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ВІДОМОСТІ ПРО АВТОРА

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THE RULE OF LAW AS A PRINCIPLE OF STATE SERVICE IN UKRAINE

ЗМІЦНЕННЯ ПРАВОВОЇ ДЕРЖАВИ ЯК ПРИНЦИП ДЕРЖАВНОЇ СЛУЖБИ В УКРАЇНІ

УКРЕПЛЕНИЕ ПРАВОВОГО ГОСУДАРСТВА КАК ПРИНЦИП ГОСУДАРСТВЕННОЙ СЛУЖБЫ В УКРАИНЕ

Oleksii DROZD *(Kyiv)*

У статті автор розглядає верховенство права як принцип проходження державної служби в Україні. Визначено місце верховенства права в системі принципів державної служби в цілому та її проходження зокрема. Розкрито сутність верховенства права в якості принципу проходження державної служби.

Проаналізовано проблеми нормативного закріплення та реалізації принципу верховенства права під час проходження державної служби в Україні.

Ключові слова: *верховенство права, принцип, державна служба, проходження державної служби, принципи державної служби.*

В статье автор рассматривает верховенство права как принцип прохождения государственной службы в Украине. Определено место верховенства права в системе принципов государственной службы в целом и ее прохождения в частности. Раскрыта сущность верховенства права в качестве принципа прохождения государственной службы. Проанализированы проблемы нормативного закрепления и реализации принципа верховенства права во время прохождения государственной службы в Украине.

Ключевые слова: *верховенство права, принцип, государственная служба, прохождение государственной службы, принципы государственной службы.*

The article considers the rule of law as a principle of state service in Ukraine. The place of the rule of law in a system of principles of state service in general and its passing, in particular, is determined. The essence of the rule of law as the principle of state service passing is disclosed. Problems of standard legislative consolidation and implementation of the principle of the rule of law during the passage of state service in Ukraine are analyzed.

Keywords: *rule of law, principle, state service, passage of state service, principles of state service.*

The relevance of the topic. Reform of the state service in Ukraine with the consideration of European experience of the state service legal regulation is one of the key tasks of administrative and legal reform carried out in order to create efficient and politically neutral state apparatus and to establish professional and reputable state service institute that should ensure the enforcement of the rights and freedoms of the person and of the citizen, including provide individuals with quality administrative services [1, p.13].

The state service is a central institute (sub-branch) of the state service that characterizes the legal regulation of temporary residence as a civil servant. Activation of law-making processes in the field of state service is associated with viewing the nature of the phenomenon of state service as a whole, which in turn causes the update of legal doctrine. The key for determining the principles of legal regulation of the state service rules through the prism of the ratio of administrative and labour law is the research of the rule of law as a principle of state service in Ukraine, which is the purpose of this scientific article. For its successful implementation it is expected to solve the following problems: firstly, to determine the place of rule of law in the system of state service principles in general and its passing in particular; secondly, to discover the essence of the rule of law as a principle of state service; thirdly, to analyze the problems of legislative consolidation and enforcement of the rule of law principle in the state service in Ukraine.

State of scientific research. The Scientific and theoretical basis of this article are the scientific works of such domestic and foreign scientists as V.B. Averianov, Y.P. Bytiak, L.R. Bila-Tiunova, I.V.Boiko, M.O. Hermaniuk, I.E. Danylieva, M.I. Inshyn, S.V. Kivalov, A.V. Kirmach, M.I. Koziubra, A.M. Kolodii, T.O. Kolomoiets, D.V. Nelipa, O.V. Petryshyn, O.S. Prodaievych, S.H. Stetsenko, M.V.Tsvikta and others.

Presentation of basic material. The principles of state service are a complex entity that integrates laws of development of various aspects of the manifestations of state-service relations. They are formed influenced by general principles of administrative law and public administration, constitutional principles of the state system and the system of executive power, international standards recognized by Ukraine, the laws of social systems and management practices. In addition, a significant role in determining the content of state service principles is played by modern reformation processes in the field of public administration aimed at updating activity of all government and legal institutions of society in line with the priority of rights and freedoms of the person and of the citizen [2, p. 8].

According to T.O. Kolomoiets and M.O. Hermaniuk, the principles of public service are initial positions, ideas that reflect the objective regularities of the state and society development, among other things they determine the content of public relations, the most characteristic features of the organization and functioning of the state service, and the entire system of public authorities, and determine the value and social significance of the state service functioning, directing the development of state service to protect the rights, freedoms and interests of citizens of Ukraine, natural persons, legal persons regardless of ownership form. The main role of state service principles is their purpose, namely the consolidation of basic principles, ideas and development lines of state service; ensuring the creation of a unified law that regulates public-legal relations in the field of state service; providing influence of basic guidelines of state service on its regulation [3, p. 189]. At the same time, A.A. Sharai proposes to understand the state service principles as the basic, fundamental ideas, provisions, which are the basis of building the entire system of state service and compliance with which is a prerequisite for the effective discharge of the functions assigned to the state civil servant [4, p. 115].

In legal literature, based on different criteria the different types of public service principles are singled out, for example, by the sub-sectoral belonging – general legal and special; by the statutory objectification – enshrined in law, reflected in administrative and legal doctrine, and without their normative fixation; by the content – basic, organizational and procedural. Thus, the fundamental principles of state service are its fundamental common ideas and guiding principles that define the priority areas of its existence and development. It is fundamental principles that are actually the foundation for the entire legal system, the field of administrative law in general and state service in

particular. These principles play a crucial role in building and existence of the state service, as they are the basis of its formation and operation; they determine the basic principles of construction of behavioral models of state-service relationship, they are the source of the formation of organizational and procedural principles of the state service. A characteristic feature of the fundamental principles of the state service is their organic relationship to each other: they are closely intertwined with each other, complement each other, thus forming a certain complex system. The defining principle in the system of public service principles, a kind of "cornerstone" is the rule of law, which "pierces" the totality of the state service principles [3, p. 87].

In turn, A.V. Kirmach interprets principles of state service as the basic ideas that reflect the objective regularities and determine the direction of realization of competence, tasks and functions of state authorities and civil servants. Based on the systematization of legislation of European countries, the scholar formulates a unified list of the key principles of the state service, which includes the rule of law, legality, patriotism, publicity, professionalism, political neutrality, transparency and openness, stability and honesty, equality and dignity [1, p .15]. Hence, it follows that in the modern administrative-legal doctrine the rule of law is seen both as a fundamental, general legal and enshrined in current legislation (Art. 4 of the Law of Ukraine "On State Service" on 10 December 2015) principle of state service in general and its institution (sub-institution) – passage.

In a general-theoretical aspect, the rule of law is one of the leading elements of the general principles of the constitutional system of Ukraine. This principle has not only considerable theoretical but also practical importance. The action of the rule of law is intended to establish certain limits of the government actions in the name of human rights protection, any arbitrariness elimination. It is for this effect a fundamental principle of a democratic state as the separation of powers acts. It is the existence of the right that ensures the protection of individual rights as according to the demands of justice it is the right of such freedom and equality for every person who cannot hinder the freedom or equality of all other participants in public relations [5, p. 44].

The term "rule of law" was introduced into scientific circulation by British public figure and scholar D. Harrington in 1656. In modern times, the doctrine of the rule of law was being grounded by a classic of English School of constitutional law, Professor A.V. Dicey. The rule of law in a way is a mechanism to protect the rights and freedoms of the person and of the citizen that is practiced in the countries of the Anglo-Saxon legal tradition, and partly – in some countries, which legal systems tend to Romano-Germanic legal family. The content, forms, methods and limits of this mechanism realization can be different, especially in countries with the transitional legal systems, which include Ukraine. According to the considerations of M.I. Koziubra, a concept of the rule of law is extremely complex, diverse and multifaceted; it can be considered at various logical and legal levels. The concept of the rule of law combines the scientific truth and the values of goodness and justice, the achievement of legal theory and the practical legal experience, legal ideas and common sense. This makes the mentioned category quite dynamic [6, p. 150].

According to O.V. Petryshyn, it is appropriate to analyze the rule of law in two aspects. Firstly, in the broad sense – as the principle of legal organization of state power in society, so to speak, in the sense of "rule of law over the state". Exactly this principle is interpreted outside the continental model of law through the medium of English construction of "rule of law". Secondly, in the narrow sense, namely in the context of the correlation between similar legal categories – the right and the law in the system of regulation of social relations, their role and place in enforcement of the law, that is, in the sense of "rule of right over the law" [7, p. 24 – 25]. A special interest is the viewpoint of A.M. Kolodii that the rule of law in a legal state determines the living conditions of the entire social body, i.e. the formation, existence and functioning of state authorities and public organizations, social communities, attitudes toward them, as well as mutual relations of individuals, and so is the basic, most important principle. Due to this, it is modified in different areas of the state and law functioning, for example, in law-making, enforcement of the right, and protection of rights. This principle also means that not the state makes right, but rather right is the basis of organization and vital activity of the state and its

bodies and officials, other organizations. From here follows the statement that not the state provides rights and freedoms, but people form the right in order to limit the state power above all things [8, p. 124, 188].

Taking into account the abovementioned, it should be noted that at the 86th plenary session (25 – 26 March 2011) the Venice Commission (the European Commission for Democracy through Law) approved a special report on the rule of law. Paragraph 41 of the document states that now the consensus is possible about the mandatory elements of the concept of "rule of law", which is not only formal but also substantive or material, in particular, these components are: 1) legitimateness, including transparent, accountable and democratic process of enactment of a law; 2) legal certainty; 3) prohibition of arbitrariness; 4) access to justice, submitted by independent and impartial courts, including those exercising judicial supervision of administrative activities; 5) observance of human rights; 6) non-discrimination and equality before the law [9, p. 177].

The rule of law acts as a litmus test of compliance of one or another state establishment to democratic standards. The rule of law is more than an accurate application of legal instruments; it is also the rule of justice and protection of all members of society from excessive state power. The object of the rule of law is an exercise of power and the relationships between the individual and the state. The principle of the rule of law is intended to establish certain limits to the governmental activities in the name of protecting human rights and freedoms, eliminate any arbitrariness. In fact, the fundamental rights and freedoms determine the content and direction of understanding the rule of law as doctrine, principle and ideal [10, p. 11].

The constitutional provision that a person, his rights and freedom are the most important value serves as a defining backbone of civil servants' activities regardless of the service and official status [11, p. 12]. Moreover, when in the Law of Ukraine "On State Service" on 16 December 1993 the principle of the rule of law was not even mentioned, and the principle of legality "occupied" in the Art. 3 of the Law, in which the basic principles of state service were grouped, "second place", which it shared with the principle of democracy, but only in the later Law of Ukraine "On State Service" on 17 November 2011 (term of entry into force of this law changed several times, and subsequently was canceled altogether) it has "occupied" its proper "first place".

It is worth noting the positive transformations in the legislative regulation of the principles of state service, which are quite visible in the new Law of Ukraine "On State Service" on 10December 2015. Primarily, it is a full adherence to logic in the arrangement of two basic principles – the rule of law and legality that are not only located in the proper hierarchy without interleaving them with other principles but also are interpreted by a legislator. Thus, in accordance with the Art. 4 of the Law of Ukraine "On State Service" on 10 December 2015 the rule of law as the principle of implementation of state service – is the priority of the rights and freedoms of the person and of the citizen under the Constitution of Ukraine, which determine the content and focus of a public servant in the performance of tasks and functions of the state [12]. Incidentally, among the three outlined above Laws of Ukraine "On State Service", the new Law provides for the first time a particular interpretation of principles, in compliance with which the state service should be. Of course, there will be many discussions on the completeness of their contents, but a certainly positive aspect is that these principles are defined by law, not just listed, as it was observed in previous laws [13, p. 46].

In addition, in a number of regulations the legislator associates the implementation of the rule of law principle with the need to take into account the European Court of Human Rights. These rules are, for example, in the Code of Administrative Legal Proceedings of Ukraine on 6 July 2005: "the court applies the rule of law on the basis of court decisions of the European Court of Human Rights" (Ch. 2, Art. 8); Law of Ukraine "On the National Police" on 2 July 2015: "the rule of law is applied on the basis of court decisions of the European Court of Human Rights" (Ch. 2, Art. 6).

In view of this, there can be a competition of principles used in the implementation by public officials of their powers. As an example, we present the court judgment of the European Court of Human Rights "Harnaha against Ukraine" (№ 20390/07). The applicant N. Harnaha has submitted to

the Department of Civil Status Act Registration of the Bila Tserkva City Department of Justice an application on changing the patronymic name. The Department of Civil Status Act Registration rejected the application, citing the approved by the Ministry of Justice of Ukraine rules of civil status act registration in Ukraine, according to which the patronymic name of an individual can be changed only when his or her father changes his own name [14, p. 128]. Later N. Harnaha appealed in the court against epy refusal to grant approval of the right, but no courts accepted the position of the applicant. The latter appealed for protection of her right to the European Court of Human Rights, which, considering the case, stated that the restrictions imposed on the change in patronymic name, are not issued properly and sufficiently motivated by the national legislation. Moreover, public authorities gave no justifications for depriving the applicant of her right to decide on this important aspect of her private and family life, and this justification was not found in any other way. Accordingly, the European Court of Human Rights noted that there has been a violation of Art. 8 "The right to respect for private and family life" of the European Convention on Human Rights. The judgment of the European Court of Human Rights "Harnaha against Ukraine" became final.

As a result, we have a situation that according to the rules of national law a natural person can change the patronymic name only when his or her father changes his name. On the other hand, the European Court of Human Rights considers such restrictions as violations of the rights enshrined in the European Convention on Human Rights. It will be extremely difficult for the civil servant who performs the functions of civil registration to select which position to accept because considering the judgment of the European Court of Human Rights when deciding on a change in patronymic name, employee violates the principle of legality. Deciding the case in accordance with the requirements of the legislation, the employee does not hold the rule of law. It can be assumed that in the event of similar cases courts will rely on the European Court of Human Rights. However, in terms of administration efficiency, it is necessary to address further the problem of hierarchy and correlation of principles of the state service in Ukraine [14, p. 129].

So based on the above mentioned, the following **conclusions** should be made.

Introducing a qualitatively new state service must begin with the doctrinal justification and legislative consolidation of its implementation principles, in particular, the passage. The principles of state service are directed at promoting, support and protection of social values during its implementation and passage; have the most common, abstract nature; determine the essence and content of the state service, as well as lines of their further development; have a priority (primacy) over the rule of law in the field of state service; are characterized by increased stability and resistance; at present are enshrined in Art. 4 of the Law of Ukraine "On State Service" on 10 December 2015.

General (specifically legal, fundamental) principle of implementation of the state service in Ukraine and the vast majority of European countries is the rule of law. In its essence, the rule of law is fundamental and common European standard – to guide and restrain the exercise of democratic power. In Ukrainian realities, the rule of law is an independent legal mechanism, which received a formal legal recognition (§ 1 Ch. 1 Art. 4 of the Law of Ukraine "On State Service" on 10 December 2015) and practical implementation and aims to protect the rights and freedoms of the person and of the citizen, coming primarily from the principles of justice, morality, equality and so on. The rule of law along with the democracy and observance of human rights and freedoms are the key, fundamental value orientations of European doctrine of legal consciousness [10, p. 12]. At the same time, in the Law of Ukraine "On State Service" it is appropriate to enshrine the provision that the legitimateness is a part of the rule of law and covered by it. This will orient subjects of law enforcement, when performing powers of a civil servant, to those norms that are reflected in international legal documents and their interpretations in decisions of the European Court of Human Rights.

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ПРОЦЕДУРА НАДАННЯ ПУБЛІЧНИХ ПОСЛУГ СУБ'ЄКТАМИ ПУБЛІЧНОЇ АДМІНІСТРАЦІЇ

Євген ЛЕГЕЗА *(Дніпропетровськ)*

Наукова стаття присвячена висвітленню категорії процедурі надання публічних послуг. Співвідносяться терміни як адміністративний процес, адміністративна процедура, адміністративне провадження, адміністративна послуга. Висвітлюються наукові підходи щодо визначення процедура з надання публічних послуг органами публічної адміністрації і виокремленні ознаки зазначеного поняття.

Ключові слова: *адміністративний процес, адміністративна процедура, адміністративне провадження, публічна послуга, провадження з надання публічних послуг.*

Научная статья посвящена освещению категории процедуры предоставления публичных услуг. Соотносятся термины как административный процесс, административная процедура, административное производство, административная услуга. Освещаются научные подходы к определению процедура по предоставлению публичных услуг органами публичной администрации и выделении признаки указанного понятия.

Ключевые слова: *административный процесс, административная процедура, административное производство, публичная услуга, производства по предоставлению публичных услуг.*

This scientific article surveys the category of the procedure of providing public services. The terms as administrative process, ministerial procedure, administrative proceedings, and administrative service are considered. Scientific approaches to the definition of