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АДМІНІСТРАТИВНО-ПРАВОВІ ОСНОВИ ФУНКЦІОНУВАННЯ ДЕРЖАВНОЇ СЛУЖБИ: ПОРІВНЯЛЬНО-ПРАВОВИЙ АСПЕКТ

Анотація. Актуальність даної статті зумовлена тим, що державна служба є особливим елементом державної системи кожної держави, ефективне функціонування якої забезпечує дотримання конституційних прав і свобод громадян, послідовний і сталий розвиток країни. Метою статті є проведення наукових досліджень щодо функціонування та загального реформування державного контролю та державної служби в Україні та розвинених країнах світу. Провідними методами дослідження є загальнонаукові та специфічні методи дослідження, у тому числі методи логіки, аналізу, порівняння тощо. Результатами даного дослідження є порівняльно-правовий аналіз побудови інститутів державної служби в розвинених країнах світу, визначення основних проблеми та наслідки реформування цієї сфери в Україні. Важливість отриманих результатів виражається в тому, що дане дослідження може стати основою для окреслення майбутніх змін до чинного законодавства України щодо функціонування державної служби та захисту прав і законних інтересів державних службовців

Ключові слова: державна служба, державний контроль, моделі державної служби, реформа державної служби

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ADMINISTRATIVE-LEGAL BASES OF FUNCTIONING OF THE CIVIL SERVICE: COMPARATIVE-LEGAL ASPECT

Abstract. *The topicality of this article is due to the fact that the civil service is a special element of the governmental system of each state, the effective functioning of which provides the observance of constitutional rights and freedoms of citizens, consistent and sustainable development of the country. The purpose of the article is to conduct scientific research on the functioning and overall reform of government control and civil service in Ukraine and in developed countries of the world. The leading research methods are general scientific and specific research methods, including methods of logic, analysis, comparison etc. The results of this study are a comparative and legal analysis of the civil service institute construction in developed countries of the world, the identification of basic problems and consequences of reforming this field in Ukraine. The significance of the obtained results is reflected in the fact that this study may serve as a basis for outlining future changes to the current legislation of Ukraine on the functioning of the civil service and the protection of the rights and legitimate interests of civil servants*

Keywords: *civil service, government control, models of civil service, reform of civil service*

INTRODUCTION

Civil service has emerged and exists where a state exists. It is the basis of state power and a legal mechanism for managing society. In many developed countries of the world, civil service is one of the key elements of the system of public administration, the effective functioning of which provides the observance of the constitutional rights and freedoms of citizens, consistent and sustainable development of the country. It is the source of regulation of most social problems and it varies depending on the social and economic level of each country, their regime and forms of government. Without the civil service, it is impossible to realize the various tasks and functions that are entrusted to the state, developed countries will simply lose the legal mechanisms for managing it and will not be able to exist in a stable way [1].

Creating an effective and efficient government control mechanism is a priority task for any country in the world. Thus, in 1991, after Ukraine's independence was proclaimed, our society also raised the question of finding the optimal political, legal and managerial model of state building. The Ukrainians demanded from the state makers to abandon the totalitarian Soviet model of government and began building a new democratic mechanism of government. The main issue that needed a conceptual solution was the demand of society for the reorientation of the state apparatus. Thus, the public service should become not only a structural mechanism that implements the state will, but also turn into an effective mechanism for managing society for which the care of its citizens, safeguarding their constitutional rights and creating appropriate socio-economic conditions

for their comfortable living in their country will be of paramount importance [2; 3]. It must be consistent with the generally recognized value system and be oriented towards social fixation on the formation of civil society. That is why the already initiated structural changes require a revision of socio-political priorities, which, in its turn, leads to new forms of interaction between the legal space, the state power and the institutions of civil society and requires improvement of the mechanisms of the system of public needs and interests' realization [4].

The civil service is one of many professions that require professional skills and knowledge, beliefs and compulsory special education for employees. The fulfillment of the tasks and functions of the state by the civil servants on a professional basis should be accompanied by the stability of the civil service relations, the impeccability and efficiency of the administrative activity, its independence from possible political changes [5]. After the declaration of Ukraine's independence, the modernization of the entire public administration system and the renewal of the civil service institute has begun [6; 7]. The government system in Ukraine for a long time was built on the model of the Soviet times, did not meet the requirements of the times and needed change. The Law of Ukraine "On Civil Service" (2015) [8] was adopted, which redefined the designation of the state and the civil service as a whole, its content defining the general principles of activity and the status of civil servants working in state bodies and their apparatus. In our opinion, public administration reform should be one of the main ones, especially for countries with emerging economies, since the level of citizens' lives the quality of business operations, the level of GDP and other economic indicators directly depend on the effective functioning of the government [9].

The formation of state policy will be possible only in the presence of a professional, efficient, effective and accountable society of the state power system. An effective system of government is also one of the basic prerequisites for democratic governance, based on the rule of law. That is why for young and independent Ukraine the creation of an effective civil service as a mechanism for governing the country is a paramount issue [10; 11]. The permanent change of the Governments of Ukraine (which changed 19 times over the past 29 years, that, in fact, means that every half a year a new CM of Ukraine is appointed), indicates the absence of an effective state mechanism for governing the country. The adoption of the Law of Ukraine "On Amendments to Some Laws of Ukraine on Restarting Power" [12] by the Verkhovna Rada of Ukraine in the autumn of 2019 proves that the civil service in our country is ineffective and needs major changes. Given the new public administration reforms, it is important that the rights of civil servants in public service are not violated when conducting new systemic reforms. This is the problem that our study addresses, in which we compare the mechanisms of protection of civil servants in Ukraine and developed European countries, and try to offer an effective administrative and legal mechanism for the protection of civil servants [13].

1. MATERIALS AND METHODS

The following methods were used during the research: general theoretical (analysis, synthesis, concretization, generalization, analogy method, modeling); empirical methods (research of functioning of the civil service institute experience in Ukraine and abroad, research of normative-legal and scientific-methodical literature on the subject, scientific researches and conclusions).

The legal basis for the emergence and functioning of the civil service institute in Ukraine is the Constitution of Ukraine [14] and the special Law of Ukraine "On Civil Service" [8]. Article 1 of this law defines that public service is a public, professional, and politically impartial activity in the practical fulfillment of the tasks and functions of the state. Section 2 of Article 38 of the Basic Law guarantees all citizens the right of access to public service, as well as to the service in bodies of local self-government, and item 12 of part 1 of article 92 provides for a legal norm about exclusive regulation by laws of questions of organization and activity of bodies of executive power and bases of public service. But according to the law, only a citizen of Ukraine, who is fluent in the state language, has a proper education and has passed a competition for the position, can enter the civil service. According to the national legislation, civil servants as representatives of the state are responsible for the practical implementation of civil policy in the relevant field or sphere of public relations such as economy, education, medicine, social protection, public finances, etc. Civil servants working in the respective state bodies, in accordance with their competence, ensure the implementation of the statutory national programs defined by the CM of Ukraine and the sectoral programs defined by the respective ministries [15]. In addition to the implementation of national and sectoral programs, civil servants of local state bodies also ensure the implementation of regional programs approved by local executive authorities together with the relevant local self-government bodies.

In the modern world, many different models of public service are being implemented, depending on the form of government in the country. In our opinion, for a meaningful and comprehensive study of these issues, studying basic civil service models can be very useful. That is why in our research we analyze the classical ways of organizing civil service in countries such as France, Germany and the United Kingdom.

The Republic of France is a unitary state. The form of state system is presidential-parliamentary republic. The executive power in the country is exercised by the President of France and the Council of Ministers (Government). In France the process of centralization was completed earlier than in other Western European countries, there was a separation of state apparatus from civil society, and a professional bureaucracy based on the specification of functions, division of labor and differentiation of roles originated there. It is in this country that a specific kind of public service system has emerged [16]. The legal basis of the civil service in France is the Constitution of France [17], the Law of France dated 13 July, 1983 “On the Rights and Obligations of Servants” [18], the Law of France dated 11 January, 1984, which contains the “Statute of the General Statute of the Central Civil Service” [19] and the Law of France dated 26 January, 1984 “On Local Public Service” [20].

The French law contains a term such as “official”, which applies exclusively to civil servants. A key element of a bureaucratic career in France is the guarantee of gradual promotion over the years of service or seniority in government. Public service promotions are reflected in increased salary depending on the official’s length of service and the assessments he/she has received. Promotion can be done in two ways. Firstly, by entering the officials in the annual list of promotions, which is made after the decision of the administrative parity commission on the basis of the annual estimates received by the official, taking into account the years of service. Secondly, based on professional selection, which is done with the help of a special exam [21]. In France, officials are completely under the control of the Head of State and Government. The current legislation enshrines a clear hierarchy for the positions and ranks of civil servants, as well as the principle of their subordination to bodies of political power. In general, the system is focused on the fact that when the person, who enters the civil service, stays there throughout his/her working life, gradually progressing through career paths. Therefore, public service in France is an exemplary model of government for unitary centralized states.

Among the European countries with a federal type of administrative and public control, Germany is the most influential. First of all, it should be noted that this is a parliamentary federal republic in which the power of the President is limited and most of the powers vested in the Chancellor. Thus, historically the first in Europe professional civil service was in Germany. It was built on the principles of dedication, legality, unity, professionalism and stability. The German civil service is governed by the provisions of the Basic Law of Germany – the Constitution of Germany dated 23 May, 1949 [22]. Part 2 of Article 33 of this Law establishes equal access of citizens to all state bodies: “every German has equal access to any state position in accordance with his or her abilities and professional qualifications”, and part 3 of Article 33 of the Basic Law of Germany establishes the principle of equality in the civil service, and that no one can be restricted in their rights by virtue of their religion or outlook [22]. The basic principles of the civil service, the legal status of the civil servant and the promotion of the civil service are set out in more detail at the level of federal laws, namely, the General Law “On the Legal Status of Civil Servants”, the Law “On the Official”, and the Law “On Federal Civil Servants”. According to them, a characteristic feature of civil service management in Germany is the close interaction between the political and administrative spheres. Thus, under German law, civil servants have the right to participate in political party activities and pursue a political career [23]. It should be noted that in Germany there is no concept of “civil service” (Staatdienst), which after the Second World War was superseded by the concept of “public service” (öffentlicher Dienst), which is firmly embedded in the theory and practice of social life. Nowadays, “public service” in the functional plan is understood as an activity for the purpose of fulfilling national tasks of management. In institutional terms it means a certain number of persons and positions whose performance of public functions is the content of their activity [23].

It is in the Basic Law of Germany that the basic principles of public service are laid down [22]. The main ones include: the principle of equal access of citizens to each state position in accordance with his / her qualification, professional training, abilities and business qualities; the principle of loyalty to the state and the principle of political neutrality of officials; protection by the state of the legal position of officials in the event of causing harm to them; social security at the expense of the state and payment of financial security corresponding to the position occupied; freedom of thought and freedom to form public associations.

According to the Law “On the Official” [24], as amended in 1985, public service in Germany covers the legal regulation of special public-law relations, which are divided into two main groups: relations with officials and relations with employees – public servants and employees of public institutions. According to this Law, the category of “official” includes not only civil servants who work in the state apparatus but also judges, teachers of schools and institutions of higher education, servicemen, postmen, employees of railways and state banks. At the same time, the legal form of employer organization is decisive for the concept of “civil service”. Public service is only an activity in the service of a legal person governed by public law. Thus, under the civil service in Germany the activities of federal and land authorities are considered. The very model of civil service management in Germany is the oldest in Europe.

The United Kingdom is one of the most developed countries in the world, which is a state with a constitutional monarchy. There is no presidential institution in this state, and the Queen, Her Majesty Elizabeth II, is the Head of State. In this country, civil service is referred to in the regulations as “civic service” [25]. In this country, there is no single constitution in the form of a single document, and traditions, Parliament’s legislative acts and judicial precedents have a constitutional significance for legislation. In the UK legislation is a non-systematic and very peculiar set of rules, consisting of a series of parliamentary charters and acts, Queen’s decrees in Parliament, various decrees, instructions from individual ministries. Therefore, there is no single consolidating civil service law yet, as only some of the most important aspects set out in the Civil Service Code [26] are regulated. In the United Kingdom, the public service management model consists of three autonomous entities: Her Majesty’s Civil Service, Northern Ireland’s Civil Service and Her Majesty’s Diplomatic Service. Unlike in France, in the UK there is still local self-government within a unitary state. All counties and cities elect their own councils, which form permanent administrative committees, each responsible for a specific area of government: police, health care, education, social affairs [5]. In Britain, as noted by D. Harper: “civil servants are obliged to maintain loyalty to a government in power and to serve faithfully the government that adheres to opposing political beliefs” [25].

2. RESULTS AND DISCUSSION

By examining three different systems of government, we can conclude that there are no ideal models of public service management in any country in the world, since it is very difficult to satisfy the interests of all citizens without exception and to combine them with public interests. But in every country there is a public (state) power which is directed to and subordinates to the society which exists in a certain (subordinate) territory. Public power is exercised by employees (the apparatus of power), a special layer of people appointed or elected by the people for the professional and effective management of society, which can be called the apparatus of government (state apparatus) [27]. This apparatus subordinates all sections of society, social groups to its will, controls on the basis of organized coercion down to the possibility of physical violence against social groups and individuals. The apparatus of public authority exists and operates at the expense of taxes on the population and is intended to act in the public interest. This apparatus, and above all its leadership, reflects the interests of most social groups in society as they understand them.

Building a national model of civil service is an important task for establishing Ukraine as a rule of law, social and democratic state. At the same time, priority is given to the formation of a proper legal framework for the functioning of the public service in Ukraine, ensuring the fundamental rights of citizens associated with the public service. Building Ukraine as a democratic rule of law in line with European standards places considerable expectations on the civil service as an effective administrative mechanism for governing the state [6]. It is the civil servants, on the European integration path of Ukraine, that should be the basis of all new transformational administrative and legal transformations. They should become state guarantors of priority of human interests in the country, improvement of relations between the state and the citizen and free participation of civil society in the management of their state. After all, civil servants are professional workers whom the people of Ukraine hired to work for the purpose of quality and effective management of the country aimed at improving the life of society.

Part 2 of Article 1 of the Law of Ukraine “On Civil Service” [8] clearly states that a civil servant is a citizen of Ukraine, who holds a civil service position in a public authority, another public authority, its apparatus (secretariat), receives a salary at the expense of the state budget and exercises the powers assigned to him/her for that position, directly related to the performance of the tasks and functions of such public authority, and adheres to the principles of public service. Only citizens of Ukraine who are 18 years of age, fluent in Ukrainian and have a bachelor’s degree in higher education are eligible to become civil servants.

Traditionally, disclosure of the issue of the status of civil servants involves the presence of such elements as rights, obligations, restrictions, guarantees, encouragement, responsibility. Thanks to these elements, the activity of a civil servant, its functioning in the civil service system, professional and personal development, disclosure of professional, creative and personal potential is ensured. Service activity assumes that the officials who commit it are not only empowered by the service, but they also perform certain duties. According to the Law of Ukraine “On Civil Service” [8], duties are a set of duties of a civil servant, the rules of internal official regulations of the respective state body, authority of the Autonomous Republic of Crimea or their apparatus and their duties. The main duties of civil servants are defined in Art. 8, and the rights of public servants – in Art. 7 of this Law. However, specific responsibilities and rights for civil servants in accordance with their positions and qualifications are set out in the standard in the official instructions and regulations on the state body, which are approved by the heads of the relevant state institutions within their competence and in accordance with the current legislation. However, the legislation of Ukraine stipulates that a civil servant

is obliged to execute orders (decrees), instructions of a supervisor issued within the limits of his/her powers, except when the civil servant has doubts about the legality of such an order.

Public service positions in public bodies are divided into categories (A, B, C) and subcategories, depending on the order of appointment, nature and scope of authority, the content of the work and its impact on the final decision, the degree of official responsibility, the required level of qualification and professional competencies of civil servants. Ukrainian law provides for career advancement for civil servants. Thus, the passing of a civil service is a set of legal facts related to the emergence, change and termination of public service relations, namely, the acceptance of a public office, career and termination of service. This process is ongoing and has a stage character [28]. In our opinion, it includes three main stages: acceptance into service, promotion and termination of service. This is the simplest way of classifying the stages of civil servant passing the civil service. In the legal literature, there are also optional (nonbinding) stages – transfer to another position, prosecution, extraordinary assignment of rank, etc.

It is during the civil service that the relationship between: a civil servant and the state; the state (represented by a civil servant) and citizens; civil servants working in state bodies of different levels and branches of government; civil servants (state bodies) and structures of civil society self-organization occurs [29]. Essentially, a career is a judgment of an employee about his or her future, expected ways of self-expression and job satisfaction; gradual promotion of career ladders within the organizational hierarchy, changes in skills, abilities, qualifications, and rewards associated with employee activity. Recruitment to the civil service, promotion of civil servants, and other issues related to the service are carried out taking into account the categories of public service positions and the ranks of civil servants assigned to them. The ranks of civil servants are a type of special ranks. Nine ranks of civil servants are established. Ranks are assigned to civil servants by the subject of appointment, except in cases provided for by law.

According to the results of the evaluation, Ukraine received even higher scores than the average Western Balkan states in the areas of civil service and human resources management and organization of the system of central executive bodies [30].

According to the SIGMA proposals, the main priorities for reforming the civil service for the next period are: introduction of a transparent and targeted classification of civil service posts and the salary system in public administration; improving accountability of the various central executive bodies and ensuring effective organization of ministries; adoption and implementation of the Law on General Administrative Procedure, etc. [31; 32]. Civil service is the basis of public administration, which is why the modernization of the civil service and human resources management, creation of a professional civil service is of extreme importance for our country at the present stage of development. It should be noted that the need for reform and modernization of the civil service and human resources management was caused by its insufficient ability to effectively fulfill its obligations to society, citizens of Ukraine, poor quality of both the civil service and quality of public services rendered to the citizens of Ukraine. Thus, according to the indexes of the Global Competitiveness Index 2019, Ukraine ranks 85th among 141 countries and 132nd according to the indicator “public institutions”. Ukraine’s low position in world competitiveness ratings is related to the current situation in the management of the state apparatus, which leads to insufficient management of human resources in the public service [31].

In foreign countries there are two main models within which the management of career advancement of civil servants is carried out: closed and open. Each of the systems has both advantages and disadvantages, as it differently considers the types of personnel work, such as the selection of staff, its adaptation, training and development, career growth and innovation. The closed model of the civil service is characterized by an elitist approach to the selection and appointment of civil servants who have received special education. This approach is more typical for Germany and France [32]. In a closed model, a civil servant spends his/her professional life in a hierarchical structure with high job security guarantees. The closed model is sometimes called a career model. In this model, career ladder promotion is of a smooth, somewhat automatic nature, and implicitly gives benefits to its “insiders”. One of the main criteria for a civil servant’s value in a closed system is years of service [33]. An open civil service model is characterized by the free selection and appointment of staff to any position. The main conditions for career advancement are the suitability of existing knowledge, skills and abilities to a specific position. This model is widely used in the UK. An open model of public service is called by some researchers as official or positional. Its main feature is the presence of public positions with clearly defined duties and conditions of their employment, opportunities for career advancement, and the main criterion for promotion of career ladder – the availability of specialized knowledge and professional achievements. Career management features of civil servants in Germany, France and the UK are best exemplified by the given models [34]. According to the legislation of Germany, the official is called “one who is in public-office relations on the basis of the oath of allegiance with a legal entity of public administration and performs on behalf of the latter public and legal functions on a permanent basis” [33]. Unlike in other

countries, a public servant's career is not an alternative to a political career, but on the contrary, it is often a prerequisite for successful political activity. German law specifies that civil service relations are public-law relations, with one official acting on one side and federal, land-based authorities and other public bodies on the other.

The main normative act governing the legal status of bureaucracy is the Federal Law on officials, adopted in 1953 and still in force as amended in 1985. This law gives a general definition of the legal status of officials, it defines the principles of their appointment, promotion, defines the rights and obligations, conditions that an official must meet, and defines the special qualities that allow to claim the title of civil servant. In particular, it is stated that a person applying for a civil servant position must provide guarantees of his / her political credibility and possess the necessary level of professional training, which is determined according to the level of the official hierarchy [34; 35]. The German legislation provides four categories of positions of officials (lower, medium, higher, high) and 16 grades, which are replaced by competitive selection after passing the probationary period. In France, civil servants include all employees of the state – its legislative, executive, judicial bodies. In addition to the civil service, the 1984 law also introduced public service to local communities [33]. The term “civil service” broadly means in France “the pursuit of a professional activity in the service of the state, the territorial community, a public institution and, in general, any administration”. In the narrow sense of the term “civil servant” excludes the categories of military, judges and applies only to those who are employed in a permanent position in the public administration and are included in the state, that is, have permanent positions. The legal status of these employees is governed by the General Statute of the servants of the state and local communities [36].

All civil servants, according to the hierarchical system of positions, are divided into central and local ones. Employees of the central level are all employees of the peripheral bodies, which are subordinate to the central authorities and are members of their state, and local – those who are members of the state institutions, organizations and institutions of local subordination. Depending on the importance and complexity of the work, all civil servants are also divided into four classes (Table 1).

Table 1. Classes of civil servants in France

No.	Name of civil servant class	The powers of a civil servant
1.	A	Making management decisions
2.	B	Implementation of these management decisions
3.	C	Fulfillment of powers of specialists
4.	D	Fulfillment of the powers of support staff

Source: compiled by the authors

In France, there is a concept of “corps” of employees. It brings together employees who perform the same job and occupy the same positions (for example, the control corps brings together all inspectors). In addition to classes and corps, there are grades that are assigned to a civil servant as a result of competitive examinations. UK regulations do not have a well-defined concept of “civil servant”. However, based on documentary sources, researchers attach broad and narrow meanings to this notion. Civil servants in a broad sense include all public sector employees – employees of state ministries and agencies, the armed forces, the police, as well as public corporations, local authorities, the health care system, school education, etc. [37; 38]. In a narrow sense, civil servants are considered as persons who work in the administrative bodies of public administration and receive wages at the expense of funds allocated by parliament.

We believe that one of the elements of government is the public service itself as a channel of direct communication with the citizen. The civil service in Ukraine is one of the key institutions in the formation and development of statehood, which depends on the functioning of the whole socio-political system, the solution of various tasks and functions of the modern state [39; 40]. It is the basis of modern state building and it exerts its influence on all major constitutional and legal formations. As an integral part of public administration, public service is aimed at meeting the needs of society, ensuring the protection of fundamental rights and freedoms of man and citizen, the consistent and sustainable development of the country and its gradual accession to the European community. Obviously, public service is an essential prerequisite for a strong democracy, an important tool for ensuring the rights and needs, freedoms, interests of the individual and the citizen, shaping and implementing public policy. It is the basis for the country's consistent and sustainable development, its competitiveness on the international market and its gradual entry into the European community.

CONCLUSIONS

Public administration and civil service reform is one of the most important horizontal reforms, as it is a prerequisite for the implementation of effective industrial and sectoral policies and a basis for the implementation of legislation approximating to EU law. The reform of public administration and public service must respond to the need of society for effective, responsible and open government, and thus for good governance, efficient and quality processes and services. The key tasks of reforming the public administration system in Ukraine at the present stage are to improve the quality of the civil service and service in the bodies of local self-government, to optimize the functions of government institutions, to ensure the effective distribution of powers and areas of responsibility between them, to identify and strengthen the overall managerial and administrative capacity of the state apparatus the principles of good governance and the best experience of EU member states, making it an effective tool for continuous and sustainable development of Ukraine. In 2018, according to the SIGMA program, an assessment of the state of affairs in the public administration system of Ukraine was carried out, which resulted in appropriate recommendations for improving the system in the report of experts. According to the results of the OECD / SIGMA program, the state of affairs in the public administration, Ukraine has made significant progress in reforming the civil service in recent years.

Summarizing the results of the study, we believe that in order to create a new model of civil service of the European model, the following questions need to be addressed:

1. Streamlining public competences and functions, administrative procedures in decision-making and providing public services.
2. Consolidation of indicators of institutional, social, economic, marketing effectiveness of public authorities' activity evaluation.
3. Ensuring the maximum respect for European standards of work with the civil service personnel in the field of regular training, use of training products aimed at improving skills and improving core competences.
4. Application of anti-corruption mechanisms, tools of conflict of interest management for overcoming personnel deformations in public authorities in accordance with the requirements of Article 7, paragraph 4 of the UN Convention against Corruption.
5. Use of technologies of managerial leadership, reputation management, strategic partnership.

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