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The Vicious Circle of Change

The Political and Legal Conditions of the
Establishment of the Civil Service in Poland after 1996

Franz Steiner Verlag



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Magistratum legem esse
loquentem, legem autem
mutum magistratum
(The official is the speaker of law, and the law
a silent official)

Introduction

The functioning of the state is not possible without a well-organised clerical structure. In the first state structures we had to deal with officials performing specific functions that could not be fulfilled by the ruler. Of course, as territorial expansion took place, as a result of social and political processes, the number of officials steadily increased, but care was also taken to ensure that their functioning was organised. Thus, the scope of duties was defined, and very often the qualities of character that allowed one to hold a particular office or function were also enumerated. In the genetic phase of state development, it was usually the case that a single official had a wide range of powers and performed a variety of functions. As the state developed, the number of cases increased and thus the duties of officials became more specialised, which naturally increased their number and role. This process has varied from country to country, and so today we have, for example in Europe, many models of public administration, and thus the public service or civil service corps has been shaped in different ways. The main dividing line is between closed systems (French, German) and open systems (English). Nowadays, however, it is inappropriate to speak of model solutions on the example of specific countries, most of them accumulating features of both systems (often with a clear predominance of one of them), hence more and more often in the literature on the subject we find – a mixed – hybrid model. In addition, the ‘national’ models developed are overlaid by a variety of historical, geographical, cultural and social conditions. The civil service is a special type of structure, functioning in the state in order to perform its tasks. It belongs to the executive sphere of the state and is organisationally subordinate to the executive. The special legal status of persons employed in the civil service (public service) corps should allow for relative independence and isolation

from the vested interests of political parties, which does not imply complete separation of the two spheres. The creation of appropriate conditions for the functioning of the service should ensure the professional performance of state tasks. The Polish Civil Service Corps is still in a permanent phase of creation and transformation. There are many reasons for this state of affairs, ranging from the legacy of the previous system, through the lack of political will (or to be more precise, political will does exist, but in terms of subordinating the corps to those currently in power), to the uneducated political culture of the organisation, which young democracies also need to build. Building an efficiently functioning corps is a long-term process, and results should not be expected within 5 years, but rather – 50 years. The process of creating the Polish Civil Service and its permanent transformation is inextricably linked to the alternation of power in successive parliamentary elections. This is undoubtedly related to the inclinations of the political sphere to influence the civil service sphere, attempts at appropriating areas of administrative authority, and a misunderstanding of the role and significance of a politically neutral civil service corps.

At the same time, a thesis should be put forward that the term “process” in the case of the creation of the civil service in Poland is, in the author’s opinion, an abuse. Understood by the term “process” – a course of consecutive and causally linked specific changes¹, it should be noted that in the case of changes in the civil service corps they were undoubtedly not causally linked. Rather, they should be described as chaotic and ad hoc, pursuing current political priorities. Resulting from a concern for the lack of subordination of officials to those currently in power. The key to categorising the changes, apart from timing, is the subsequent parliamentary elections.

It should be remembered that all the transforming countries of Central and Eastern Europe struggled with problems during the establishment of the civil service corps. It is rightly argued in the literature that weak institutional structures and their development problems are dominant features of post-socialist countries (Chrabąszcz at al. 2003: 9–20). The legacy of communist policies, centralisation are the main obstacles standing in the way of civil service reforms in countries such as Poland, the Czech Republic or Slovakia. However, as some researchers note in the case of Poland, these difficulties have been exacerbated by traditionally negative attitudes towards public administration dating back to the period of Poland’s partitions 1795–1918 (Majcherkiewicz 2008: 140).

The aim of the monograph is to answer the question of how the Civil Service Corps in Poland evolved after 1996, and in what conditions, political and organisational problems, this evolution took place. The timeframe was set by normative acts and their amendments. Starting with the first Civil Service Act of 1996, through the subsequent ones of 1998, 2006, 2008 and the most recent amendment of the Act of 2015, which

1 The term “process” <https://sjp.pwn.pl/sjp/proces;2508456.html> (accessed 2017/10/18).

came into force at the beginning of 2016. In 1996, the first Civil Service Act was passed and thus began the process of building a civil service corps in Poland after the 1989 breakthrough. During the communist period, the corps did not function and the administration, called state administration, was a uniform system subordinated to the political will of those in power. The premise of the publication and, at the same time, the hypothesis of the research was that, for almost 30 years after the change of the political system, no efficiently functioning civil service corps had been created. The evolution of the civil service was thus going nowhere, becoming hostage to the ongoing political and organisational problems of the Polish state. In fact, attempts at building it came to nothing, due to political infighting and the desire to subordinate civil servants to successive ruling teams. This assertion is undoubtedly demonstrated by successive normative acts, which only changed the principles of functioning of the service. I am not saying that a fully formed corpus can be built in a period of 30 years, however, the foundations can be laid. The first stage in which the corps began to be consistently built was during the 1998 Act (until October 2006). The change of service philosophy in the 2006 normative acts, together with the simultaneous abolition of corps structures, nullified the previous achievements. The normative acts of 1996 and 2006 were in force for too short a time to speak of the existence of a civil service concept on their basis. In 2008, the legislator largely returned to the 1998 solutions and, as a result, between 2008 and 2015 we have another period in which attempts were made to build the corps. The parliamentary elections in 2015 and the alternation of power brought about further conceptual changes in the functioning of the service.

Building the corps will undoubtedly be arduous. It will not be so much the process of setting up the structures that will take a long time, as the process of shaping the principles and instilling behaviours that reflect the idea of service to the state. It can be said with certainty that at this stage no efficiently functioning civil service corps has been developed in Poland. Despite its formal establishment (this is only a preliminary element), there is still a need to shape the standards that apply in the Corps, to develop mechanisms for its effective operation, to ensure political neutrality, observance of the rules of a democratic state under the rule of law, and respect for the principles of official ethics. These elements will not function properly only with precisely constructed legal norms, for which there is also a need for mutual respect of the legal status (differences) of the political and official spheres. There is a need for mutual relations to be established on a partnership basis (with the rules defining administration as an executive sphere being respected) and for mechanisms to be worked out which, on the one hand, inhibit the desire of politicians to exert influence on the civil service sector (politicisation of administration) and, on the other hand, eliminate the bureaucratisation of politics.

I have used a variety of research methods in the book. In the part devoted to the problems of the evolution of the functioning of the administration, I applied a chronological approach to the presented process. In the chapters dealing with the historical

outline of the civil service, I applied a historical approach showing the genesis of phenomena and processes. The method of comparative analysis was also helpful, which I used in the development of the chapter on model solutions in the corps. In the main part of the monograph, I used the institutional-legal analysis method, the comparative method and the content analysis method, which served to establish similarities and differences between the analysed normative solutions. A systemic analysis of the administration subsystem as a whole was also applied. Using quantitative analysis, selected aspects of the functioning of the civil service corps after 1996 were presented. The technique I used in the course of research was the analysis of documents, mainly normative acts, but also statements, reports, political and legal opinions, press articles, scientific articles, book publications and websites. The book is therefore interdisciplinary in nature, presenting the issue of the civil service from various perspectives (mainly political and legal) and at many levels.

The issue of the Civil Service in Poland has been the subject of many publications and studies. Already in the inter-war period, monographs on this topic were published, e.g. (Hekajłło 1924). Two years after the end of the war, a commentary to the Act of 1922 on the State Civil Service was published by (Kościołek 1947). From the 1950s onwards, for obvious reasons, there was no publication on this subject. In the years 1989–1996 justifications for successive drafts of civil service acts were published, as well as materials on the reform of public administration, such as a study by Government Plenipotentiary for Reform of Public Administration (Zonn – Pasternak 1993). Researchers analysing the functioning of the civil service include: prof. E. Ura, prof. T. Liszcz, prof. T. Rabska, prof. R. Herbut, prof. H. Izdebski, prof. M. Kulesza, prof. G. Rydlewski, prof. J. Hausner, prof. W. Sanetra, prof. J. Jagielski, prof. Z. Cieślak, prof. K. Rączka, prof. B. Kudrycka, prof. J. Itrich-Drabarek, prof. T. Górzyńska, prof. S. Mazur, prof. J. Czaputowicz, dr hab. H. Szewczyk, dr hab. K. Gadowska, dr hab. K. Mroczka, dr A. Ferens, dr I. Macek,

After the Act was passed in 1996, few monographs and commentaries on the Act appeared (Cieślak at al. 1998). Publications on the 1996 solutions often appeared when the subsequent Act on the service was in force. The short duration of the legislation eliminated some of the publications as the doctrine began to deal with the new legislation. Most publications were produced between 1999 and 2006, the period during which the 1998 Act was in force. The most well-known ones include the commentary by authors: (Jagielski&Rączka, 2001; Rydlewski 2001; Sinkowska 2002). Subsequent monographs started to appear only after the enactment of the 2008 Act, for example (Szewczyk 2010; Itrich-Drabarek 2010; Drobny at al. 2010; Pryciak 2011; Przywora 2012). At the same time, in the literature we can find publications about the service in a broader context, analysing the corpus in the world, e.g. (Kudrycka 1998; Rydlewski 2007; Śledzińska – Simon 2010). The problem of civil service, both in Poland and internationally, has been repeatedly addressed in collective publications, e.g. (Zuba 2007; Kudrycka 2003; Sanetra 2001; Gadowska 2015; Itrich-Drabarek 2012, 2013; Pastwa 2016).

The Polish civil service was also addressed by researchers from the European Institute of Public Administration (EIPA) in Maastricht, the Netherlands (Bossaert&Demmke 2003; Demmke 2004, 2006; Demmke&Moilanen 2010; Peters&Pierre 2006; Raadschelders at al. 2007). In addition, between 1996 and 2016, a number of continuous publications were published on both Polish regulations and systems in Europe and the world. Numerous publications were published in: *Studia Prawnicze, Pracy i Zabezpieczenia Społecznego* or *Samorząd Terytorialny*. Beginning in 1997, the Civil Service Office began to publish a biannual magazine devoted to the functioning and development of the civil service at home and abroad. Initially it was: *Biuletyn Służby Cywilnej* and then a biannual entitled *Służba Cywilna*. It also published on the functioning of public administration in the broadest sense. When the Office was liquidated, the magazine ceased publication. At the turn of July/August 2009 the Civil Service Department of the Chancellery of the Prime Minister started to publish *Przegląd Służby Cywilnej*, an electronic periodical devoted to the service, which is primarily a collection of information on the functioning of the civil service corps. A number of political and legal opinions on successive laws and the jurisprudence of the Constitutional Tribunal and the Supreme Court are also a source of knowledge.

In general, the state of scientific research on the civil service in Poland is satisfactory, but it is a pity that it does not reflect the actual state of the Polish civil service. Among the works devoted to Polish systemic solutions we will find few cross-sectional and comparative publications, covering the entire period of the corps' functioning.

The publication consists of four chapters devoted to the civil service corps in Poland and around the world. The first chapter discusses the evolution of the role of the state in the context of the functioning of public administration. It characterises the changes taking place in state structures, various concepts of management in public administration, from the Max Weber model to the good governance model and neo-Weberism. The chapter will also include the genesis of the formation of the civil service corps. An analysis of the interrelationship between the civil service corps and the political sphere (administration versus politics) is made.

The second chapter contains a discussion of the development of the Polish civil service in the interwar period, as well as in the period of the People's Republic of Poland. Chapter Three, in turn, analyses the issues surrounding attempts to build a modern corps after the 1989 breakthrough. The premises and conditions are characterised. In the fourth chapter, I made a comparison of normative solutions after 1996, i. e. after the enactment of the first Civil Service Act after the breakthrough of 1989. I characterised the systemic position of members of the civil service corps under the four Acts of 1996, 1998, 2006 and 2008. (together with the 2015 amendment). I analysed areas related to the functioning of the corps: the legal nature of the employment relationship, the analysis and description of organisational structures, the scope of rights, duties and disciplinary responsibility to which members of the civil service corps are subject. I showed the problems and doubts related to the construction of

a modern corps and the concepts of the authorities of the time as regards systemic solutions. The chapter is enriched with statistical analyses of the functioning of the corps after 1996.

Chapter 1

The changing role of the state and the mechanism of public administration

1.1 The evolving role of the state. From the pre-modern state to the post-modern state

Administration has been an integral part of the functioning of the state, from the ancient state to the post-modern state, in various forms, with different tasks, competences and capacities. Being an essential element of the state, it has not withstood doctrinal disputes as to how to define it and explain its principles of operation. It is impossible to point to a single universal definition of administration, since, being a subject of research with a very complex structure, it is of interest to many scientific disciplines. Since ancient times, its task has been to perform tasks imposed by the sovereign. In modern democracies, it is the servant of the law, but also serves the public. Depending on the orientation, doctrine distinguishes between legal approaches, theories specific to the fields of organisation and management, sociological and political science (Fereys 1999: 16). Administration is analysed from different points of view, using a variety of research methods depending on the scientific discipline. Among the oldest approaches are legalistic, analysing administration in normative-institutional categories. H. Izdebski and M. Kulesza construct a mixed subject-object definition of administration of legal provenance. Taking into account the realisation of the public interest, they state that it is (...) a set of activities, actions and organisational and executive undertakings, conducted for the realisation of the public interest by various entities, bodies and institutions, on the basis of a law and in the forms specified by law (2004: 93).

From the point of view of this dissertation, the most relevant definitions will be those with a political science orientation – e.g. R. Herbut defines administration: “(...) as a mechanism, as well as a system of institutions, by means of which the assumptions and canons of state public policy are put into practice (implemented)” (1999: 30). On the one hand, it should be treated as a static element, while on the other hand as a dynamic element of social, political life, which interpenetrate, serving the realisation of state

tasks. At this point, it is also necessary to cite the definition of administration in the terms of B. G. Peters, who treats it in two parts. In terms of its functions, it is “the process of applying specific rules, i. e. transforming general rules into concrete decisions concerning individual cases” and in terms of its object, it is “the structures of political power whose primary task is to fulfil the above-mentioned functions” (1999: 16).

As can be seen, definitions with a political science orientation pay attention both to the structures of administration and, above all, to the relations, the interrelationships between political power and executive structures. They do not confine themselves to treating administration as a set of institutions serving only administration, but see a broader aspect of its functioning in contrast to legal orientations, which place the primary emphasis on normative issues. At the same time, it should be borne in mind that the political science approach is not homogeneous; many research concepts and methods can be found. The former include the traditional (1980s and 1990s) methods based on formal-legal and historical aspects of political life, while the latter include the contemporary ones that emphasise decision-making processes and behavioural elements (Ferens 1999: 22). Economic approaches, on the other hand, oscillate around financial aspects, the budget and the impact on the economy. Public administration, in terms of organisational and management theory, is a discipline that describes and explains the process of satisfying collective needs and organisational and management dilemmas, particularly in terms of human resource preparation. This approach differs in the way in which it looks at aspects of management, especially human resource management, supervision, control or accountability. The concepts of New Public Management were built on this approach. In sociological terms, on the other hand, public administration is a formalised social group linked by a system of structures and institutions and the internal relations between them. Characteristic of this approach is the concept of the German sociologist Max Weber’s model of ideal bureaucracy, in which he treated administration as an organised bureaucratic machine (Ferens 1999: 20). From the above review of different types of approaches to defining public administration, it is apparent that it is a complex subject of research in various scientific disciplines, which pay attention to different aspects of its functioning. It is a multidimensional phenomenon and can therefore be analysed in terms of its subject, object and, most importantly, as a process serving the realisation of specific citizen concerns. Due to the complexity and interdisciplinary nature of the matter, a number of definitions have been proposed depending on the context and scientific discipline. In conclusion, it must be said that multidimensionality leaves researchers with a wide room for discussion, without limiting the tools or the area of analysis. Following A. Ferens, it can be pointed out that administration is:

(...) a subsystem of the political system, the boundaries of which are difficult to define precisely, comprising entities with a legal-political status, locating them in the area of political executive power. It is characterised by a relative level of autonomy, conditioned by

the nature of the political system. It performs significant functions derived from those of the political system, ensuring its permanence, stability and continuity, while the content of its activity is to take decisions aimed at authoritative distribution of public goods and services (1999: 23).

With the evolution of the role and tasks of the state, the institutionalisation of various types of administrative structures, the desire to ensure the protection of democracy, guarantee respect for the rule of law and, above all, to protect public sector employees from political influence and pressure, the construction of a civil service corps was created. It is treated as a professional, independent and specialised group of persons employed in the clerical apparatus (Rexed 2004–2005: 48–49). In order to be able to move freely in the complexities of the legal and organisational nature of the Civil Service, it seems necessary at this point to clarify the terminological differences and the conceptual scopes of the terms used to designate this part of the administration. Generally speaking, under the term civil service we shall understand a permanent, professional corps of civil servants, hierarchical, divided internally into grades, categories, classes and corps, in which people with a variety of training and skills find work. The very term service falls within the colloquial meaning of the word, denoting subordination, carrying out not only the orders of those currently in power, but above all serving the interests of the state, performing public tasks with respect for the values accepted in a democratic state of law, reflected in the constitutional provisions and legal order (Grosse 2000: 34). In different countries, the conceptual scope of the term civil service includes various categories of persons employed in public administration. Thus, the term used in France is *la Fonction Publique* – the public service, in the United Kingdom – *Civil Service*, and in Germany the term used is *Beamtendienst*, in the United States – *Federal Employee*. The scope of the subject matter is also different, in France it covers not only government administration, but also local government, the hospital service, while in England it applies only to government officials (as in Poland). In Germany, only about 40 % of civil servants belong to the civil service corps – officials of the federal and state governments and university professors on special terms.

By contrast, a broader term will be the public service, as we will understand all those employed in the public sector, regardless of the employment relationship between the person and the employer. It will be of secondary importance whether we are talking about government administration, local government administration or a yet another distinct part of administration. The conceptual scope of the civil service falls within the term public service, which means that members of the civil service are one element of the public service corps. However, not all members of the public service will be included in the category of members of the civil service corps. The Recommendation of the Committee of Ministers of the Council of Europe of 24 February 2000 on the status of public servants in Europe refers to the institutional and functional meaning of the term public service. The institutional meaning is defined through the prism of

the state structure/institution as the determinant that defines the service, while the functional meaning is the definition of the service through tasks of a public nature, whether performed by the public or private sector (Śledzińska-Simon 2010: 16). Civil (public) service systems have also been structured in various ways. In other words, the institutional forms within which the service has been set up vary. Different types of terminology are used to describe those employed in the public sector, e.g. civil servant, officer. Forms of creation, in different systems, are specific, depending on political, social, economic and historical circumstances. The construction of the civil service corps is a consequence of the adopted concept of the structure of public administration, the construction of which results from the perception of the role of the state. The organisation of the administration in a particular, typical way is the result of the needs and preferences of the state at a particular time, which change as the conception of the role and functions of the state evolves (Herbut 1999: 42).

The organisation of public administration structures, their scope, degree of decentralisation, freedom of action, accountability, functions, as well as the scope of action, are in each case strongly influenced by the system of a particular state and it is impossible to separate these elements connected to each other by a kind of feedback (Rydlewski 2007: 17). Ancient states were characterised by different needs and functions, the functions of absolute monarchy were understood differently and the role of the state was presented even differently during the development of liberal doctrines. The tasks of administration in democratic and non-democratic states are perceived and performed differently. The effect of the change in the role of the state over the centuries was an evolution in the structures and functions of administration, a change in its scope of action, mode and organisational forms. What has remained unchanged, however, is its character – servile (executive) towards the sovereign, regardless of how it was conceived. The way in which the administrative system is constructed, the model of its functioning, and the directions of evolution depend on many factors, among which are tradition, culture, historical fate or the nature of production relations.

In ancient states, the functioning of the official apparatus was fully subordinated to the will of the ruler – the sovereign on the basis of absolute subordination and obedience. Ancient administration was characterised in its initial phase by a high degree of centralisation, concentration of power in the hands of the ruler, execution of his orders. As territory expanded, decentralisation became necessary. In the Middle Ages in Western Europe, the magnates were of great importance, and they created their own offices in independence from the ruler. In addition, there was also a royal administration as an expression of the king's will. The creation of absolute monarchies in the 16th century was aimed at centralising state power in the hands of the monarch, eliminating the influence of the magnates and initiating the process of nation-state building. A manifestation of the change in the role of the state was the creation of hierarchical administrative structures subordinated to the unlimited will of the king, who had absolute power without any control (Mazur 2005: 41–51). In the later period of absolute