of one specific political force. Moreover, if the objective, as indicated in the law, of holding office is clearly unlawful, then specific and conscious steps taken to achieve this objective must also be deemed unlawful. Otherwise we would have to acknowledge effective permission to engage in open speculation on legislative norms, to abuse formal law in a way quite transparent to the general public, and to show disregard for the legislative guarantees of the Human Rights Ombudsperson’s impartiality. Regrettably Nina Karpachova resorted to overt (and, according to some human rights colleagues, cynical) abuse of the law during the parliamentary election campaign.

Later, having been elected to parliament, Nina Karpachova did not herself resign from office as Human Rights Ombudsperson, thus infringing the Law on the Human Rights Ombudsperson which expressly prohibits combining this office with any representative mandate. “The Human Rights Ombudsperson may not hold a representative’s mandate or occupy any other paid or unpaid office in government bodies” (Article 8 § 1).

The Law also states (in the same Article) that the Ombudsperson “may not be a member of any political party”. This effectively means that the Ombudsperson must be apolitical, with his or her

¹ 9 March 2001 was the last day of confrontation between the mostly young activists of the organization “Ukraine without Kuchma”. Around a thousand activists were detained and/or beaten up by law enforcement officers, many targeted at stations, bus stops when heard speaking Ukrainian. The protest movement suffered a serious setback.

candidacy being agreed by both the ruling party or coalition, and the opposition. In other countries, the Human Rights Ombudsperson is usually elected by a qualified, rather than a simple, majority. In the case of Ukraine, this office has become extremely politicized.

Of major importance is the Ombudsperson's right to make submissions to the Constitutional Court since members of the public may not themselves approach the Court. However Nina Karpachova has only made four submissions during her entire period in office, although in our view the need for these was considerably greater. The Ombudsperson should, first, have asked the Constitutional Court to provide an interpretation of social and economic rights to prevent them appearing like purely Soviet guile. For example, what is meant by "a standard of living sufficient for himself or herself" and does the minimum subsistence level ensure such a "sufficient level". Secondly, the Ombudsperson was simply obliged, I believe, to ask the Constitutional Court to assess the new procedure for allocating pensions, to determine whether or not they discriminate on age or other grounds. A third submission would be in defence of the right to information, putting forward a question about the unlawful restrictions to access which are in breach of the Constitution. This list of possible submissions the Human Rights Ombudsperson could make to the Constitutional Court could go on and on.

The Ombudsperson's level of communication with the public also leaves a great deal to be desired. By law the Ombudsperson must provide an annual general report on the human rights situation in the country, and there may also be special reports. However in almost nine years there have been a total of only three general reports – in 2000, 2002 and 2005, as well as on special report on the rights of Ukrainians working abroad. There have only been five Bulletins of the Human Rights Ombudsperson. All of them contain either international agreements or submissions and letters from the Ombudsperson, or her speeches, and contain a lot of photographs of Karpachova herself. The Ombudsperson's website is not updated very often, 5 or 6 times a months, and is not, in our view, particularly informative. You can find the reports, bulletins, press releases, regulations about the Secretariat of the Human Rights Ombudsperson and its representatives, You cannot, however, get answers to questions regarding the Secretariat's structure and its staff; how many appeals have been received, what kinds of violations people are complaining of; which government bodies are involved; a social portrait of the people making the complaints; how many complaints have been resolved by the Secretariat and how many were sent for review to other government bodies, and about the success rate on resolving the problems people have approached the Ombudsperson with. There is no such information on the site, and there is also virtually no information about the Secretariat's budget and how it is spent. There is only some similar information for 2005, but very short on substance and giving little idea about the work of the Ombudsperson. The Secretariat does not provide substantive answers to formal information requests asking about the Ombudsperson's activities deeming these to constitute interference. This is despite the fact that the Law "On information" clearly applies to the Human Rights Ombudsperson.

It is thus difficult to assess how effective the Ombudsperson's work is. In the Government's responses to questions posed by the UN Committee against Torture regarding Ukraine's Fifth Periodic Report on its implementation of the UN Convention against Torture, it is asserted that over the period that the office of Human Rights Ombudsperson has existed in Ukraine, more than 712 thousand Ukrainian citizens, foreign nationals and stateless persons have turned to it with appeals falling within the Ombudsperson's competence, with investigations into violations of rights and freedoms being initiated in 35 percent of these cases. Apparently, as a result of the investigation each third violation was eliminated. These figures would seem improbable if one simply compares them with the number of working hours of the staff of the Secretariat. The question arises why such information is sent to the UN but is not communicated to the Ukrainian public?

Some actions of those in the Secretariat suggest a total lack of understanding of human rights issues. For example, complaints from prisoners alleging unlawful behaviour by the staff of penal institutions are constantly sent to the State Department for the Execution of Sentences for "measures to be

taken”. Secretariat staff should at very least ensure minimum guarantees of safety of those making complaints, and specifically confidentiality of information received. Principle 33 (3) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: “Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant”. The prisoners who send complaints to the Ombudsperson alleging unlawful treatment clearly do not expect their complaints to be passed to precisely those people the complaints refer to. Such treacherous behaviour is absolutely unacceptable. We would note that the UN Committee against Torture drew attention to the question of ensuring confidentiality in their Conclusions and Recommendations with respect to Ukraine’s Fifth Periodic Report on its implementation of the UN Convention against Torture. It stated²:

“The State party should ensure that the Ukrainian Parliament Commissioner for Human Rights functions effectively as an independent national human rights institution, in accordance with the Paris Principles, and with independence from political activities, as specified in the “Law on the Ukrainian Parliament Commissioner for Human Rights” of 1997.

The State party should provide the Committee with detailed information on independence, mandate, resources, procedures and effective results of the Ukrainian Parliament Commissioner for Human Rights and ensure that the complaints received by the institution remain confidential so that complainants are not subjected to any reprisals.”

The Law on the Human Rights Ombudsperson envisages the option of the Ombudsperson appointing representatives. It would be desirable to have such representatives in each of the 27 regions of the country since the central office in Kyiv is simply not able to deal with the large influx of appeals received. Karpachova has not, however, done this, claiming lack of funds. In 2006 the Secretariat’s budget was nearly 20 million UAH which is no small sum for an office with 120 members of staff. The appointment of regional representatives would strengthen control over the human rights situation at local level. As well as delegating powers to regional representatives, it would also be expedient to have representatives with specific focus, by creating the positions of three specialized Ombudspersons – on the rights of the child, on minority rights and freedom of information and protection of personal data. These specialized Ombudspersons could head the relevant departments in the Secretariat however an important prerequisite for their work would be their procedural independence. Yet this has not been done either. As Ombudsperson on the rights of the child Karpachova represented two children which elicited from experts only ironic smiles.

In our opinion, following the Orange Revolution there were a real opportunity to create a State system for the protection of human rights. The key elements of this would be: the creation of a network of regional representative offices, the delegating of powers at regional level and to specialized Ombudspersons; significant improvement in communication and the level of information on human rights issues; development of cooperation between a network of nongovernmental human rights organizations and the office of the Ombudsperson; particular attention to strategic litigations, including those which are likely to be successful in the European Court of Human Rights; as well as organizing cooperation with bar lawyers. These options have yet to be adopted.

What would be ways of improving the effectiveness of the Human Rights Ombudsperson? One would involve changes in the Law on the Human Rights Ombudsperson. Wishing to increase the Ombudsperson’s mandate, Nina Karpachova, together with two colleagues from the Party of the Regions, Edward Pavlenko and Yury Myroshnychenko, tabled legislative initiatives. Draft Law № 2892 “On amendments and additions to the Civil Procedure Code of Ukraine” and № 2893 “On amendments to the Code of Administrative Justice” envisage giving the Human Rights Ombudsperson the status of independent party to civil and administrative proceedings. This would

² CAT/C/UKR/CO/5, 18.05.2007, p.21

enable her/him to become the party to court proceedings at any time, even after the parties' debate. In our view this would constitute direct pressure on the court, and violates the principles of "equality of arms" in court proceedings, as well as the principle of independence of the judiciary. It would effectively be an attempt to give the Ombudsperson the functions of Prosecutor supervision which is unacceptable. Amendments to the Law on the Human Rights Ombudsperson should be based on two premises, firstly that the Ombudsperson cannot take on the powers of the government authorities, and secondly, the activities of the Ombudsperson must not influence the independence of the judiciary. On the other hand, since the judicial system has failings, it would be desirable to give the Ombudsperson the possibility of drawing attention to court rulings which she/he believes to infringe human rights. It would be a good idea to give the Ombudsperson the right to turn to the legally envisaged structures with a recommendation to check court rulings which had already come into effect if there was evidence that during the court procedure, there had been human rights violations which had had an impact on the ruling itself. It would also be appropriate to entitle the Ombudsperson to approach the court on her/his own initiative in cases where a normative act (order, resolution, instruction) which infringes human rights needs to be revoked. As well as the rights already mentioned, it would also be expedient to entitle the Human Rights Ombudsperson:

- to initiate amendments to legislation in the interests of safeguarding human rights and fundamental freedoms;
- to issue formal warnings to public officials responsible for human rights infringements;
- to institute in the public authorities or bodies of local self-government the disciplinary procedure allowed for by labour legislation on officials responsible for human rights infringements;
- to make a submission to the public authorities or bodies of local self-government to dismiss individuals who have repeatedly or flagrantly violated human rights and fundamental freedoms;
- to inform the public via the mass media about human rights infringements by public officials, or cases where public officials have not responded appropriately to appeals from the Human Rights Ombudsperson.

Other serious resources which have yet to be made use of are creating regional representative offices of the Ombudsperson and working in cooperation with nongovernmental human rights organizations. In order to work efficiently with complaints sent to the Human Rights Ombudsperson, it would seem vital to have an electronic database. The development of an internal network within the structure would make it possible within the space of a few minutes to obtain information from any computer in the network about the content and stage of review of any complaint. The system of communication with the public also needs improvement which could be achieved by daily updates of the website of the Human Rights Ombudsperson, regular publication of a bulletin describing and analyzing violations of human rights violations, and fundamental freedoms, television programmes on Ukrainian Television Channel 1 with direct contact between the Human Rights Ombudsperson and the viewers..

On 8 February 2007 parliament with 255 votes elected Nina Karpachova to a third term as their Authorised Human Rights Representative, i.e. Human Rights Ombudsperson. It turned out that civic society which had succeeded in having its candidate put forward in parliament was still not strong enough to force parliament to heed the will of a substantial part of Ukrainian society.

We wish Nina Karpachova every success in restoring her tarnished reputation. Her participation in political activities while at the same time holding office as Human Rights Ombudsperson seriously undermined the authority of the office in general and confidence in her. One cannot sit on two chairs simultaneously; political activities are incompatible with the vital role the Ombudsperson must play in defending human rights. A move is needed away from politics, and towards working quite differently from before. All the more so since public attention on the work of the Human Rights

Ombudsperson has increased considerably since the last elections and this work is now under the close scrutiny of hundreds of human rights organizations.