

## NATIONAL INSTITUTIONS ESTABLISHED IN ACCORDANCE WITH THE PARIS PRINCIPLES, ENGAGED INTO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE SYSTEM OF INTERNAL MEANS OF SECURITY

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### Summary

The purpose of the article is to clarify the place of national institutions engaged in the promotion and protection of human rights in the system of domestic means created in accordance with the Paris Principles. Research methods is the general methods of scientific cognitivism as well as concerning those used in legal science: methods of analysis and synthesis, formal logic, comparative law etc.

The concept of understanding of the organizational and legal guarantees of human and citizen's rights has been improved in the constitutional law science, namely: the classification criterion for division into groups is the possibility/non possibility of exercising any kind of state coercion in the course of jurisdictional/ non jurisdictional activity; representative body (body responsible for ensuring Ukraine's representation in the European Court of Human Rights and coordinating the implementation of its decisions), bodies of the state executive service, private executors are the elements of the system of organizational and legal guarantees of human and citizen's rights; by classification criterion – the protection of human rights and fundamental freedoms is the primary function of the authority-guarantor or similar body of some other kinds of functions – it is substantiated that national institutions engaged into the promotion and protection of human rights belong to the group of authority-guarantor of special competence established specifically to provide guarantees, human rights and fundamental freedoms.

It is proposed within the group of authority-guarantor of special competence established specifically to ensure the guarantees of human rights and fundamental freedoms, to distinguish a sub-group of national institutions engaged into the promotion and protection of human rights: 1) human rights commissions; 2) human rights ombudsmen; 3) anti-discrimination ombudsmen (commissions); 4) human rights institutes (centers); 5) human rights advisory committees; 6) comprehensive human rights institutes.

**Key words:** the legal means, the competence of national institutions; promotion and protection of human rights; international courts; European Court of Human Rights; an intrinsically effective measure that must be terminated when appealing to each of the relevant international courts or international bodies.

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### 1. Introduction

The coordination of the state's guaranteeing functions with constitutional and international standards in the field of human rights determines the relevance and necessity of the

improvement of the theory on guarantees of human rights and fundamental freedoms, as well as the related normative, law-enforcement and other kinds of practices.

For example, the Resolution of the UN General Assembly adopted on December, 18, 2013 called on member-states to establish effective, independent and pluralistic national institutions that promote and protect all human rights and fundamental freedoms for all; and there where they already exist – to strengthen them as provided for in the Vienna Declaration and Program of Action, and, if they are in accordance with the Paris Principles, that is to continue to participate in discussions in all relevant mechanisms contributing to these discussions in accordance with their respective mandates, including reviewing the development agenda for the period after 2015.

In the doctrine of international law, depending on the powers and functions, the following types of institutions are distinguished that promote and protect human rights: human rights commissions, human rights ombudsmen (ombudsmen institutions), and anti-discrimination ombudsmen/commissions, human rights advisory committees, comprehensive human rights institutes. However, specialized human rights institutions with a narrow area of competence (commissions/ombudsmen for the rights of children, women, and other persons) do not comply with the Paris Principles and are not considered a national institution that promotes and protects human rights (Chyksina, 2005; Buletsa, 2019).

The question of whether national institutions established in accordance with the Paris Principles, which promote and protect human rights, are intrinsically effective means that subject to the exhaustion of human rights when appealing of any person to the European Court, has become relevant issue in the science of constitutional and international law. This issue needs to be investigated in the context of the organizational guarantees on the implementation the right of everyone, after the use of all national means, to apply for the protection of their rights and freedoms onto the relevant international judicial institutions or to the relevant international bodies, where Ukraine is being a member of.

At the same time, the analysis of scientific researches testifies that at the top of scientific discussions in the legal literature there are questions of the types, powers and functions of national institutions engaged into the pro-

motion and protection of human rights (e. g. works by D. Belov, Y. Bysaga, A. Wurf, L. Zaidenstiker, R. Karver, L. Rife, V. Chuksina, N. Mishyna and other authors). The question of the constitutionally legal status of certain types of such institutions (ombudsman, human rights commissions) before extending their powers in accordance with the aforementioned resolutions of the UN General Assembly and the UN Human Rights Council had been studied in detail in domestic and foreign countries scientific literature. However, the question of their place created in accordance with the Paris Principles of national institutions dealing with the promotion and protection of human rights in the system of domestic measures has not been the subject of scientific research in literature of judicial content.

The purpose of the article is to clarify the place of national institutions engaged in the promotion and protection of human rights in the system of domestic means created in accordance with the Paris Principles.

## **2. The Rule on termination of domestic means for legal protection**

According to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone, whose rights and freedoms recognized in this Convention are violated, is entitled to an effective measure through the national authority, even if such violation was committed by persons acting as officials. The European Court of Human Rights can only bring the case only after that, when all domestic measures were applied, as provided for by generally recognized Rules of international law (Article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms) (Deshko, 2019).

The requirement that the applicant uses domestic measures before applying to the Court is an important aspect of the protection mechanism established by the Convention, which is subsidiary to the national system of human rights protection (paragraph 65 of ECHR in the case “Akdyvar and others vs. Turkey”, dated September, 16, 1996, and the resolution of the case “A, B and C vs. Ireland”, dated December, 16, 2010. For this purpose, the Article 35 of paragraph 1 of the Convention enables national

authorities to prevent or correct alleged violations of the Convention, first of all through judicial protection, before these applications are brought to the Court. However, only measures that are effective and available in theory, so in practice over the certain period of time considered, they must be tried. In particular, the funds must ensure that the applicant was compensated for the damage and had a reasonable chance for success (paragraph 71 of the Court resolution in the case of “Skoppol vs. Italy”, dated September, 17, 2009).

In the case of “Kudla vs. Poland”, dated October, 26, 2000, the European Court of Human Rights stated: “It is generally accepted that the protection given by the Article 13 of the Convention is not absolute. The context, in which the alleged infringement (or group of infringements) occurs, may limit the range of potential measures. In these circumstances, Article 13 of the Convention is not considered inappropriate and the requirement contained in for an “effective means of legal protection” should be interpreted as meaning that the responding State should create such means as effective as possible, taking into account the existing limitations at that period of time to access these tools”. The European Court of Human Rights is competent enough in ancillary nature of its role, and also that the object and purpose underlying foundation of the Convention, which provided by Article 1 of the Convention (“The High Contracting Parties should ensure the rights and freedoms of everyone under their jurisdiction”) are to be undermined by its own ability to function unless it encourages applicants to use available funds for compensations (Resolution of ECHR in the case of “B. L vs. The United Kingdom”). The Rule on usage of domestic measures referred to in paragraph 1 of Article 35 of the Convention, thus initially obliges the applicants to use measures normally available to them and sufficient in the domestic legal system, and to be able to obtain compensation for the alleged violations. The availability of such measures must be sufficiently precise, both in practice and in theory, but in their absence, they are to be rendered from necessarily accessibility and effectiveness (paragraphs 65-67 of the ECHR in the case of “Akdyvar and others vs. Turkey”; the Resolution on the case of “Aksa vs. Turkey”).

### **3. Effectiveness of legal protection measures**

Having used all national remedies, entrepreneurs, who consider themselves victims of an alleged violation of their rights by one of the State parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”), appeal to the European Court of Human Rights (hereinafter referred to as “the Court”) (Deshko, 2018). They appeal to the Court in order to restore their violated rights at the national level in accordance with the principle of subsidiarity (Deshko, 2018).

According to the content of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the effectiveness of measures does not depend on the determination of the result favorable to the applicant. Similarly, the “authority” referred to in this provision needs not be judicial; however, if it is not judicial, its powers and guarantees given to it are essential in determining whether this measure is effective. Moreover, even if any measure does not meet the requirements of Article 13 of the Convention in full content, they may be matched by the totality of the costs provided for by national law (Resolution of the European Court of Human Rights in the case of “Silver and others vs. The United Kingdom”, dated March, 25, 1983; “Chahal vs. The United Kingdom”, dated November, 15, 1996).

In Resolution of the case “Sering vs. The United Kingdom” dated July, 7, 1989, the European Court of Human Rights emphasized that Article 13 of the Convention guarantees the right to obtain legal protection at the national level for the real protection of the rights and freedoms provided for by the Convention, regardless of the legal form in which they are secured in the national legal system. Therefore, Article 13 of the Convention requires that such internal measures be available to enable the competent “public authority” to consider a complaint on a certain violation of the Convention and to provide adequate protection.

In the Resolution of the case “Sering vs. The United Kingdom”, dated March, 25, 1983, analyzing the Ombudsman’s competences, the Court stated that this body was not empowered to take compulsory decisions on the purpose of

compensation (paragraphs 115, 54). In the Resolution of the case of “Oleksandr Makarov vs. Russia”, dated March, 12, 2009, the ECtHR stated, first of all, that as a general rule, the appeal to the Ombudsman could not be considered as an effective measure as required by the norm of the Convention (Resolution of the European Court of Human Rights in the case of “Lentinen vs. Finland, dated October, 14, 1999, application no. 39076/97; with the necessary amendments – paragraphs 80 to 84 of the ECHR Resolution in the case of “Leander vs. Sweden” dated March, 26, 1987; Resolution of the Commission on Human Rights in the case of “Monsion vs. France, dated May, 14, 1987, complaint No. 11192/84). The European Court of Human Rights sees no reason to reach a different conclusion in this case. It recalls that in order of a measure to be considered effectively there it must be able to obtain compensation for the complaint. This means that in determining the effectiveness of measures, the authority and procedural safeguards of the authority is referred to by the authorities as the means of legal protection. The parties cannot dispute that the Human Rights Ombudsman did not have the authority to make a binding decision. Accordingly, the European Court of Human Rights considers that an appeal to a Commissioner for Human Rights, a body that could only monitor the management of detention facilities, could not constitute an effective measure, which is determined in the Article 35 of the Convention.

T. Pashuk emphasizes that Resolutions in the cases of “Egmez vs. Cyprus” and “The Deniz and others vs. Cyprus, the Court stated that, in the view of his case president right, the complaint to the Ombudsman could not be attributed to national measures at all; which should be tried out before appealing to the Court according to Article 35 of the Convention (Pashyk, 2007).

#### **4. Criterion for distinguishing national institutions' activities engaged into the promotion and protection of human rights from other authorities - guarantors of human rights and fundamental freedoms of special competence**

In accordance with the Paris Principles, the national institution engaged into the promo-

tion and protection of human rights performs the following general functions: 1) Representation to the Government, the Parliament and any other competent authority on an advisory basis, at the request of the interested authorities or in order of its right for implementation of the consideration of issue without appealing to the higher authority, the opinion, the recommendation, the proposal and the report on the issues related to the promotion and protection of human rights; the national authority may decide to make these findings, recommendations, proposals and reports; 2) encouragement and insurance of the coordination of national legislation, rules and practices with international human rights instruments to which this State is a party, and also their effective implementation; 3) facilitation for the ratification of the above-mentioned documents or accession to them, ensure of their implementation; 4) participation in the preparation of reports to be submitted by States to the organs and committees of the United Nations, as well as to regional agencies, in the fulfillment of their treaty obligations, where it is appropriate, to express their views on the matter as appropriate; 5) cooperation with the United Nations and other organizations related to the United Nations, regional and national institutions of other countries competent in the promotion and protection of human rights; 6) promotion of the development of human rights education and research programs and participation in their implementation in schools, universities and professional circles; 7) promulgation of the information on human rights situation in the sphere and efforts to combat all forms of discrimination, especially racial discrimination by raising public awareness, in particular through information and education, and through the usage of all means of printing authorities.

In the legal literature it is recognized that an important place in the mechanism of non-judicial protection of human and citizen rights and freedoms is parliamentary control over the executive power as a special form of external control. Renowned French scientist B. Chantebou believes that the controlling function of the English Parliament has historically served as the basis for the appearance of legislative function. V. Melekhin rightly points out that the parliament or its commissions, fulfilling

their controlling function, monitor the extent to which the executive branch complies with the laws relating to the rights of the individual, and how well the legislative goal has been achieved. In foreign practice, the interference of members of parliament as a means of protecting the rights and freedoms of a person and a citizen takes many forms, such as a parliamentary request, the creation of a permanent or temporary parliamentary commission, a parliamentary inquiry, debates on issues related to the provision of a certain right or connection with gross or mass violations of rights. However, the main function of parliament is lawmaking, which defines its role in the mechanism of non-judicial protection of human rights [Melekhin, 2002].

Thus, as V. Melekhin points out, although parliamentary control compensates to some extent for the shortcomings of administrative procedures and ways of protecting the rights of citizens, however, the possibilities of the parliament's human rights function are not absolute and limited by strict rules (control powers, rules for constructing laws and regulations, judicial activity, etc.), often reflected in the Constitution (Melekhin, 2002).

The Ombudsman can apply only those measures, which are aimed at speeding up, enhancing the efficiency of human rights activities of other bodies, whose competence is already a binding decision with the possibility of applying state coercion (Pashyk, 2006). The Ombudsman cannot consider the merits of the case and conclude it with a binding decision to implement an effective measure. An additional argument to support this is the decision of the European Court of Human Rights. Thus, in the Resolution case of "Silver and others vs. The United Kingdom dated March, 25, 1983, analyzing the Ombudsman's competence, the Court notes that this body was not empowered to make binding decisions on the compulsory compensation (paragraph 115, 54).

Thus, the Ombudsman, as a national institute engaged into the promotion and protection of human rights, established in accordance with the Paris Principles, applies forms of coercion such as warnings or terminations without jurisdiction activity.

Therefore, although the functioning of the Ombudsman Institute, established in accord-

ance with the Paris Principles, is aimed at protecting human rights, it exercises the legal protection of the subjective rights of all and their fundamental freedoms.

The criterion for the distinguishing of the activities of national institutions engaged into the promotion and protection of human rights, from other bodies – guarantors of human rights and fundamental freedoms of special competence is not the stage of application of legal guarantees of rights, not the very fact of violation or non-violation of human rights or fundamental freedoms, but any kind of state coercion in the process of settling a legal dispute, that is being in the process of jurisdiction: restoration of already violated law, legal responsibility, warning, termination. In other words, the use of forms of state coercion constantly accompanies by jurisdictional activity. At the same time, the position, taken among the constitutionalist scholars, according to which the jurisdiction is a lawful activity, which is aimed at resolving not any legal issues, but only legal disputes in the sphere of private and public law.

## **5. Results**

Established in accordance with the Paris Principles, national institutions engaged into the promotion and protection of human rights have no legal means that enable them to independently defend the subjective legal rights of human beings and their fundamental freedoms – to consider a person's complaint on the merits and to finish up it with a strong decision to use an effective measure. The competence of national institutions established under the Paris Principles dealing with the promotion and protection of human rights does not meet the criteria of European standards of measures on legal support subject to their termination at the time of appeal to each international court or regarded international court authorities. Appeal to national institutions established in accordance with the Paris Principles dealing with the promotion and protection of human rights is not an intrinsically effective measure that must be terminated when appealing to each of the relevant international courts or international bodies.

## **6. Conclusions**

The concept of understanding of the organizational and legal guarantees of human and

citizen's rights has been improved in the constitutional law science, namely: the classification criterion for division into groups is the possibility/non possibility of exercising any kind of state coercion in the course of jurisdictional/ non jurisdictional activity; representative body (body responsible for ensuring Ukraine's representation in the European Court of Human Rights and coordinating the implementation of its decisions), bodies of the state executive service, private executors are the elements of the system of organizational and legal guarantees of human and citizen's rights; by classification criterion – the protection of human rights and fundamental freedoms is the primary function of the authority-guarantor or similar body of some other kinds of functions – it is substantiated that national institutions engaged into the promotion and protection of human rights belong to the group of authority-guarantor of special competence established specifically to provide guarantees, human rights and fundamental freedoms.

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STVORENI VIDPOVIDNO DO PARIZ`KIH PRINCIPIV NACIIONALNI USTANOVY,  
YAKI ZAJMAJUT`SJA ZAOHOCENNEM I ZAXISTOM PRAV LYUDINI,  
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